10. To conclude, section 13-A of the Act vests a discretion in the court only to grant the alternative lesser relief of judicial separation in a petition for divorce provided the requisite ground therefor prescribed by section 13 of the Act, has been established.

11. Now applying the abovesaid rule, it seems plain that the learned Single Judge himself held that the respondent-husband entirely was at fault and, therefore, was not entitled to the decree of divorce passed by the trial court which could not be sustained. It having been established beyond cavil that the respondent-husband was wholly the guilty party, the wife's stand that because of the same, she would not resume cohabitation with him, was obviously justified. No matrimonial misconduct even remotely could be laid at the door of the appellant-wife far from the same having been established. Consequently, no relief against her could be granted. Section 13-A of the Act, therefore, could not be attracted to the situation and with great respect, the learned Judge erred in making resort thereto. It is significant to recall that the findings of fact by the learned Single Judge have in a way achieved finality because the respondent-husband did not choose to file any appeal against the same and even otherwise not the least meaningful challenge could be raised against them. This appeal has, therefore, to be allowed. The judgment of the learned Single Judge is, hereby set aside as also that of the trial court and the petition for divorce preferred by the husband dismissed. The appellant would be entitled to her costs as well.

H.S.B.

Before R. N. Mittal and Surinder Singh, JJ.

COMMISSIONER OF INCOME-TAX HARYANA & CHANDIGARH,—*Applicant.*

versus

O. P. KHANNA & SONS,—*Respondent.*

Income tax Reference No. 146 *of* 1976

April 23, 1982.

Income-tax Act (XLIII of 1961)—Section 32(1)—Building acquired by an assessee for the purposes of his business—Electrical fittings and machinery etc. installed in the building—Business, however, actually started after sometime—Depreciation for the building and electrical fittings—Whether could be claimed from the date of its purchase—Word 'used' occurring in section 32(1)—Meaning of.

Held, that when a new unit is required to be set up, it involves a number of procedural formalities before the stage of "Turn Key" as is technically termed. The procedure for setting up the unit would naturally commence with the arrangement of a suitable building to house the same. This will be followed by installation of electrical or other fittings to provide the source of energy for the unit. The installation of the machinery would be the next step and thereafter the man-power, technical or non-technical, to run the unit would have to be arranged. The provision for raw-material would come next. In addition, the legal formalities required under various statutory provisions would have to be complied with and then alone the stage would arrive for the actual functioning of the unit. This procedure is bound to take considerable time depending upon the nature and capacity of the industry and the capital outlay of the unit. After a building has been arranged for housing the proposed industry and the necessary electrical fittings have been carried out it cannot be said that the building has not been put to use within the meaning of Section 32(1) of the Income-tax Act, 1961. In such a situation, the assessee would be entitled to claim depreciation in respect of written down value of the building and the electrical fittings therein from the date of its purchase. (Para 6).

Reference under section 256(1) of the Income-tax Act 1961 made by the Income Tax Appellate Tribunal (Chandigarh Bench) Chandigarh referring the following question of law to this Hon'ble Court for its opinion which is arising out of its I.T.A. No. 895 of 1974-75 and R.A. No. 23 of 1976-77 for the Assessment year 1971-72.

> *"Whether on the facts of the case, the Appellate Tribunal was right in law in holding that the depreciation allowance should have been made in respect of the building at Chandigarh while computing the business income of the assessee for the assessment year 1971-72"?*

Ashok Bhan, Advocate, *for the Appellant.*

Bhagirath Dass with Romesh Kumar, Advocates, *for the Respondent.*

JUDGMENT

Surinder Singh, J.—

This Reference initiated by the Revenue against the decision of the Income-Tax Appellate Tribunal, Amritsar Bench (Camp at Chandigarh) has been forwarded by the Tribunal to this Court under section 256(1) of the Income-tax Act, for expression of opinion on the following question which has been formulated:

> "Whether on the facts of the case, the Appellate Tribunal was right in law in holding that the depreciation allowance should have been made in respect of the building at

Chandigarh while computing the business income of the assessee for the assessment year 1971-72?"

(2) The facts as mentioned in the Statement of the Case are that the respondent-assessee is a Hindu Undivided Family which was carrying on business of a printing press under the name and style of Gemini Printers, Ambala Cantt. during the assessment year 1971-72 (accounting year 1st April, 1970 to 31st March, 1971). The assessee declared his income as Rs. 58,711. At the time of the assessment before the Income-tax Officer, the assessee claimed depreciation of Rs. 10,743 in respect of written-down value of the factory building at Chandigarh and certain electrical fittings therein. It is not disputed that the factory building in question was purchased by the assessee on November 27, 1970. The claim for depreciation was, however, disallowed by the Income-tax Officer on the ground that the said building had not been actually used in the accounting year, referred to above. The Income-tax Officer assessed the income of the respondent for the assessment year in question at Rs. 1,10,060.

(3) The respondent-assessee preferred an appeal before the Appellate Assistant Commissioner, but he failed to get any relief from that quarter. The assessee then approached the Income-tax Appellate Tribunal which allowed his appeal, holding that as the building at Chandigarh had been purchased by the assessee for shifting his business of printing press from Ambala to Chandigarh and the purchase had been made for the purpose of his business, he was entitled to the depreciation claim in respect of the said building and the electrical installations therein. That is how the present Reference was initiated by the Revenue to this Court.

(4) In so far as the facts are concerned, as already noticed, there is no dispute *inter se* the parties. The respondent had purchased the new factory building at Chandigarh on November 27, 1970. The learned counsel for the parties are further agreed at the bar that the assessee shifted from Ambala to the new building at Chandigarh on September 30, 1971. The only bone of contention in the present Reference is as to whether the respondent can be allowed to claim depreciation in respect of the building and the electrical fittings for the period November 22, 1970 to March 31, 1971, ie., little over four months.

(5) The argument addressed by the learned counsel for the parties revolved around the interpretation of the word 'used' occurring in section 32(1) of the Income-Tax Act. According to the said provision, an assessee can claim depreciation in respect of the buildings, machinery etc. owned by the assessee and used for the purpose of his business. Mr. Ashok Bhan, learned counsel for the Revenue has contended that the word 'used' connotes actual user of the building and in support of his argument, he has sought to place reliance upon certain observations in *Commissioner of Income-Tax* v. *Jiwaji Rao Sugar Company Limited* (1). A reference to the said authority would indicate that the same pertains to the case of machinery and not a building. The use of machinery involves a set of circumstances different from that of a building. In this authority, the decision of the Supreme Court in *The Liquidators of Pursa Limited* v. *Commissioner of Income-tax, Bihar,* (2) was also noticed and a reference to the said authority, would amplify that their Lordships of the Supreme Court, though deciding the question regarding the use of the machinery or plant for the purpose of business, left the interpretation of the word 'used' open in so far as it pertained to the difference between an active or passive use. This difference has indeed been highlighted in *Commissioner of Income-Tax, Bombay* v. *Siswanath Bhaskar Sathe,* (3) but then the said authority again relates to the case of machinery and not a building. There being no direct authority relating to the case of a building, the matter will have to be considered on first principles.

(6) It is a matter of common knowledge that when a new unit is required to be set up, it involves a number of procedural formalities before the stage of "Turn Key" as is technically termed. The procedure for setting up the unit would naturally commence with the arrangement of a suitable building to house the same. This would be followed by installation of electrical or other fittings to provide the source of energy for the unit. The installation of machinery would be the next step and thereafter the man-power, technical or non-technical, to run the unit would have to be arranged. The provision for raw-material would come next. In addition, the legal formalities required under various statutory provisions would have to be complied with and then alone the stage would arrive for

(1) (1969) 71 I.T.R. 319.
(2) (1954) 25 I.T.R. 265.
(3) (1937) 5 I.T.R. 621.

the actual functioning of the unit. The procedure referred to above is bound to take considerable time, depending of course upon the nature and capacity of the industry and the capital outlay of the unit. The question which falls for consideration is that after a building has been arranged for housing the proposed industry and the necessary electrical fittings have been carried out, can it be said that the building has not been put to use? After hearing the learned counsel for the parties at considerable length, we find that it is not so. If the contention of the learned counsel for the Revenue that it is only when the unit actually starts functioning that the building can be said to have been used, is accepted, it would lead to illogical results. Let us test the contention to examine its mettle. For the sake of argument, we may visualise a case where an entrepreneur makes arrangements for the building, instals the electrical and other fittings as also the machinery required, and even engages the necessary man-power for running the unit. However when the unit is all set for actual functioning, there is a sudden non-availability of the required raw-material or some other unforeseen circumstances occurs, with the result that though the entrepreneur has thrown all his investment into the business, but on account of the said circumstance, he is not able to put the unit into operation for a certain period which may extend to the next financial year. In such a situation, would it be reasonable to hold that the entrepreneur is not entitled to claim any depreciation in respect of the building which housed his unit, merely on account of the non-availability of raw-material or some other circumstance referred to above. Our answer to the question posed is definitely in the negative and the reason for this conclusion is simple. After arranging for the building, any step taken by the entrepreneur to set the building into gear for running the unit, would be nothing but putting it to 'use'.

(7) On the legal proposition, Mr. Bhagirath Das, learned counsel for the respondent assessee has also placed reliance upon the observations in *Sarabhai Management Corporation* Ltd. v. *Commissioner of Income-Tax, Gujarat,* (4) which are of some assistance to the determination of the point involved in this Reference. The case pertained to a Private Limited Company, whose main object was to acquire immovable property and give it

(4) (1976) 102 I.T.R. 25.

out either on lease or licence, for the purpose of residence or business, with all appurtenant amenities including storage, watch and ward facilities, canteens, refreshment rooms, etc. In the said case, the assessee had claimed depreciation in respect of the building and other amenities pertaining to the period in which the building was in the process of preparation for being leased, as above. It was held by a Bench of the Gujarat High Court that the assessee would be entitled to claim depreciation for the said period. The facts of the present case though not absolutely akin, are quite similar as the respondent-assessee after purchase of the building at Chandigarh had installed electrical fittings to run the unit. As already noticed, the respondent was able to shift his business into the said building within a few months. There is thus no difficulty in holding that during this transitory period, the building purchased by the assessee had been "used".

(8) As a result of the above discussion, we answer the question referred to this Court in the affirmative, i.e., in favour of the respondent-assessee and against the Revenue. In the circumstances of the case, there shall be no order as to costs of this Reference.

N.K.S.

Before S. S. Sandhawalia, C.J. & D. S. Tewatia, J.

DEWAN MODERN BREWERIES LTD.,—*Petitioner.*

versus

STATE OF HARYANA and others,—*Respondent.*

Civil Writ Petition No. 921 *of* 1979.

April 27, 1982.

Constitution of India, 1950—*Articles* 301, 304, 305, 366 and 372—*Punjab Excise Act* (1 *of* 1914)—*Sections* 31, 32—*Punjab Excise Fiscal (Haryana Amendment) Orders,* 1968, 1969 *and* 1974—*Fiscal orders issued under Excise Act imposing export duty at a certain rate already existing at the time of coming into force of the Constitution—Such duty enhanced by amendment by the impugned orders—Such orders—Whether "existing laws" in terms of Article* 366 *so as to be protected by of Article* 372—*Massive enhancement*