

In view of the aforesaid discussion, the present appeal succeeds and is allowed. The decisions of the Courts, below are set aside and the case is remanded to the executing Court for a fresh decision according to law. I may indicate that in case the Court comes to the conclusion that the sale is not a nullity it should dismiss the application on the short ground that the same is not maintainable after confirmation in view of the provisions of section 47 of the Code. The Court will also go into the question whether the application under section 47 is within limitation. The decree-holder will be entitled to get the costs of these proceedings from the judgment-debtor in the event of his succeeding. In case he fails, the parties will bear their own costs throughout of the proceedings up to today. If the judgment-debtor succeeds in establishing that the sale is a nullity, it will be set aside, otherwise, as I have already said, the sale will stand. The parties are directed to appear before the trial Court on the 6th October, 1959.

Balwant Rai  
Kumar  
v.  
Amrit Kaur  
—————  
Mahajan, J.

B.R.T.

CIVIL MISCELLANEOUS

*Before Bhandari, C.J. and Falshaw, J.*

PARMESHWARI DASS WADHERA,—*Petitioner.*

*versus*

THE COMMISSIONER OF INCOME-TAX,—*Respondent.*

Civil Reference No. 9 of 1953.

*Indian Income-tax Act (XI of 1922)—Section 66(1)—Adventure in the nature of trade—Factors to determine—Tribunal holding an enterprise to be an adventure in the nature of trade—High Court—Whether will interfere with the finding.*

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*Held*, that the question whether an adventure is in the nature of trade is a mixed question of law and fact. Although the fact that an assessee was actuated by the sole object of selling at a profit is a relevant circumstance which would raise a strong presumption that the purchase and subsequent sale are an adventure in the nature of trade, the said presumption is not conclusive and may be rebutted or offset by other relevant circumstances. Before an adventure can be regarded as one in the nature of trade, it is necessary to consider whether the assessee embarked upon it with the intention of making a profit or of producing income. The number of transactions entered into and the gross amount of business done are also factors to be considered. If the profit motive is completely absent the enterprise may well be regarded as a hobby.

*Held*, that if, having regard to all the facts and circumstances of the case; the Tribunal comes to the conclusion that a certain enterprise is an adventure in the nature of trade, the conclusion cannot be said to be manifestly erroneous and it is not within the competence of the High Court to sit in appeal over the decision of the Tribunal or to give a decision of its own on a different view of the facts and circumstances.

*Case stated on 24th January, 1953, under section 66(1) of the Indian Income-Tax Act, by the Income-Tax Appellate Tribunal, Delhi Bench, on the following questions of law:*

*“Whether in the circumstances of the case there is material to justify the finding that the adventure in question was an adventure in the nature of trade?”*

D. N. AWASTHY and V. C. MAHAJAN, for Petitioner.

S. M. SIKRI ADVOCATE-GENERAL and H. R. MAHAJAN, for Respondent.

#### ORDER

Bhandari, C. J. BHANDARI, C.J.—This is a reference under section 66 (1) of the Indian Income-tax Act.

During the period November, 1939, to January, 1941, the assessee purchased 4,316 tolas of gold in fourteen separate transactions each of which consisted of several purchases. During the account year 1945-46 he sold 3,049 tolas of gold for Rs. 2,31,203 recovering a sum of Rs. 1,00,096 in excess of the price paid by him. The Income-tax Officer regarded this profit as a revenue receipt arising out of business and assessed him accordingly. The order of the Income-tax Officer was upheld by the Appellate Assistant Commissioner and later by the Appellate Tribunal. The Appellate Tribunal has now stated the following question of law under the provisions of section 66 (1) of the Indian Income-tax Act, namely :—

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“Whether in the circumstances of the case there is material to justify the finding that the adventure in question was an adventure in the nature of trade ?”

Mr. D. N. Awasthy who appears for the assessee contends that his client had no intention of embarking on an adventure in the nature of trade. The Second World War was declared in the year 1939, and there was widespread panic in the country. His sole object was to put his money in a safe investment and thereby to avoid the risk of War involved in bank deposits. The assessee who is a man of the world realised that circumstances may compel him to leave the shelter of his roof and to seek his fortunes elsewhere. He accordingly decided to avoid the risk involved in bank deposits, to liquefy his assets, and to convert every penny he had into gold. With this object in view he cashed before maturity the bank and postal cash certificates. He called in or realised deposits with banks and business houses and raised loans on the security of fixed deposits of which the terms were yet to expire. He retained the gold

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in his custody during the first 5½ years of the War. Germany collapsed on the 7th May, 1945, and the assessee sold his first lot of 2,018½ tolas on the 12th May, 1945. Japan capitulated in August, 1945, and the assessee made another sale of gold on the 19th December, 1945. It is true that the gold was purchased at the average price of Rs. 43 per tola and that it was sold at the average price of Rs. 75-12-0 per tola yielding a substantial profit to the assessee, but the mere fact that the assessee recovered a profit on these transactions does not indicate necessarily that the adventure was in the nature of trade. Had the purchases been made with the sole object of making a profit, the assessee would have parted with his gold in the year 1943, when the prices were at their peak and would not have waited till the year 1945, when the prices had fallen. He did not sell gold in small quantities but in large blocks. These circumstances, it is contended make it quite clear that gold was purchased for the purpose of safe investment and not for the purpose of resale.

The question whether an adventure is in the nature of trade is a mixed question of law and fact. Although the fact that an assessee was actuated by the sole object of selling at a profit is a relevant circumstance which would raise a strong presumption that the purchase and subsequent sale are an adventure in the nature of trade, the said presumption is not conclusive and may be rebutted or offset by other relevant circumstances *G. Venkataswami Naidu and Co. v. Commissioner of Income-tax* (1). Before an adventure can be regarded as one in the nature of trade, it is necessary to consider whether the assessee embarked upon it with the intention of making a profit or of producing income. The number of transactions entered into

(1) A.I.R. 1959 S.C. 359

and the gross amount of business done are also factors to be considered. If the profit motive is completely absent the enterprise may well be regarded as a hobby.

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It is common ground that the assessee is a money-lender by profession. In the assessment for the year 1925-26 he was assessed on a profit of Rs. 17 in silver dealings and of Rs. 27 in gold dealings. In the assessment for the year 1926-27 he claimed and was allowed losses of Rs. 957 in dealings in gold bullion and of Rs. 84 in dealings in silver bullion. The Income-tax Officer came to the conclusion, with which the Tribunal found itself in agreement, that the assessee taking advantage of the experiences of the First World War during which prices of all commodities had risen, decided to invest every single penny in gold in the confident hope that the prices of gold would rise and bring him a substantial profit. The business history of the assessee, the outbreak of the War, the extent of the transactions, the mode of financing the purchases and the substantial profits which actually arose led the Tribunal irresistibly to the conclusion that the assessee had engaged in this enterprise for the purpose of profit and not for the purpose of safeguarding his property. Having regard to all the facts and circumstances of the case I am not in position to hold that the conclusion at which the Tribunal has arrived is manifestly erroneous. If the facts and circumstances of a case can reasonably indicate that a certain enterprise is an adventure in the nature of trade it is not within the competence of the High Court to sit in appeal over the decision of the Tribunal or to give a decision of its own on a different view of the facts and circumstances *A Grezo v. Commissioner of Income-tax* (1),

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For these reasons I am of the opinion that there is sufficient material on the record to justify the conclusion that the adventure in question was an adventure in the nature of trade. The question referred to us must, therefore, be answered in the affirmative. The Department will be entitled to the costs of this Court which we assess at Rs. 250.

Falshaw, J.

FALSHAW, J.—I agree.

B.R.T.

#### APPELLATE CIVIL

Before Shamsheer Bahadur, J.

Mst. MATO,—Appellant.

*versus*

SADHU,—Respondent.

F.A.O. No. 174 of 1958.

1959  
Sept., 2nd

*Hindu Marriage Act (XXV of 1955)—Section 10—Decree for judicial separation—Whether can be granted to a guilty party—Desertion—Meaning of.*

*Held*, that a decree for judicial separation can be granted to a petitioner who comes to court with clean hands, that is, free from matrimonial misconduct. A guilty party in a matrimonial suit cannot obtain relief either by way of judicial separation or by way of divorce.

*Held*, that 'desertion' implies abandonment against the wish of the person charging it. In order to succeed on a plea of desertion, it must be shown by the wife that she was obliged to leave her husband's home because of his conduct and against her own wishes. Where the wife states that the reason for her departure from the matrimonial home was the persistent refusal of the husband to discharge his matrimonial obligations and that after leaving his home she started the life of promiscuous adultery, it cannot be said that the husband was guilty of desertion