# THE

# INDIAN LAW REPORTS

## PUNJAB SERIES

### CIVIL REFERENCE

*Before Kapur and Soni, JJ.*

1950

May 22nd.

IN THE MATTER OF THE INDIAN INCOME TAX ACT XI OF 1922

AND

IN THE MATTER OF THE INCOME TAX ASSESSMENT OF M/S LAXMICHAND JAIPORIA SPINNING & WEAVING MILLS, DELHI, FOR THE YEAR 1942-43.

**Civil Reference No. 5 of 1949.**

*Indian Income-tax Act (XI of 1922)—Section 10 (2) (VI) proviso (b) and Section 24 (1) second proviso—Depreciation allowance to which effect could not be given—Whether could be treated as loss of profits under 'business' and approtioned amongst partners under second proviso to section 24 (1) of the Act—word "any" in section 10, meaning of—Allowance for depreciation under clause (vi) of section 10 to be treated in the same way for purpose of computing as in the other clauses.*

The scheme of the Indian Income-tax Act is first to show the total income under all heads to be chargeable then to lay down the method of computing this total income from all sources after giving allowances and thereafter to make provision as to what is to happen in the case of a partner of a firm which makes a profit and loss. Section 23 is the assessment section and section 24 provides for losses and how they are to be set off. These provisions are meant for assessment on the total income of individual and not on one kind of income with one kind of allowance or set off only on one ground or head.

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Under subsection (1) of section 24 an assessee is entitled to have the loss of profits or gains under any of the heads given in section 6 set off against his income under any of the other heads. In other words, any loss that he may incur under any of the heads can be deducted from the total profit or income which he may have made in any manner whatsoever, and the second part of the second proviso allows this loss, in the case of a registered firm, where any loss cannot be so set off against the income of the firm, to be apportioned between the partners of the firm who alone are entitled to have the amount of the loss set off under this section.

The object of the proviso (b) to subsection (2) is only to give preference to ordinary losses incurred by an assessee in regard to set off over the loss which come under clause (b) of the proviso to subsection 2 (vi) of section 10, and subsection (2) of section 24 cannot be read in such a manner as to exclude depreciation from the words 'loss or profits' occuring in that subsection. If a man has suffered loss of income due to any cause other than depreciation that loss is first to be deducted and then the depreciation. The former cannot be carried forward for more than six years, but the latter can be carried forward upto any term of years. It is not correct to say that the object of the proviso was to make the loss due to depreciation a capital loss and not a revenue loss.

It is settled law that if a person carries on two or more distinct businesses the profits or losses of all of them are to be added together, and the aggregate sum so arrived at represents his profits or gains under the head 'business'. If the net result of this calculation shows a loss, such loss may under section 24 be set off against the profits or gains derived by the assessee from other heads of income in that year.

*Held*, therefore, that in the circumstances of the case and having regard to the proviso (b) to section 10 (2) (VI) the part of the depreciation allowance (to which effect could not be given) could be treated as loss of profits under the head 'business' and apportioned amongst the partners under the second proviso to section 24 (1) of the Indian Income Tax Act.

*Held* further that in section 10 the word 'any' means all the heads of income which come within section 6 of the Income-tax Act and for the purposes of computing the profits or gains which are chargeable to income-tax certain allowances have to be made which are enumerated in clauses (i) to (xvi) and out of these clause (vi) deals with depreciation. There is no reason why the allowance for

depreciation in clause (vi) should be treated differently for the purpose of computing from that given in the other clauses. Section 24 provides for the set off which is allowable to an assessee and the whole income is to be determined after the profits and losses, including allowances in section 10 (2), have been all added together and where the assessee is a registered firm and the loss cannot be wholly set off against the income of the firm, this loss shall be apportioned as between the partners constituting the firm. Where set off is to be given for different kinds of losses other than those due to depreciation it shall be first set off and then the loss due to depreciation.

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

*The guardians of the Poor of the West Derby Union* v. *The Metropolitan Life Assurance Society and other* (1), *Messrs Karam Ilahi-Mohammad Shafi* v. *The Commissioner of Income-tax, Delhi* (2), *Commissioner of Income-tax* v. *Arunechalam Chettiar* (3), *A Suppan Chettiar & Co.* v. *The Commissioner of Income-tax, Madras* (4), *Saularpur Collieries* v. *The Commissioner of Income-tax, Central Provinces* (5), relied upon.

*Case referred by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Income-tax Act, 1922, for order of the Hon'ble Judges of the High Court.*

BHAGIRATH DASS and PARSHOTAM LAL CHOPRA, for Petitioner.

S. M. SIKRI and HEM RAJ MAHAJAN, for Respondent.

JUDGMENT

JUDGMENT OF THE COURT WAS DELIVERED BY

Kapur J.

KAPUR J. The point at issue in this case is stated in the question which has been referred to this Court by the Income-Tax Tribunal, Bombay Bench, by their order, dated the 31st of August 1949, which is whether, "in the circumstances of the case and having regard to the proviso(b) to section 10(2)(vi), the part of the depreciation allowance (to which effect could not be given) viz. Rs. 12,505 (Rs 23,990 minus Rs. 8,228 and minus Rs 3,257) could be treated as loss of profits

(1) (1897) A. C. 647 at p. 652.
(2) I. L. R. (1930) II Lah. 338.
(3) (1926) I I. T. C. 276.
(4) I I. L. R. (1930) 53 Mad. 702.
(5) 4 I. T. R. 255—1930 A. I. R. Nag. 183.

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

under the head 'business' and apportioned amongst the partners under the second proviso to section 24(1) of the Indian Income-tax Act."

The case as stated by the Income-tax Tribunal is as follows :

"2. The assessee is a registered firm known by the name Laxmichand -Jaiporia Spinning and Weaving Mills. It is the proprietor of the Spinning and Weaving Mills known as Laxmichand Jaiporia Spinning and Weaving Mills. In the previous year ending Kartik Vadi 14, 1998, relevant to the assessment year 1942-43, its income from property was computed at Rs 2,897 and its income from other sources was computed at Rs 360. Its income from the Mills without providing for depreciation under section 10(2)(vi) of the Indian Income-tax Act amounted to Rs 8,228. The depreciation allowance permissible to the assessee for the year of account amounted to Rs 23,990. The assessee had also to its credit unabsorbed balance of the depreciation allowance brought forward from the preceding year amounting to Rs 27,012. According to the assessee its income should have been computed as follows :—

Business profit Rs 8,228 Less :—

Depreciation (Rs 23,990 depreciation on account of the year of account and Rs. 27,012 on account of the unabsorbed balance of depreciation allowance) Rs. 51,002.

Total business loss Rs. 42,774" The Income-tax Officer having allowed, under Section 24(1) of the Act, a set off against the income from property and other sources amounting to Rs 3,257 (2,897

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

plus 360), the net loss amounting to Rs 39,517 (42,774-3,257), according to the assessee, should have been apportioned amongst the partners of the firm and that the loss so apportioned should have been set off against their profits in their individual assessments as laid down in the second proviso to section 24(1) of the Act. The Department, on the other hand, relying upon section 10(2)(vi), proviso (b), contended that the assessee was only entitled to claim depreciation allowance to the extent of the business profits of the year of account and that the balance of the depreciation allowance, viz., Rs 42,774 (51,002 minus 8,228) should be carried forward. The Income-Tax Officer having allowed under section 24(1) the set off to the extent of Rs 3,257, the question whether it was properly done was not decided by the Tribunal.

3. The Tribunal for the reasons given by it in its order, dated 31st March 1948 held as follows :—

'We therefore hold that the assessee cannot take into account the item of Rs 27,012 and the figure of loss 'for the year of account would be (Rs 39,517-27,012) Rs 12,505 which should be apportioned between the partners. The partners are entitled to claim a deduction in their individual assessments as provided under the second proviso to section 24(1).'

A copy of the Tribunal's order is annexure 'A' and forms part of the case. The assessee has sought no reference in connection with the order of the Tribunal disallowing the sum of Rs 27,012 for the purpose of the set off under section 24(1) of the Indian

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M/S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

Income-tax Act, although it seeks, by its reply to the Commissioner's application under section 66(1) of the Act, to raise that point. In our opinion, the assessee cannot raise this question without making an application under section 66(1) of the Act."

The question is whether this sum of Rs 12,505 can be taken into account by the partners of the registered firm in their individual assessment. The submission of the Commissioner was that this was not a loss which could be so taken into consideration for the purpose of section 24 of the Income-Tax Act. Reliance was placed on section 6 of the Income-Tax Act under this section the heads of income chargeable to income-tax are—

(i) Salaries,

(ii) Interest on securities,

(iii) Income from property,

(iv) Profits and gains of business, profession or vocation,

(v) Income from other sources,

(vi) *Capital gains.*

Under section 10(2)(vi) the method of computing is given in respect of depreciation of buildings, machinery, plant, etc and in proviso (b) to this section it is said :

"Where full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, owing to there being no profits or gains chargeable for that year or owing to profits or gains chargeable being less than the allowance, then, subject to the provisions of

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M/S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

> clause (b) of the proviso to subsection (2) of Section 24, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, and so on for succeeding years."

There was some dispute as to whether the words "subject to provision" of clause (b) of the proviso to subsection (2) of section 24 were correct or the reference was to clause (a). On looking at the original Act XXIII of 1941, section 6 and Act XI of 1944 section 6, it was discovered that (b) was correct and not (a).

The submissions of the Commissioner may be stated as follows :

(i) Clause (b) to section 10(2) (vi) provides for carrying forward of depreciation which has not been fully given effect to and section 24(2) also does the same. Section 24(2) says :

"Where any assessee sustains a loss of profits or gains in any year, etc. etc."

To this there is a proviso (b) which says that depreciation allowance under clause (b) of the proviso to clause (vi) of subsection 10 provides. "Where depreciation allowance is, under clause (b) of the proviso to clause (vi) of subsection (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this subsection." The argument was that the word 'depreciation' used in the proviso could not have been included in the words 'loss of profits or gains' used in subsection (2) of section 24 otherwise there was no need for having this proviso.

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

(*ii*) On general considerations it was submitted that section 10(2) only deals with computing of profits and not of losses, and depreciation is not a revenue loss and the argument was that under proviso (b) to clause (vi) of subsection (2) of section 10, if the total income is more than the depreciation, a deduction can be made, and if it is less than the only thing that can be done is that it can be carried forward and nothing more.

I am unable to agree with these contentions. The scheme of the Income Tax Act is : Section 3 of the Act deals with the charge of income-tax and it says that income-tax shall be charged in respect of the total income of the previous year of every individual, etc. Section 4 includes all income, profits and gains from whatever source derived. Section 6 gives the heads of income, profits and gains which are chargeable to income-tax under the Act. Section 7 deals with the head 'salaries' and section 8 with the head interest on securities. Section 9 deals with the tax which is payable by an assessee in respect of property consisting of any buildings, etc. Section 10 gives the head 'profits and gains of business, professions or vocation' and also gives the method by which such profits or gains shall be computed after making the allowance therein enumerated. The allowances are rent paid ; expenditure on repairs ; interest on capital borrowed ; insurance paid ; current repairs to buildings machinery, etc. ; depreciation on such buildings machinery, etc. and what is to happen, if full effect cannot be given in any one year to the allowance allowed under the head 'depreciation ; losses in respect of any buildings sold, discarded or demolished ;' and several other heads which it is not necessary for me to enumerate. Section 12 defines other sources within clause (v) of section 6. Section 16 gives the exemptions and exclusions in determining the total income and subsection (1)(b) of this section says that the income of a partner of a firm shall be his total income plus the income or loss of the firm of

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

which he is a partner. Section 22 deals with the return of income which may show a loss but if the return is one of profit, it is followed by assessment. Section 23 deals with assessment and subsection 5(a) proviso (1) says: "Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24". Section 23 deals with assessment and section 24 provides for set off for all losses in computing correct income. It runs as follows:

Set-off of loss in computing aggregate income.

(1). Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year:

* * * * * *

Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (b) of subsection (5) of section 23 in the manner applicable to a registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the patners of the firm and they alone shall be entitled to have the amount of the loss set off under this section.

(2) Where any assessee sustains a loss of profits or gains in any year, * * * * * under the head 'profits and gains of business, profession or vocation', and the loss

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

cannot be wholly set off under subsection (1) the portion not so set off shall be carried forward to the following year, etc. etc., but no loss shall be so carried forward for more than six years.

Provided that—

(b) where depreciation allowance is, under clause (vi) of subsection (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this subsection."

The scheme shows that first the total income under all heads is shown to be chargeable, then the method of computing this total income from all sources after giving allowances, then there are provisions as to what is to happen in the case of a partner of a firm which makes a profit and loss. Section 23 is the assessment section and section 24 provides for losses and how they are to be set off. These provisions are meant for assessment on the total income of individuals and not on one kind of income with one kind of allowance or set off only on one ground or head.

As I read section 24, subsection (1) provides that if the assessee sustains a loss of profits or gains under any of the heads given in section 6 he shall be entitled to have the loss set off against his income under any of the other heads. In other words any loss that he may incur under any of the heads can be deducted from the total profit or income which he may have made in any manner whatsoever, and the second part of the second proviso allows this loss, in the case of a registered firm, where any loss cannot be so set off against the income of the firm to be apportioned between the partners of the firm who alone are entitled to have the amount of the loss set off under this section. The submission of the counsel for the Commissioner that subsection (2) and proviso (b) of that subsection has to be read in such a manner

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

that depreciation should no longer be included in the words 'loss of profits' occurring in that subsection appears to me to be without any force. It is true that there can be provisos which can be destructive of the section itself. But this is not one of those provisos, because the object of this proviso is only to give preference to ordinary losses incurred by an assessee in regard to set off over the loss which comes under clause (b) of the proviso to subsection (2)(vi) of section 10.

In his speech in *The Guardians of the Poor of the West Derby Union* v. *The Metropolian Life Assurance Society and others* (1), Lord Waston, said :

> "But I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words."

These observations apply to the present case and to the proviso be of S. 10(2)(vi).

In other words, if a man has suffered loss of income due to any cause other than depreciation that loss is first to be deducted and then the depreciation and there seems to be a good reason for it. The

(1) (1897) A. C. 647. at p. (652).

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

former cannot be carried forward for more than six years and the latter can be carried forward up to any term of years. This is really to stop the Income-tax officers giving a set off of an item which can be taken into consideration at any time rather than to a loss which cannot be set off after six years. I do not think that the submission of the Commissioner is sustainable when he says that the object of the proviso was to make the loss, due to depreciation a capital loss and not a revenue loss.

Section 10(2) provides for the method of computing profits or gains after making various allowances given in subclauses (i) to (xvi). If for the purposes of determining the assessable income the allowances given in clauses other than clause (vi) are allowable under section 24(1), I cannot see why the allowances given in clause (vi) are not so allowable.

In *Messrs. Karam Illahi Muhammad Shafi* v. *The Commissioner of Income-tax, Delhi,* (1) clause (vi) of subsection (2) of Section 10 was interpreted by the Lahore High Court. It was there held, relying on *Commissioner of Income-tax* v. *Arunachalam Chettiar* (2) that the words ' any business ' in section 10 mean ' each and every business ' and therefore, as held in the Lahore case it may be taken as settled law that if a person carries on two or more distinct businesses the profits or losses of all of them are to be added together, and the aggregate sum so arrived at represents his ' profits or gains ' under the head ' business '. If the net result of this calculation shows a loss, such loss may under section 24, be set off against the profits or gains derived by the assessee from other heads of income in that year (per Tek Chand, J., at p. 458).

Interpreting proviso (b) of clause (vi) of Section 10(2), the learned Judge said :

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(1) I. L. R. (1930) 11 Lah. 338-3 I. T. C. 456 (458).
(2) (1926) 1 I. T. C. 256.

"Reading the proviso in its plain meaning and interpreting it according to well settled canons of construction of fiscal statutes, I have no hesitation in holding that the 'profits or gains' referred to above are profits or gains' generally from whatsoever source derived and are not confined to profits or gains of the particular business alone in which the buildings and machinery were used. I have no doubt that the provison for carrying over the unabsorbed depreciation allowance to the succeeding years is not the exclusive remedy allowed to the assessee and cannot be interpreted as debarring him from claiming the benefit of the earlier part of the subsection."



A Full Bench of the Madras High Court in *A. Suppan Chettiar and Co.* v. *The Commissioner of Income-tax, Madras* (1), held that where the profits and gains were insufficient to cover the full depreciation allowance under section 10(2)(vi) of the Income-tax Act on the machinery, plant, etc., used for the purposes of that business, the excess depreciation could be set off against the profits and gains of other businesses or from other sources. In that case it was contended that the proviso allowed the unabsorbed portion of the depreciation to be carried forward into the next year's account, but could not figure as an actual loss, and after considering the proviso it was there said :

"We do not think, therefore, that upon the terms of the section an assessee is precluded from adding the whole charge for depreciation to his other business charges, even though the result is to show a loss, and then claiming under section 24 to set off the loss against profits from other sources. Nor have we been shown that

(1) I. L. R. (1930) 53 Mad. 702-4 I. T. C. 211 (216).

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

> there is anything in the nature of this allowance for depreciation to render such a course inadmissible." (per Curgenven, J., at p. 216).

In this case the construction put upon the word 'any' as meaning 'all the businesses put together' by the Lahore High Court in *Messrs Karam Ilahi Muhammad Shafi* v. *The Commissioner of Income Tax Delhi* (1) was approved of by the Full Bench.

In another case *Ballarpur Collieries* v. *The Commissioner of Income-tax. Central Provinces* (2), the assessee was a registered firm owning collieries and it made a return of a loss of over six lacs of rupees including depreciation and claimed to set off this loss against the other income of the members of the firm under section 24 of the Income-tax Act. The Income-tax Officer refused to make any allowance for depreciation on the ground that as the firm had suffered a loss depreciation could not be allowed for that year, but must be carried forward under proviso (b) of section 10(2)(vi). It was held that the assessees were entitled to the depreciation allowance under section 10(2)(vi) and to increase the business loss thereby. Dealing with section 24 the learned Judges said, at page 258,

> "It is clear that the loss to which subsection (2) refers is 'loss of profits or gains'. This phrase is unusual, but must, when the loss is under the head 'business', mean loss on the year's working. When the general principles on which profits or gains of a business are computed are utilised to ascertain the result of the year's working and the calculation shows that there has been a loss, that is a loss of profits

(1) I. L. R. (1930) 11 Lah. 338-3 I. T. C. 456.
(2) 4 I. T. R. 255-1930 A. I. R. Nag. 183.

or gains. Now, clause (vi)(b) of section 19(2) does not enunciate a general proposition regarding the calculation of the result of a year's business. It is applicable only when there is in reality no profits or gains, and it is not used for calculation of loss. The general principle is that the diminution of value of buildings, machinery, plant and furniture should be taken into account in calculating the result of the year's working; for the sake of convenience a certain percentage of the original cost is taken to represent the diminution in value during the year."

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

Dealing with another aspect of proviso (b) in regard to depreciation the learned Judges said :

"Even if there is no profit in the business I consider that effect can be given to the allowance, if the assessee (or where the assessee is a firm, all the individuals who constitute the firm) can benefit by that allowance by virtue of the provisions of section 24."

A perusal of these authorities and a careful study of the relevant sections show that in section 10 the word 'any' means all the heads of income which come within section 6 of the Income-tax Act and for the purposes of computing the profits or gains which are chargeable to income-tax certain allowances have to be made which are enumerated in clauses (i) to (xvi) and out of these clause (vi) deals with depreciation. There is no reason why the allowance for depreciation in clause (vi) should be treated differently for the purpose of computing from that given in the other clauses. Section 24 provides for the set off which is allowable to an assessee and the whole income is to be determined after the profits and losses including allowance in S. 10(2) have been all added together and where the assessee is a registered firm and the loss cannot be wholly set off against the income of the firm,

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M|S Laxmichand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43.

Kapur J.

this loss shall be apportioned as between the partners constituting the firm. Where set off is to be given for different kinds of losses other than those due to depreciation it shall be first set off and then the loss due to depreciation.

For the reasons, which I have given above, the answer to the question must be in the affirmative. As the result is against the Commissioner the assessee shall have his costs in this Court. Counsel's fee Rs. 250.

## MISCELLANEOUS CIVIL

*Before Falshaw and Kapur, JJ.*

1951

Jan. 15th

OM PARKASH DHRI AND OTHERS,—*Petitioners,*

*versus*

THE STATE OF PUNJAB, through THE CHIEF SECRETARY, PUNJAB CIVIL SECRETARIAT, SIMLA—E,—*Respondent.*

**Civil Miscellaneous No. 731 of 1950.**

*Constitution of India Articles 13, 14, 15 (1), 16 (ii), 29 (2), 37 and 46 Fundamental Rights—Admission to Colleges—Rules governing whether laws as contemplated in Article 13 (3) (a)—Articles 14, 15 (i) and 16 (2)—Whether applicable.*

A number of students who had obtained higher marks in the qualifying examinations than those who had been admitted to the Punjab Engineering College, Rorkee filed an application under article 226 of the Constitution praying for the issue of a Writ of mandamus or such other, Writ or Order as the High Court may deem fit in the circumstances to the State Government to admit them in the Engineering College by cancelling the nomination of the candidates already admitted.

*Held,* that the admission of the candidates by nomination to the Engineering College not strictly on the basis of the marks obtained in the qualifying examinations but on the basis of certain *criteria* e.g., being Harijans or sons of Ex-service men or being otherwise fit, did not offend against