goods could only later have been transported under an export permit, must be overruled, and the defendant must be held liable. I would accordingly dismiss the appeals, but in view of the fact that the non-delivery of the plaintiff's goods is to a considerable extent due to the misconduct of Railway servants in Pakistan, whom the Government of India could not control, although it has been made liable under clause (1) of Article 8 of the Order of 1947, I would leave the parties to bear their own costs in the appeals as was done in the lower Court. The cross objections are dismissed with no order as to costs.

DUA, J.—I agree.

B.R.T.

SUPREME COURT

Before Sudhi Ranjan Das, C. J., N. H. Bhagwati. Bhuvaneshwar Prasad Sinha, K. Subba Rao and K.N. Wanchoo, JJ.

MESSRS GHAIO MAL AND SONS,—*Appellant*

versus

THE STATE OF DELHI,—*Respondents*

Civil Appeal No. 481 of 1957.

1958

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Constitution of India (1950)—Article 226—Writ of Certiorari— *Object of—Duty of the inferior Court or tribunal when a rule is issued on an application for* certiorari *—Document conveying sanction—Whether can be construed as sanction.*

Held, that the whole object of a writ of certiorari is to bring up the records of the inferior court or other quasi-judicial body for examination by the Superior Court so that the latter may be satisfied that the inferior court or the quasi-judicial body has not gone beyond its jurisdiction and has exercised its jurisdiction within the limits fixed by the law. Non-production of the records completely defeats the purpose for which such writs are issued.

Held, that when a superior court issues a rule on an application for certiorari, it is incumbent on the inferior court or the quasi-judicial body to whom the rule is addressed, to produce the entire records before the court along with its return.

Held, that a document which conveys the sanction can hardly be equated with the sanction itself.

Appeal by Special Leave from the Judgment and Order, dated the 12th December, 1955, of the Punjab High Court (Circuit Bench) at Delhi, in Civil Writ Application No. 11-D of 1955.

MR. GURBACHAN SINGH, Senior Advocate (MR. R. S. NARULA, Advocate, with him). for the Appellant.

MR. C. K. DAPHTARY, Solicitor-General of India (*M/s.* H. J. UMRIGAR and T. M. SEN, Advocates, with him). For Respondents Nos. 1 to 4.

DR. J. N. BANERJEE, Senior Advocate (MR. P. C. AGARWALA, Advocate, with him). for Respondents No. 5.

JUDGMENT

The following Judgment of the Court was delivered by—

Das, C. J.

DAS, C. J.—The facts material for the purpose of disposing of this appeal by Special Leave are shortly as follows: The appellants before us claim to have been dealers in foreign liquor since 1922 and to have, before the partition of the country, held licenses in Forms L-1, L-2, L-10 and L-11 at Amritsar, Sialkot and Multan. The appellants allege that in 1945, they had also secured a licence in Form L-2 in respect of some premises in Chawri Bazar, Delhi, but that the operation of the said license had to be suspended on account of the unsuitability of the Chawri Bazar premises. Then came the communal riots in the wake of the partition of the country and that license could not be

renewed. In 1951, the appellants applied to the Chief Commissioner, Delhi (Ex. 1), for licenses both in Forms L-1 and L-2 in respect of Karolbagh or at any place in Delhi. On May 17, 1951, the Home Secretary to the Chief Commissioner by letter (Ex. 2) conveyed to the appellants the sanction of the Chief Commissioner to the grant to them of a license in Form L-2 in respect of Karolbagh, Delhi. This license has ever since then been renewed from year to year. In 1954 a vacancy arose in respect of a license in Form L-2 on account of the closure of the business of Messrs Army and Navy Stores of Regal Buildings, New Delhi, which held such a license. Accordingly on January 21, 1954, the appellants submitted an application (Ex. 4) to the Deputy Commissioner for the grant of a foreign liquor license in Form L-2 in the aforesaid vacancy. In that application the appellants stated, *inter alia*, that they were "prepared to operate it in such a part of Delhi as may be determined by the authorities". Not having received any reply for nearly 3 months and apprehending that interested persons were endeavouring to cause hindrance in the matter of the granting of the license to them on the plea that the appellants had no premises in Connaught Place the appellants on March 11, 1954, wrote a letter (Ex. 5) to the Chief Commissioner in which, after pointing out that Karolbagh where they had their L-1 license was in New Delhi, the appellants stated: "In any case, we have already made it clear in our application which we made to the Deputy Commissioner, Delhi on the 21st January, 1954, that we are prepared to operate this license in any locality which the authorities might deem proper". This letter was acknowledged by the Personal Assistant to the Chief Commissioner who, on March 15, 1954, stated (Ex. 6) that the "application No. *nil*, dated 18th March, 1954, on the subject

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of grant of foreign liquor license in Form L-2" had been forwarded to the Home Secretary, Delhi State, for disposal. Exhibit 7 to the petition is an important document. It is a letter dated May 21, 1954, addressed by the appellants to the Excise and Taxation Commissioner stating that "with a view to avoiding any possible objection as to locality, etc., we have secured suitable premises also in the Connaught Place area, New Delhi, in which area has occurred a vacancy on account of the surrender of this license by Messrs Army and Navy Stores". The letter concluded with the request that early orders be passed on their application. On July 30, 1954, the appellants wrote a long letter (Ex. 8) to the Chief Commissioner claiming justice in the matter of their application for the L-2 license. In the second paragraph of that letter it was stated: "It is now being acclaimed by the party concerned and their friends that they have succeeded in removing the only obstacle that stood in the way of their getting the said L-2 license by so arranging matters that our application has been kept back by the Excise Commissioner and that only five or six other applications of firms without much merit in them have been forwarded to you in order that they might have a smooth sailing as against those applicants." The appellants prayed that the Excise Commissioner might be directed to forward all records concerning the case to the Chief Commissioner so that the latter might be able to arrive at a just conclusion and they asked for a hearing to explain their claim fully. A copy of this letter appears to have been endorsed to the Excise Commissioner on August 13, 1954, by the Under Secretary, Finance. The Excise Commissioner then wrote a letter No. 295/C/54, dated August 31, 1954, to the Under-Secretary, Finance, a copy of which was produced by the learned Solicitor

General at the hearing before us. In this letter the Excise Commissioner explained why the application of the appellants was not considered by him to be a good and proper one and stated the reasons why, according to him, the applications of two other applicants, including Messrs Gainda Mal Hem Raj (respondent No. 5), should be given the preference. In the penultimate paragraph of this letter of explanation it was stated: "In the end it may also be added that the applicant has no premises in New Delhi and as such he has no claim. The license in Form L-2 is granted in respect of certain premises." The conclusion was that "under the circumstances there is no force in the application of Messrs Ghaio Mall and Sons." It is apparent that the Excise Commissioner did not remember that the appellants had, by their letter (Ex. 7) of May 21, 1954, addressed to him, stated that they had secured suitable premises also in the Connaught Place area, New Delhi. Be that as it may, on September 11, 1954, the appellants wrote another letter (Ex. 9) to the Chief Commissioner pressing their claim. In this letter reference was made to their letter to the Excise Commissioner of May 21, 1954 (Ex. 7), in which it had been stated that the appellants had secured suitable premises in the Connaught Place area in New Delhi. A copy of this letter was sent to the same Under-Secretary, Finance, to whom the Excise Commissioner had written his letter of August 31, 1954, alleging that the appellants had no premises in New Delhi. Exhibit 9A is the postal acknowledgement by the Under-Secretary, Finance, of the letter containing the copy of the appellants' letter but it does not appear from the record that the Under-Secretary, Finance, thought it necessary to remind the Excise Commissiner that the appellants were maintaining that they had secured suitable premises in

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New Delhi. This was followed by a letter (Ex. 10) from the appellants to the Excise Commissioner intimating that an application had been made to the Collector on September 11, 1954, for a change of their premises for L-1 license from Karolbagh, New Delhi to H-32 Connaught Circus, New Delhi. Although this letter had been written in connection with the change of L-1 license, it certainly did specify that the appellants had secured the premises H-32 Connaught Circus. The Personal Assistant to the Excise Commissioner replied (Ex. 11) that the matter was under consideration. There was a reminder (Ex. 12) sent to the Excise Commissioner on December 8, 1954, about the change of L-1 license from Karolbagh to Connaught Circus. It appears from papers, for the first time produced before us at the hearing of this appeal, that on September 3, 1954, a note was put up by the Under-Secretary, Finance, before the Finance Secretary, Shri S. K. Mazumdar. At the forefront of this note we find the following statement: "The applicants (Messrs Ghaio Mall and Sons) have no premises in Connaught Circus. For this reason, if for no other, their claim has to be rejected." The note concluded with the recommendation that, in case it was decided that the vacancy should be filled, the recommendation of Excise Commissioner should be accepted, that is to say, the L-2 license should go to Messrs Gainda Mall Hem Raj (respondent No. 5). On September 8, 1954, the Finance Secretary simply endorsed the file to the Chief Minister who, on September 14, 1954, recorded the following order on the file: "Commissioner's recommendation may be accepted." There is nothing on the record produced before us to indicate that the matter was sent up to the Chief Commissioner or that his concurrence was obtained under section 36 of the Government of Part C States Act (49 of 1951). On December

14, 1954, the Under-Secretary, Finance, wrote to the Excise Commissioner a letter which was for the first time produced at the hearing before the High Court and to which detailed reference will be made hereafter. On January 15, 1955, the appellants were informed that the change applied for by them in respect of their L-1 License had been allowed. The appellants were not told anything about the rejection of their application for L-2 license, but evidently they came to know that the L-2 license, for which a vacancy had arisen on account of the closure of Messrs Army and Navy Stores, had been granted to Messrs Gainda Mall-Hem Raj (respondent No. 5). On December 24, 1954, the appellants wrote severally to the Home Secretary (Ex. 14), Finance Secretary (Ex. 15) and the Under-Secretary, Finance (Ex. 16) asking for a copy of the order or orders granting license to Messrs Gainda Mall-Hem Raj and/or rejecting their own application for L-2 foreign liquor license. Three postal acknowledgments (Exs. 16A, 16B, 16C), relating to those three letters are on the record. The appellants got no reply from any of them.

Not having received any reply the appellants on December 21, 1954, moved the Punjab High Court (Circuit Bench) under Article 226 for appropriate writs or orders, but as it was not then quite clear whether the order granting the license to Messrs Gainda Mall-Hem Raj had actually been made, the Circuit Bench summarily dismissed that writ application as premature. There were proceedings taken by the appellants to obtain leave to appeal first from this Court under Article 136 which was adjourned *sine die* and then from the High Court under Article 133, but it is not necessary to go into further details of those proceedings. After the appellants had definitely ascertained

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that the L-2 license had been granted to Messrs Gainda Mall-Hem Raj, the appellants, instead of proceeding with their application for leave to appeal to this Court, filed a fresh writ petition in the High Court (Circuit Bench) out of which the present appeal has arisen.

In the present writ petition the appellants have impleaded 7 respondents, namely, (1) The State of Delhi, (2) The Chief Minister, Delhi, (3) The Excise and Taxation Commissioner, Delhi, (3A) Secretary, Delhi State, (3B) Under-Secretary, Finance, (4) The Chief Commissioner, Delhi and (5) Messrs. Gainda Mall-Hem Raj. The principal grounds urged by the appellants in support of this petition are that the applications of the appellants and of the other applicants had never been placed before the Chief Commissioner who, under rule 1 of Ch. 5 of the Delhi Liquor License Rules, 1935 framed under section 59 of the Punjab Excise Act (Punjab 1 of 1914), as extended to Delhi, was the only competent authority empowered to grant L-2 license for wholesale and retail vend of foreign liquor to the public and that the Chief Commissioner had never applied his mind to the applications and did not in fact make any order and that respondents Nos. 2 and 3 had purported to exercise jurisdiction and powers which were not vested in them by law and that their decision, if any, had not received the concurrence of the Chief Commissioner, as required by the proviso to section 36 of the Government of Part C States Act. The appellants pray for the issue of appropriate writs, orders or directions (a) quashing and setting aside the order granting L-2 license to respondent No. 5, (b) directing respondent No. 4 (the Chief Commissioner) to hold proper enquiry regarding suitability of premises etc. to hear both the parties and to decide the application of the petitioner before taking up

the application of the 5th respondent. There is a prayer in the nature of a prayer for further and other reliefs and there is the usual prayer for costs.

A written statement verified by the affidavit of Shri S. K. Majumdar, the Finance Secretary, has been filed on behalf of respondents 1 to 4. In paragraph 5 of that written statement it has been averred that all the applications including the appellant's application were in fact considered; but it is significant that it has not been stated by whom the applications had been considered. Messrs Gainda Mall-Hem Raj have filed an affidavit only stating that they had been informed that the Chief Commissioner had sanctioned the grant of the license to them. The appellants, with the leave of the High Court, filed a consolidated affidavit setting out facts including the fact that although they had written to the Home Secretary, the Finance Secretary and the Under-Secretary, Finance, asking for a copy of the order granting the license to Messrs Gainda Mall-Hem Raj, no copy of the order or even a reply to the letters had been received. In reply to the consolidated fresh affidavit an affidavit affirmed by the Finance Secretary (Shri S. K. Majumdar) has been filed. In paragraph 13 of this affidavit it has been stated that, since no appeal lies against the order of the Chief Commissioner, the question of supplying a copy of the order to the appellants does not arise. Statements of this kind cannot but leave an impression in the mind of the Court that the respondents were not squarely dealing with the case made by the appellants, but were evading the production of the order of the Chief Commissioner which it was obviously insinuated not to have been made at all. In order to compel the respondents to produce the original order, if any, the appellants made an application to the High Court supported

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by an affidavit. Paragraph 2 of the petition which was quite precise reads thus:

> "(2) That with reference to paragraphs 7 and 8 of the written statement and paragraphs 10 and 11 of the affidavit of the Finance Secretary, it is submitted that the respondents have not filed any proper return to the rule issued by the Court inasmuch as the original orders sought to be quashed with notings, etc., which led to those orders have been withheld by the respondents. The respondents have not even stated that the Chief Commissioner, Delhi, who is admittedly the only competent authority for the grant of an L-2 license passed any orders himself. The replies are evasive. It is not stated who considered the application of the petitioner, i.e., whether it was a clerk who was doing the noting or whether the Collector or the Finance Secretary or the Chief Minister who did it."

On this application the High Court on April 11, 1955, made the following order:

> "Let the order rejecting the petitioners' application be brought to Court by an officer or official of the department concerned."

The Finance Secretary filed a reply paragraph 3 of which was in the terms following:—

> "(3) That I have carefully gone through the relevant papers. The case of the petitioner was considered along with that

of other applicants and it was finally decided to issue the license in favour of Messrs Gainda Mall-Hem Raj. It was not considered necessary to send an intimation of rejection to all those who had not been granted the license in question. There is, therefore, no specific order rejecting the petitioners' application as ordered to be produced by the Hon'ble Court."

Although it was obvious what order of the Chief Commissioner the appellants were insisting on being produced, the respondents were prompt in taking advantage of the wording of the High Court's order directing the production of the order rejecting the appellants' application and stated that there was no specific order rejecting the appellants' application. This is nothing short of what may be called swearing by the card. The deponent overlooks the fact that the order granting the license to Messrs Gainda Mall-Hem Raj was in effect tantamount to a rejection of the appellants' application. The appellants moved the High Court again on August 8, 1955. After stating how the respondents were evading the real issue, the appellants in paragraph 5 of the petition categorically stated that their case was that the Chief Commissioner, Delhi, the competent authority, had not passed any order sanctioning the license in favour of Messrs Gainda Mall-Hem Raj and prayed that the respondents be directed to file the original record of the case including the actual sanction for the grant of the license to Messrs Gainda Mall-Hem Raj. On August 19, 1955, the Court ordered the relevant records to be called for. The only thing the respondents could, at long last, produce before the High Court was the letter of the Under-Secretary, Finance, to the

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Excise Commissioner, dated December 14, 1954, to which reference has already been made.

Learned Solicitor-General appearing for respondents 1 to 4 pointed out that the order which is sought to be quashed was the grant of L-2 license for the year 1954/1955, which has long expired and suggested that the writ petition and conesquently the appeal had become infructuous. It appears that the usual practice in such matters is that once a licence in Form L-2 is granted by the Chief Commissioner, it is almost automatically renewed by the Collector from year to year, unless, of course, the licensee is found guilty of breach of any excise rule and that in such cases of renewal there arises no question of vacancy entitling any outside competitor to apply for a license in Form L-2. That being the position—and this is not in dispute—it is vitally important for the appellants that we should consider the validity of the grant of the L-2 license for 1954/1955, to Messrs Gainda Mall-Hem Raj for in case of our holding that the order granting the same was a nullity on account of its not having been made by the competent authority, the vacancy caused by the closure of business by Messrs Army and Navy Stores will still remain to be filled up and the appellants will yet have a chance of having their application considered by the competent authority. We accordingly proceeded to hear the appeal on merits.

The principal question urged before us, as before the High Court, is whether the Chief Commissioner of Delhi made any order under rule 1 of Chapter 5 of the Delhi Liquor License Rules, 1935. It is significant that although the Chief Minister, the Excise Commissioner, the Secretary of Delhi State, the Under-Secretary, Finance, and

the Chief Commissioner have been impleaded in the present proceedings as respondents Nos. 2, 3, 3A, 3B, and 4, respectively, and although they or at least some of them could have deposed to the material facts of their own personal knowledge, none of them ventured to file an affidavit dealing with the categorical statement of the appellants that no order had at any time been made by the Chief Commissioner for granting the L-2 license to Messrs Gainda Mall-Hem Raj or rejecting the appellants' application. Instead of adopting the simple and straightforward way these respondents have taken recourse to putting up the Finance Secretary to give obviously evasive replies which are wholly unconvincing. It is needless to say that the adoption of such dubious devices is not calculated to produce a favourable impression on the mind of the court as to the good faith of the authorities concerned in the matter. We must also point out that when a superior court issues a rule on an application for certiorari it is incumbent on the inferior court or the quasi-judicial body, to whom the rule is addressed, to produce the entire records before the court along with its return. The whole object of a writ of certiorari is to bring up the records of the inferior court or other quasi-judical body for examination by the Superior Court, so that the latter may be satisfied that the inferior court or the quasi-judicial body has not gone beyond its jurisdiction and has exercised its jurisdiction within the limits fixed by the law. Non-production of the records completely defeats the purpose for which such writs are issued, as it did in the present case before the High Court. We strongly deprecate this attempt on the part of the official respondents to byepass the court. We are bound to observe that the facts appearing on the records before us disclose a state of affairs

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which does not reflect any credit on the administration of the erstwhile State of Delhi. We must, however, say, in fairness to the learned Solicitor-General, that he promptly produced the entire records before us during the hearing of this appeal.

As already stated the principal question, on which arguments have been addressed to us, is whether the Chief Commissioner had made any order for granting the L-2 license to Messrs Gainda Mall-Hem Raj. The High Court answered the question in the affirmative on two grounds, namely, (1) that the Finance Secretary had made an affidavit stating that the decision regarding the grant of the license to Messrs Gainda Mall-Hem Raj, had been taken by the Chief Commissioner, and (2) that the learned Solicitor-General stated in specific terms that the matter had in fact been decided by the Chief Commissioner. On the facts as they now emerge it appears to us that the High Court was under some misapprehension on both these points. We have already summarised all the statemnets and affidavits affirmed by the Finance Secretary and it is quite clear that the only thing that he did not say was that the Chief Commissioner had considered the applications or made any order. The learned Solicitor-General, with his usual fairness, also informed us that except relying on the letter of December 14, 1954, he did not say that the Chief Commissioner had taken any decision in the matter. This being the position we are free to go into the matter and come to our own decision thereon.

The records, including the documents now produced before us, do not show that the applications had ever been placed before the Chief Commissioner. There is nothing in the files showing any

order or note on the subject made or signed or initialled by the Chief Commissioner. What transpires is that the Excise Commissioner (respondent No. 3) had by his letter dated August 31, 1954, recorded the reasons why the appellants' applications could not be entertained, one of the reasons being that they had no premises in the Connaught Place area in New Delhi, that a note was then put up by the Under-Secretary, Finance on September 3, 1954, suggesting that the appellants' application should be rejected, if for nothing else, for their not having any premises in New Delhi (which according to the appellants was not a correct statement in view of their letters referred to above) and that the L-2 license should be granted to Messrs Gainda Mall-Hem Raj, that the Chief Minister on September 14, 1954, made an order on the file accordingly and finally that the Under-Secretary, Finance, wrote the letter dated December 14, 1954, to the Excise Commissioner intimating that the Chief Commissioner had been pleased to approve the grant of the license to Messrs Gainda Mall-Hem Raj. There is nothing on the record to show that the concurrence with the order of the Chief Minister was obtained from the Chief Commissioner. The inexorable force of the aforesaid facts, now appearing on the record, inevitably led the learned Solicitor-General to concede that, on the records as they are, it is not possible for him to say that the Chief Commissioner had actually made the order, but he contends that, in view of the letter of the Under-Secretary, Finance, dated December 14, 1954, the fact that the Chief Commissioner had made the order could not be questioned in any court. In other words the learned Solicitor-General submits that that letter embodies the order of the Chief Commissioner and the court cannot be asked to go behind it and enquire whether the Chief Commissioner had in fact made the order.

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In order to succeed in this contention the learned Solicitor-General has to satisfy us that this letter is the embodiment of the Chief Commissioner's order and that it has been duly authenticated. On the second point he is clearly right, for under a rule made on March 17, 1952, by the then Chief Commissioner, in exercise of powers conferred on him by section 38(3) of the Government of Part C States Act (49 of 1951), an Under-Secretary is also a person competent to authenticate an order or instrument of the Government of Delhi. The only question that remains for us to consider is whether the letter in question is the order of the Chief Commissioner? The letter on which the entire defence of the respondents rests is expressed in the following words:—

"DELHI STATE SECRETARIATE, DELHI STATE

No. F. 10(139)/54-GA & R.

Dated the

14th December, 1954.

From

Shri M. L. Batra, M.A., P.C.S.
Under-Secretary, Finance (Expenditure) to Government, Delhi State.

To

Shri Dalip Singh, M.A., I.R.S.,
Commisioner of Excise,
Delhi State,
Delhi.

Subject:—Grant of L-2 License.

Sir,

With reference to your letter No. 295/C/54, dated the 31st August, 1954, on the above subject, I am directed to say that the Chief Commissioner

is pleased to approve under Rule 5.1 of Delhi Excise Manual, Volume II the grant of L-2 license to Messrs Gainda Mall-Hem Raj, New Delhi, in place of the L-2 License surrendered by Messrs Army and Navy Stores, New Delhi. Necessary license may kindly be issued to the party concerned under intimation to this Secretariate.

Yours faithfully,

(Sd.)/- M. L. Batra.
Under-Secretary, Finance (Exp.)
to Government, Delhi State."

In the first place it is an inter-departmental communication. In the second place it is written with reference to an earlier communication made by the Excise Commissioner, that is to say, *ex facie*, it purports to be a reply to the latter's letter of August 31, 1954. In the third place the writer quite candidly states that he had been "directed to say" something—by whom, it is not stated. This makes it quite clear that this document is not the order of the Chief Commissioner but only purports to be a communication—at the direction of some unknown person—of the order which the Chief Commissioner had made. Indeed in paragraph 7 of the respondents' statement filed in the High Court on February 2, 1955, this letter has been stated to have "conveyed the sanction of the Chief Commissioner of the grant of license to the 5th respondent". A document which conveys the sanction can hardly be equated with the sanction itself. Finally the document does not purport to have been authenticated in the form in which authentication is usually made. There is no statement at the end of the letter that it has been written "by order of the Chief Commissioner". For all these reasons it is impossible to read this document as the order of the Chief Commissioner.

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Learned counsel for Messrs. Gainda Mall-Hem Raj relied on our decision in *Dattatreya Moreshwar Pangarkar* v. *The State of Bombay* (1). In that case there was ample evidence on the record to prove that a decision had in fact been taken by the appropriate authority and the infirmity in the form of the authentication did not vitiate the order but only meant that the presumption could not be availed of by the State. That decision did not proceed on the correctness of the form of authentication but on the fact of an order having in fact been made by the appropriate authority and has thus no application to the present case where it is conceded that the Chief Commissioner had not in fact made or concurred in the making of an order granting the license to Messrs. Gainda Mall-Hem Raj.

In the view we have taken it is not necessary for us to consider whether the action taken under the Excise Act and the rules thereunder was a judicial or an executive action, for even if it were of the latter category the letter of December 14, 1954, cannot be treated as an order properly authenticated to which the presumption raised by Art. 166 of the Constitution will attach. For reasons stated above we hold that there was no valid order granting the L-2 license to Messrs. Gainda Mall-Hem Raj and that in the eye of the law the vacancy arising on the closure of the business by Messrs Army and Navy Stores still remains unfilled. The applications of the appellants and other applicants were for a grant of L-2 license for 1954/1955. That year has gone past and accordingly in the changed circumstances we direct the Chief Commissioner to fill up the vacancy caused by the closure of the business by Mesrs. Army and Navy Stores by inviting applications from intending licensees including the appellants and

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Messrs. Gainda Mall-Hem Raj and granting the same to the most suitable party. We, therefore, accept this appeal, reverse the order of the High Court and issue a mandamus to the effect aforesaid and also direct the respondents Nos. 1 to 4 to pay the appellants' costs of this appeal and of the proceedings in the High Court out of which this appeal has arisen. Messrs. Gainda Mall-Hem Raj are to bear their own costs throughout.

B.R.T.

SUPREME COURT

Before T. L. Venkatarama Aiyar, P. B. Gajendragadkar and A. K. Sarkar, JJ.

SHRI BARU RAM,—*Appellant*

versus

SHRIMATI PRASANNI AND OTHERS,—*Respondents*

Civil Appeal No. 409 of 1958.

1958

Sept. 30th

The Representation of the People Act (XLIII of 1951)—Sections 33 and 36,—Candidate failing to produce evidence in the prescribed manner as to his being an elector in another constituency—Returning Officer, whether justified in rejecting his nomination paper—Provisions of section 33 (5)—Whether mandatory or directly—Defect, whether of substantial character—Section 123(7)(c) and Explanation (2)—Meaning and effect of—Section 116A—Appeal under—Finding of fact—whether binding on the High Court—Indian Evidence Act (I of 1872)—Evidence of a witness—Whether can be accepted in part.

Held, that where a candidate fails to produce the prescribed evidence in support of his being an elector in another constituency, the Returning Officer is justified in rejecting his nomination paper. The requirements of section 33(5) of the Representation of the People Act are mandatory and not directory, because the statute itself has made it clear that the failure to comply with the said requirement leads to the rejection of the nomination paper.

Whenever the statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirements should lead to any other consequence.

Held, that the essential object of the scrutiny of nomination papers is that the returning officer should be satisfied that the candidate who is not an elector in the constituency in question is in fact an elector of a different constituency. The satisfaction of the returning officer is thus the matter of substance in these proceedings; and if the statute provides the mode in which the returning officer has to be satisfied by the candidate it is that mode which the candidate must adopt.

Held, that where the statute requires specific facts to be proved in a specific way and it also provides for the consequence of non-compliance with the said requirement it would be difficult to resist the application of the penalty clause on the ground that such an application is based on a technical approach.

Held, that when Explanation (2) to section 123 refers to a person acting as a polling agent of a candidate, it contemplates the action of the polling agent who is duly appointed in that behalf by the candidate under section 46. It is only when it is shown that a person has been appointed a polling agent by the candidate and has in consequence acted as such agent for the said candidate that Explanation (2) would come into operation. If, without being appointed as a polling agent by the candidate, a person fraudulently, or without authority, manages to act as the polling agent of the said candidate, Explanation (2) would not apply.

Held, that in dealing with an appeal under section 116A of the Representation of the People Act, High Court should normally attach importance to the findings of fact recorded by the Tribunal when the said findings rest solely on the appreciation of oral evidence.

Held, that the evidence of a witness may be rejected if it appears to be unreliable; but if it is accepted, it wiuld not fair to accept it only in part.

Appeal by Special Leave from the Judgment and Order dated the 13th May, 1958, of the Punjab High Court at Chandigarh, in First Appeal from Order No. 24 of 1958.

MR. C. B. AGGARWALA, Senior Advocate (MR. NAUNIT LAL, Advocate, with him), for the Appellant.

M/S. H. S. DOABIA, K. R. CHAUDHURY and M. K. RAMAMURTY, Advocate, for Respondent No. 1.

JUDGMENT

The following Judgment of the Court was delivered by—

GAJENDRAGADKAR, J.—This appeal by special leave has been filed against the decision of the Punjab High Court confirming the order passed by the Election Tribunal by which the appellant's election has been declared to be void. The appellant Shri Baru Ram was elected to the Punjab Legislative Assembly from the Rajaund constituency in the Karnal District. Initially seventeen candidates had filed their nomination papers in this constituency. Out of these candidates, thirteen withdrew and the nomination paper filed by Jai Bhagawan was rejected by the returning officer. That left three candidates in the field. They were the appellant Baru Ram, Mrs. Prasanni and Harkesh, respondents 1 and 2 respectively. The polling took place on March 14, 1957, and the result was declared the next day. Since the appellant had secured the largest number of votes he was declared duly elected. Soon thereafter Mrs. Prasanni, respondent I, filed an election petition in which she alleged that the appellant had committed several corrupt practices and claimed a declaration that his election was void. The appellant denied all the allegations made by respondent 1. The election tribunal first framed six preliminary issues and after they were decided, it raised twenty-nine

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issues on the merits. The tribunal was not satisfied with the evidence adduced by respondent 1 to prove her allegations in respect of the corrupt practices committed by the appellant and so it recorded findings against respondent 1 on all the issues in regard to the said corrupt practices. Respondent 1 had also challenged the validity of the appellant's election on the ground that the returning officer had improperly rejected the nomination paper of Jai Bhagawan. This point was upheld by the election tribunal with the result that the appellant's election was declared to be void.

The appellant then preferred an appeal to the Punjab High Court. He urged before the High Court that the election tribunal was in error in coming to the conclusion that the nomination paper of Jai Bhagawan had been improperly rejected. This contention was accepted by the High Court and the finding of the tribunal on the point was reversed. Respondent 1 sought to support the order of the election tribunal on the ground that the tribunal was not justified in holding that the appellant was not guilty of a corrupt practice under section 123(7)(c). This argument was also accepted by the High Court and it was held that the appellant was in fact guilty of the said alleged corrupt practice. In the result, though the appellant succeeded in effectively challenging the only finding recorded by the tribunal against him, his appeal was not allowed because another finding which was made by the tribunal in favour of the appellant was also reversed by the High Court. That is why the order passed by the tribunal declaring the appellant's election to be void was confirmed though on a different ground. It is this order which is challenged before us by Mr. Aggarwal on behalf of the appellant and both the points decided by the High Court are raised before us by the parties.

At the hearing of the appeal Mr. Doabia raised a preliminary objection. He contends that the present appeal has been preferred beyond time and should be rejected on that ground alone. The Judgment under appeal was delivered on May 13, 1958, and the petition for leave to appeal under Article 136 of the Constitution has been filed in this Court on September 2, 1958. It is common ground that the appellant had applied for leave to the Punjab High Court on June 9, 1958, and his application was dismissed on August 22, 1958. If the time occupied by the appellant's application for leave is taken into account, his appeal would be in time; on the other hand, if the said period is not taken into account, his application would be beyond time. Mr. Doabia argues that the proceedings taken on an election petition are not civil proceedings and so an application for leave under Article 133 of the Constitution was incompetent, the time taken in the disposal of the said application cannot therefore be taken into account in computing the period of limitation. On the other hand, Mr. Aggarwal urges that section 116A(2) of the Representation of the People Act (43 of 1951) (hereinafter called the Act) specifically provides that the High Court, in hearing an appeal presented to it shall have the same powers, jurisdiction and authority and follow the same procedure with respect to the said appeal as if it were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction. The result of this provision is to assimilate the election proceedings coming before the High Court in appeal to civil proceedings as contemplated by Article 133 of the Constitution and so, according to him, it was not only open to the appellant but it was obligatory on him to make an application for leave to the Punjab High Court under the said

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article. That is why the time occupied by the said proceedings in the Punjab High Court must be excluded in deciding the question of limitation. We do not propose to deal with the merits of these contentions. It is not seriously disputed by Mr. Doabia that parties aggrieved by orders passed by High Courts in appeals under section 116A of the Act generally apply for leave under Article 133 and in fact such applications are entertained and considered on the merits by them. It is true that Mr. Doabia's argument is that this practice is erroneous and that Article 133 has no application to the appellate decision of the High Court under section 116A of the Act. Assuming that Mr. Doabia is right, it is clear that the appellant has merely followed the general practice in this matter when he applied for leave to the Punjab High Court; his application was entertained, considered on the merits and rejected by the High Court. Under these circumstances we think that even if we were to hold that Article 133 has no application, we would unhesitatingly have excused the delay made in the presentation of the appeal; and so we do not think we can throw out the appeal *in limine* on the ground of limitation. If necessary we would excuse the delay allegd to have been made in presenting this appeal.

On the merits, Mr. Aggarwal contends that the finding of the High Court that the appellant has committed a corrupt practice under section 123(7)(c) is not supported by any evidence. Before dealing with this argument it would be relevant to consider the legal position in the matter. Corrupt practice as defined in section 2(c) of the Act means "any of the practices specified in section 123". Section 123(7)(c) provides *inter alia* that the obtaining or procuring or abetting or attempting to obtain or procure by a candidate any assist-

ance other than giving of vote for the furtherance of the prospects of that candidate's election from any person in the service of the Government and who is a member of the armed forces of the Union, is a corrupt practice. The case against the appellant as set out by respondent 1 in her election petition on this point is that the appellant secured the assistance of Puran Singh, who is a member of the armed forces of the Union. It was alleged that Puran Singh "actively canvassed for the appellant on March, 11th to 13th, 1957, in his village and so much so that he subsequently served as his polling agent at polling booth No. 15 at village Kotra on March 14, 1957". Both the tribunal and the High Court are agreed in holding that it had not been proved that Puran Singh actively canvassed for the appellant on March 11th to 13th as alleged by respondent 1. They have, however, differed on the question as to whether the appellant had appointed Puran Singh as his polling agent for the polling booth in question. It would thus be seen that the point which falls for our decision in the present appeal lies within a very narrow compass. Did the appellant secure the assistance of Puran Singh by appointing him as his polling agent? Going back to section 123, explanation (2) to the said section provides that "for the purpose of clause (7) a person shall be deemed to assist in the furtherance of the prospects of a candidate for election if he acts as an election agent or polling agent or a counting agent of that candidate". In other words, the effect of explanation (2) is that once it is shown that Puran Singh had acted as polling agent of the appellant, it would follow that the appellant had committed a corrupt practice under section 123(7)(c). But it is important to bear in mind that before such a conclusion is drawn the provisions of section 46 of the Act must be taken into account. Section 46

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authorises a contesting candidate to appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station provided under section 25 or at the place fixed under subsection (1) of section 29 for the poll. There can be no doubt that, when explanation (2) to section 123 refers to a person acting as a polling agent of a candidate, it contemplates the action of the polling agent who is duly appointed in that behalf by the candidate under section 46. It is only when it is shown that a person has been appointed a polling agent by the candidate and has in consequence acted as such agent for the said candidate that explanation (2) would come into operation. If, without being appointed as a polling agent by the candidate, a person fraudulently, or without authority, manages to act as the polling agent of the said candidate, explanation (2) would not apply. That being the true legal position the short point which arises for our decision is whether the appellant had appointed Puran Singh as his polling agent and whether Puran Sing acted as such polling agent at the polling booth No. 15 at Kotra.

What then are the facts held proved by the High Court in support of its conclusion against the appellant under section 123(7)(c)? The first point which impressed the High Court is in respect of the writing by which the appellant is alleged to have appointed Puran Singh as his polling agent. The printed prescribed forms were not available to the candidates and so they had to copy the prescribed form for the purpose of appointing their polling agents. This position is not disputed. The form by which Puran Singh is alleged to have been appointed the appellant's polling agent contains a glaring mistake in that while reciting that the polling agent agreed to act as such polling agent the

form says "I agree to act as such *following* agent" (P.W. 48/1). The same glaring mistake is to be found in the form by which the appellant admittedly appointed Pal Chand to act as his polling agent at the same polling booth. The High Court thought that the identity of this glaring mistake in both the forms coupled with the similarity of the handwriting of the rest of the writing in them showed that the two forms must have been written by the same scribe. This is a finding of fact and it may be accepted as correct for the purpose of our decision. It would, however, be relevant to add that it is not at all clear from the record that the same scribe may not have written similar forms for other candidates as well. There is no evidence to show that the scribe who made this glaring mistake had been employed as his own scribe by the appellant.

The High Court was also disposed to take the view that Puran Singh in fact had acted as the polling agent on the day of the election at the said polling booth. Respondent 1 had examined herself in support of this plea and Banwari Lal whom she examined supported her in that behalf. The tribunal was not impressed by the evidence of these two witnesses; and it has given reasons for not accepting their evidence as true or reliable. It is unnecessary to emphasise that, in dealing with an appeal under section 116A of the Act, High Courts should normally attach importance to the findings of fact recorded by the tribunal when the said findings rest solely on the appreciation of oral evidence. The judgment of the High Court does not show that the High Court definitely accepted the evidence of the two witnesses as reliable; in dealing with the question the High Court has referred to this evidence without expressly stating whether the evidence was

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accepted or not; but it may be assumed that the High Court was disposed to accept that evidence. In this connection, we would like to add that it is difficult to understand why the High Court did not accept the criticism made by the tribunal against these two witnesses. If we consider the verifications made by respondent 1 in regard to the material allegations on this point both in her petition and in her replication, it would appear that she had made them on information received and not as a result of personal knowledge; that being so, it is not easy to accept her present claim that she saw Puran Singh working as polling agent; but apart from this consideration, the evidence of respondent 1, even if believed, does not show that Puran Singh was working as a polling agent of the appellant; and the statement of Banwari Lal that Puran Singh was working as the appellant's polling agent loses much of its force in view of his admission that he had no knowledge that Puran Singh had been appointed by the appellant as his polling agent. Even so, we may assume, though not without hesitation, that Puran Singh did act as appellant's polling agent as alleged by respondent 1.

In dealing with this question the High Court appears to have been considerably influenced by the statement made by Jangi Ram whom the appellant had examined. In his cross-examination, Jangi Ram stated that Jagtu and Pal Chand were the agents of Shri Baru Ram, but he added that Puran Singh was not at the polling booth. It may be mentioned that the appellant's case was that he had appointed only one polling agent at Kotra; and this allegation, according to the High Court, was disproved by the statement of Jangi Ram in as much as he referred to two polling agents

working for the appellant. In considering the effect of this statement, the High Court has failed to take into account the positive statement of the witness that Puran Singh was not at the polling station at all. The evidence of the witness may be rejected if it appears to be unreliable, but if it is accepted, it would not be fair to accept it only in part and to hold that two polling agents had been appointed by the appellant one of whom was Puran Singh. There is another serious infirmity in the inference drawn by the High Court from the statement of Jangi Ram; that is, that Jagtu to whom the witness has referred as a polling agent of the appellant appears in fact to have acted as a polling agent of Harkesh respondent 2. Jhandu, another witness examined by the appellant has stated so on oath and his statement has not been challenged in cross-examination. Thus, reading the evidence of Jhandu and Jangi Ram, it would be clear that Jangi Ram was right when he said that Jagtu was acting as a polling agent but he was wrong when he thought that Jagtu was the polling agent of the appellant. If the attention of the High Court had been drawn to the unchallenged statement of Jhandu on this point, it would probably not have drawn the inference that Jangi Ram's evidence supports the case of respondent 1 about the appointment of Puran Singh as the appellant's polling agent.

The next circumstance on which reliance has been placed in the judgment of the High Court is that Puran Singh has signed the prescribed form appointing him as the polling agent and he must have presented it to the returning officer. The prescribed form requires that a candidate appointing his polling agent and the polling agent himself should sign the first part of the form. Then the polling agent is required to take the form to the

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returning officer, sign in token of his agreeing to work as a polling agent before the said officer and present it to him. The High Court has found that Puran Singh must have signed the form and presented it as required by law. Puran Singh was examined by respondent 1; but when he gave evidence, he was allowed to be treated as hostile and cross-examined by her counsel. Puran Singh denied that he had acted as the appellant's polling agent and that he had signed the form and presented it to the returning officer. It, however, appears that Chand Jamadar to whose platoon Puran Singh is attached gave evidence that the signature of Puran Singh on the form in question (P.W.48/1) appeared to be like the signatures on acquittance rolls which had been admittedly made by him. On the same question handwriting experts were examined by both the parties. Mr. Om Parkash was examined by respondent 1 and he stated that he had compared the admitted signatures of Puran Singh with the disputed signature and had come to the conclusion that Puran Singh must have made the disputed signature. On the other hand, Mr. Kapur whom the appellant examined gave a contrary opinion. The tribunal thought that in view of this conflicting evidence it would not be justified in finding that Puran Singh had signed the form. The High Court has taken a contrary view. Mr. Aggarwal for the appellant contends that the High Court was in error in reversing the finding of the High Court on this point. There may be some force in this contention; but we propose to deal with this appeal on the basis that the finding of the High Court on this question is right. The position thus is that according to the High Court, Puran Singh signed the form appointing him as the appellant's agent and presented it before the officer. Puran Singh was seen at the polling booth and the scribe who wrote

the form in question also wrote the form by which the appellant appointed Pal Singh as his polling agent at the same booth. The High Court thought that from these circumstances it would be legitimate to infer that the appellant had appointed Puran Singh as his polling agent and had in fact signed the form in token of the said appointment. It is the correctness of this finding which is seriously disputed by Mr. Aggarwal before us.

It is significant that from the start the parties were at issue on the question as to whether Puran Singh had been appointed by the appellant as his polling agent; and so respondent 1 must have known that she had to prove the said appointment in order to obtain a finding in her favour on issue 29 under section 123(7)(c) of the Act. Respondent 1 in fact led evidence to prove the signature of Puran Singh but no attempt was made by her to prove the signature of the appellant on the said form. The appellant had specifically denied that he had appointed Puran Singh as his polling agent and when he stepped into the witness box he stated on oath that he had not signed any form in that behalf. Under these circumstances, it was clearly necessary for respondent 1 to examine competent witnesses to prove the appellant's signature on the form. It is true that the appellant's signature on the form appears to have been over-written, but it is only the expert who could have stated whether the over-writing in question made it impossible to compare the said signature with the admitted signatures of the appellant. It appears that after the whole of the evidence was recorded, respondent woke up to this infirmity in her case and applied to the tribunal for permission to examine an expert in that behalf. This application was made on February 6, 1958; and the only explanation given for the delay in making

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it was that it was after the appellant denied his signature on oath that respondent 1 realised the need for examining an expert. The tribunal rejected this application and we think rightly. In its order the tribunal has pointed out that respondent 1 had been given an opportunity to examine an expert and if she wanted her expert to give evidence on the alleged signature of the appellant her counsel should have asked him relevant questions when he was in the witness box. Thus the position is that there is no evidence on the record to support the case of respondent 1 that the said alleged signature has in fact been made by the appellant. The only relevant evidence on the record is the statement of the appellant on oath that he had not signed the form in question.

Mr. Doabia fairly conceded that there was no legal evidence on this point; but his argument was that from the other findings of fact recorded by the High Court it would be legitimate to infer that the appellant had made the said signature. In our opinion this contention is wholly untenable. It must be borne in mind that the allegation against the appellant is that he has committed a corrupt practice and a finding against him on the point would involve serious consequences. In such a case, it would be difficult to hold that merely from the findings recorded by the High Court it would be legitimate to infer that the appellant had signed the form and had in fact appointed Puran Singh as his polling agent. Mr. Doabia argues that it is not always absolutely necessary to examine an expert or to lead other evidence to prove handwriting. It would be possible and legal, he contends, to prove the handwriting of a person from circumstantial evidence. Section 67 of the Indian Evidence Act

(1 of 1872) provides *inter alia* that if a document is alleged to be signed by any person the signature must be proved to be in his handwriting. Sections 45 and 47 of the said Act prescribed the method in which such signature can be proved. Under section 45, the opinion of the handwriting experts is relevant while under section 47 the opinion of any person acquainted with the handwriting of the person who is alleged to have signed the document is admissible. The explanation to the section explains when a person can be said to be acquainted with the handwriting of another person. Thus, there can be no doubt as to the manner in which the alleged signature of the appellant could and should have been proved; but even assuming that the signature of the appellant can be legally held to be proved on circumstantial evidence the principle which governs the appreciation of such circumstantial evidence in cases of this kind cannot be ignored. It is only if the court is satisfied that the circumstantial evidence irresistibly leads to the inference that the appellant must have signed the form that the court can legitimately reach such a conclusion. In our opinion, it is impossible to accede to Mr. Doabia's argument that the facts held proved in the High Court inevitably lead to its final conclusion that the appellant had in fact signed the form. It is clear that in reaching this conclusion the High Court did not properly appreciate the fact that there was no legal evidence on the point and that the other facts found by it cannot even reasonably support the case for respondent 1. We must accordingly reverse the finding of the High Court and hold that respondent 1 has failed to prove that the appellant had committed a corrupt practice under section 123(7)(c) of the Act.

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This finding, however, does not finally dispose of the appeal because Mr. Doabia contends that the High Court was in error in reversing the tribunal's conclusion that the nomination paper of Jai Bhagwan had been improperly rejected. Mr. Aggarwal, however, argues that it is not open to respondent 1 to challenge the correctness of the finding of the High Court on this point. In support of his objection, Mr. Aggarwal has referred us to the decision of this Court in *Vashist Narain Sharma* v. *Dev Chandra* (1). In this case, when the respondent, having failed on the finding recorded by the tribunal in his favour, attempted to argue that he could support the decision of the tribunal on other grounds which had been found against him, this Court held that he was not entitled to do so. The provision of the Code of Civil Procedure which permits the respondent to adopt such a course, it was observed, has no application to an appeal filed by special leave under Article 136. "We have no appeal before us on behalf of the respondent", observed Ghulam Hasan, J., and we are unable to allow that question to be reagitated". Mr. Doabia challenges the correctness of these observations. He relies on section 116A of the Act which empowers the High Court to exercise its jurisdiction, authority and power, and to follow the same procedure, as would apply to appeals preferred against original decrees passed by a civil court within the local limits of its civil appellate jurisdiction. There is no doubt that, in an ordinary civil appeal, the respondent would be entitled to support the decree under appeal on grounds other than those found by the trial court in his favour. Order 41, rule 22 of the Code of Civil Procedure which permits the respondent to file cross-objections recognizes the respondent's right to support the decree on any of the

(1) (1955) 1 S.C.R. 509

grounds decided against him by the court below. In the present case no appeal could have been preferred by respondent 1 because she had succeeded in obtaining the declaration that the appellant's election was void and it should, therefore, be open to her to support the final conclusion of the High Court by contending that the other finding recorded by the High Court which would go to the root of the matter is erroneous. *Prima facie* there appears to be some force in this contention; but we do not think it necessary to decide this point in the present appeal. Mr. Aggarwal's objection assumes that respondent 1 should have preferred a petition for special leave to appeal against the finding of the High Court on the issue in question; if that be so, the application made by her for leave to urge additional grounds can be converted into a petition for special leave to appeal against the said finding, and the delay made in filing the same can be condoned. As in the case of the preliminary objection raised by respondent 1 against the appellant on the ground of limitation, so in the case of the objection raised by the appellant against respondent 1 in this matter, we would proceed on the basis that we have condoned the delay made by respondent 1 in preferring her petition to this Court for leave to challenge the finding of the High Court that the nomination form of Jai Bhagawan had been properly rejected. That is why we have allowed Mr. Doabia to argue this point before us. We may add that the two points of law raised by the respective objections of both the parties may have to be considered by a larger Bench on a suitable occasion.

On the merits, Mr. Doabia's case is that the returning officer was not justified in rejecting Jai Bhagawan's nomination under section 36(2)(b) of the Act. The facts on which this contention is

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raised are no longer in dispute. Mr. Jai Bhagawan who presented his nomination paper to the returning officer on January 29, 1956, was admittedly not an elector in the constituency of Rajaund in the District of Karnal. It is alleged that he was a voter in another constituency. When his nomination paper was presented, he did not produce a copy of the electoral roll of the said constituency or of the relevant part thereof or a certified copy of the relevant entries in the said roll. nor did he produce any of these documents on the first of February which was fixed for scrutiny of the nomination papers. When the returning officer noticed that the candidate had not produced the relevant documents, he gave him, at his request, two hours' time to produce it. The candidate failed to produce the document witin the time allowed and thereupon the returning officer rejected his nominaiton paper under section 36(2)(b) of the Act. It is true that the candidate subsequently purported to produce before the officer his affidavit that his name was entered as a voter in the list of voters (No. 1,074, Constituency No. 6, Karnal Baneket No. 21, Volume 10), but the returning officer refused to consider the said affidavit because he had already rejected his nomination paper under section 36(2)(b). Thus the rejection of the nomination paper was the result of the candidate's failure to produce any of the prescribed documents before the returning officer. On these facts the question which arises for decision is whether the returning officer was justified in rejecting the nomination paper under section 36(2)(b).

Section 33 of the Act deals with the presentation of nomination papers and prescribes the requirements for valid nomination. It would be relevant to refer to subsections (4) and (5) of this

section. Sub-section (4) provides that on the presentation of the nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral roll. The proviso to this subsection requires the returning officer to permit clerical or technical errors to be corrected. Under this subsection it would have been open to Jai Bhagawan while presenting his nomination paper to produce one of the prescribed documents to show his electoral roll number on the roll of his constituency. However, his failure to do so does not entail any penalty. Subsection (5) deals with the stage of the scrutiny of the nomination papers and it provides that where a candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or the relevant part thereof or a certified copy of the relevant entry of such roll shall, unless it is filed along with the nomination paper, be produced before the returning officer at the time of the scrutiny. It is thus clear that when the stage of scrutiny is reached the returning officer has to be satisfied that the candidate is an elector of a different constituency and for that purpose the statute has provided the mode of proof. Section 36, sub-section (7) lays down that the certified copies which are required to be produced under section 33(5) shall be conclusive evidence of the fact that the person referred to in the relevant entry is an elector of that constituency. In other words, the scheme of the Act appears to be that where a candidate is an elector of a different constituency he has to prove that fact in the manner prescribed and the production of the prescribed copy has to be taken as conclusive evidence of the said fact. This requirement had not been compiled with by Jai Bhagawan and the returning

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officer thought that the said non-compliance with the provisions of section 33(5) justified him in rejecting the nomination paper under section 36(2)(b) of the Act. The question is whether this view of the returning officer is right.

Section 36 of the Act deals with the scrutiny of nominations and the object of its provisions as shown by sub-section (8) is to prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid and to affix it to the notice board of the returning officer. Sub-section (1) of section 36 provides that on the date fixed for the scrutiny of nominations each candidate and one other person duly authorized may attend at such time and place as the returning officer may appoint and the returning officer is required to give them all reasonable facilities for examining the nomination papers of all candidates which have been duly delivered. Sub-section (2) then deals with the scrutiny of the nomination papers and provides that the returning officer shall decide all objections which may be made to any nomination and may either on such objection, or on his own nomination, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the grounds mentioned in clause (a), (b) and (c) of the said sub-section. It is obvious that this enquiry must be summary and cannot be elaborate or polonged. In fact, sub-section (5) directs that the returning officer shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riots, by open violence or by causes beyond his control and the proviso to this subsection adds that in case an objection is made the candidate concerned may be allowed time

to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned. Subsection (2) (b) deals with cases where there has been a failure to comply with any of the provisions of section 33 or section 34. There is no doubt that in the present case there was failure on the part of Jai Bhagwan to comply with section 33(5) and prima facie section 36 (2) (b) seems to justify the rejection of his nomination paper on that ground. Section 33 (5) requires the candidate to supply the prescribed copy and section 36(2) (b) provides that on his failure to comply with the said requirement his nomination paper is liable to be rejected. In other words, this is a case where the statute requires the candidate to produce the prescribed evidence and provides a penalty for his failure to do so. In such a case it is difficult to appreciate the relevance or validity of the argument that the requirement of section 33 (5) is not mandatory but is directory, because the statute itself has made it clear that the failure to comply with the said requirement leads to the rejection of the nomination paper. Whenever the statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence.

It is however, urged that the statute itself makes a distinction between defects which are of a substantial character and those which are not of a substantial character. This argument is based upon the provisions of section 36(4) of the Act which provides that the returning officer shall not reject any nomination paper on the ground of any

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defect "which is not of a substantial character". The failure to produce the requisite copy, it is urged, may amount to a defect but it is not a defect of a substantial character. We are not impressed by this argument. There is no doubt that the essential object of the scrutiny of nomination papers is that the returning officer should be satisfied that the candidate who is not an elector in the constituency in question is in fact an elector of a different constituency. The satisfaction of the returning officer is thus the matter of substance in these proceedings; and if the statute provides the mode in which the returning officer has to be satisfied by the candidate it is that mode which the candidate must adopt. In the present case Jai Bhagawan failed to produce any of the copies prescribed and the returning officer was naturally not satisfied that Jai Bhagawan was an elector of a different constituency. If that in substance was the result of Jai Bhagawan's failure to produce the relevant copy the consequence prescribed by section 36(2)(b) must inevitably follow. It is only if the returning officer had been satisfied that Jai Bhagawan was an elector of a different constituency that his nomination papers could have been accepted as valid. It is well settled that the statutory requirements of election law have to be strictly observed. As observed by Mahajan, C. J., who delivered the judgment of this Court in *Jagan Nath* v. *Jaswant Singh* (1) ". . . an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power". The learned Chief Justice has also added that ". . . it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly

(1) (1954) S.C.R. 892, 895, 896

conform to the requirements of the law". In this connection we may usefully refer to another decision of this Court in *Rattan Anmol Singh* v. *Atma Ram* (1). While dealing with the question as to whether the requirements as to attestation were of a technical or of an unsubstatial character, Bose, J., observed that "when the law enjoins the observance of a particular formality, it cannot be disregarded and the substance of the thing must be there". We must, therefore, hold that the High Court was right in coming to the conclusion that the nomination paper of Jai Bhagawan had been validly rejected by the returning officer.

Mr. Doabia, however, contends that the view taken by the High Court is purely technical and does not take into account the substance of the matter. This approach, it is said, is inconsistent with the decision of this Court in *Pratap Singh* v. *Shri Krishna Gupta* (2). It is true that in this case Bose, J., has disapproved of the tendency of the courts towards technicalities and has observed that "it is the substance that counts and must take precedence over mere form". But in order to appreciate the scope and effect of these observations, it would be necessary to bear in mind the relevant facts and the nature of the point raised before the court for decision in this case. The question raised was whether the failure of the candidate to mention his occupation as required by rule 9(1)(i) rendered his nomination paper invalid and it was answered by the court in the negative. The question arose under the provisions of the C.P. and Berar Municipalities Act II of 1922. It is significant that the decision of this

(1) (1955) 1 S.C.R. 481, 488
(2) A.I.R. 1956 S.C. 140, 141

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Court rested principally on the provisions of section 23 of the said Act according to which "Anything done or any proceedings taken under this Act shall not be questioned on account of any . . . defect or irregularity in affecting the merits of the case". It was held by this Court that reading rule 9(1) (iii)(c) which directed the supervising officer to examine nomination papers, in the light of section 23, the court had to see whether the omission to set out a candidate's occupation can be said to affect the merits of the case and on that point there was no doubt that the said failure could not possibly affect the merits of the case. The High Court had, however, taken a contrary view and it was in reversing this view that Bose, J., disapproved the purely technical approach adopted by the High Court. Where, however, the statute requires specific facts to be proved in a specific way and it also provides for the consequence of non-compliance with the said requirement it would be difficult to resist the application of the penalty clause on the ground that such an application is based on a technical approach. Indeed it was precisely this approach which was adopted by this Court in the case of *Rattan Anmol Singh* v. *Atma Ram* (*supra*) (1).

Mr. Doabia has also relied upon a decision of the Andhra High Court in *Mohan Reddy* v. *Neelagiri Muralidhar Rao* (2) in support of his argument that the failure to produce the prescribed copy cannot justify the rejection of the nomination paper. In our opinion this decision does not assist Mr. Doabia's contention. In this case it was urged before the High Court that the document produced by the party was not a certified copy as required by section 33(5) of the Act. This argument was based on the assumption that the certified copy mentioned in section 33(5) of the Act must satisfy the test prescribed by section

(1) (1955) 1 S.C.R. 481, 488
(2) A.I.R. 1958 Andhra Pradesh 485

76 of the Indian Evidence Act. The High Court rejected this argument for two reasons. It held that the certified copy mentioned in section 33(5) need not necessarily satisfy the test prescribed by section 76 of the Indian Evidence Act. Alternatively it held, on a consideration of the relevant statutory provisions, that the document in question was in fact and in law a certified copy under section 76 of the Indian Evidence Act. These points do not arise for our decision in the present appeal. Mr. Doabia, however, relies on certain observations made in the judgment of the High Court and it may be conceded that the observations seem to suggest that according to the High Court the provisions of sections 33(5) and 36(7) do not preclude proof by other means of the fact that the name of the candidate is on the relevant electoral roll. These observations are clearly *obiter*. Even so we would like to add that they do not correctly represent the effect of the relevant provisions of the Act.

The result is the appeal is allowed, the order passed by the High Court is set aside and the election petition filed by respondent 1 is dismissed with costs throughout.

B.R.T.

SUPREME COURT

Before T. L. Venkatarama Aiyar, P. B. Gajendragadkar, and A.K. Sarkar, JJ.

THE COMMISSIONER OF INCOME-TAX, DELHI,—*Appellant*

versus

THE DELHI FLOUR MILLS CO. LTD., DELHI,—*Respondent*

Civil Appeal No. 211 of 1955.

1958

October 3rd

Income-tax Act (XI of 1922)—Managing Agency agreement—Construction of—Clause providing for a Commission on net profits—Net profits to be arrived at after allowing the

working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds—Excess Profits Tax—Whether deductible for determining net profits—Working expenses—Meaning of.

A managing agency agreement contained the following clause:—

> "In consideration for acting as Managing Agents the Company should pay to the firm remuneration at Rs. 750 per month or such principal sum as may from time to time be deemed reasonable by the Directors and in addition a commission equal to 10 per cent of the annual net profits. Such net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds."

The following question relating to the construction of the above clause was referred for decision by the High Court:—

> "Whether on a true construction of the Managing Agency Agreement between the assessee Company and its Managing Agents entered into in 1936, the relevant clause of which is quoted above, the Excess Profits Tax payable should be deducted from the profits of which a percentage should be paid to the Managing Agents as their commission."

The High Court answered the question in the negative, and an appeal was filed in the Supreme Court.

Held, that the agreement was essentially one to share the profits; the agreement was that part of the profits was to go to the servant and part ensure for the master's benefit. The net profits contemplated by the parties are such profits as can be divided between the master and the servant; they are such of which both the master and the servant get the enjoyment in stated proportions. In other words, they are the divisible profits of the company, divisible that is to say, between the master and the servant. In order that the divisible profits can be ascertained Excess Profits Tax has of course to be deducted. As to that there

does not seem to be any doubt, for, that part of the profits which is taken away by the State as Excess Profits Tax, is not available either to the master or the servant and cannot, therefore, be divided between them.

Held, that the expression "working expenses" is usually understood as referring to expenses debitable to the trading account as having been incurred directly in making the income shown there.

Case law reviewed.

Appeal from the Judgment and Order dated the 30th December, 1952, of the Punjab High Court in Civil Reference case No. 18 of 1952.

H/s. H. J. UMRIGAR and R. H. DHEBAR, Advocates, for the Appellant.

MR. HARDAYAL HARDY, Advocate, for the Respondents.

JUDGMENT

The following Judgment of the Court was delivered by

SARKAR. J.—By an agreement made in 1936, the assessee company appointed a firm as its managing agents. The agreement provided that the managing agents would be remunerated in the manner following:— Sarkar, J.

> "In consideration for acting as Managing Agents the Company should pay to the firm remuneration at Rs. 750 per mensem or such principal sum as may from time to time be deemed reasonable by the Directors and in addition a commission equal to 10 per cent of the annual net profits. Such net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds."

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The question is whether the commission payable to the managing agents under this agreement is to be ten per cent of the profits of the assessee without deduction of the Excess Profits tax payable by it on its profits or after deduction.

The question has arisen in the course of the assessment of excess profits tax payable by the assessee. The Excess Profits Tax Officer held that the commission has to be ascertained on the profits remaining after deduction of excess profits tax. This view was upheld by the Appellate Assistant Commissioner on an appeal being taken to him by the assessee. On a further appeal by the assessee to the Appellate Tribunal it was held that the commission has to be ascertained on the profits without any deduction of the tax. The revenue authorities then applied for and obtained an order from the Tribunal referring the following question for decision by the High Court:

> "Whether on a true construction of the Managing Agency Agreement between the assessee Company and its Managing Agents entered into in 1936, the relevant clause of which is quoted above, the Excess Profits Tax payable should be deducted from the profits of the Company for the purpose of arriving at the annual net profits of which a percentage should be paid to the Managing Agents as their commission."

The High Court answered the question in the negative. The present appeal is by the revenue authorities against the judgment of the High Court.

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The question is a short one. It is one of construction of the managing agency agreement. Of course, whatever is payable under this agreement to the managing agents as their remuneration is a proper expense of the business of the assessee and has to be deducted in ascertaining its profits and it is upon such profits that excess profits tax has to be assessed. There is no dispute about this. The dispute has arisen because the remuneration of the managing agents is—we leave out now the minimum and fixed remuneration of Rs. 750 per month as to which no question arises and with which we are therefore not concerned—itself to be calculated on the profits. The dispute is whether the proper construction of the agreement is that the profits, a percentage of which is to be paid to the managing agents as their remuneration, are the profits before deduction of excess profits tax or after.

What then is the true construction? The agreement is that "the net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation but without setting aside anything to reserves or special funds." We can leave out the things expressly made not deductible for as to these no question arises, the question being whether something more, namely, excess profits tax, can be deducted. Working expenses, interest on loans and due depreciation have however been expressly made deductible in ascertaining the net profits. If these are all the deductions that can be made, excess profits tax cannot be deducted for it does not come under any one of them. But it seems to us that the agreement was not intended to lay down all the deductions that can be made. It is not in dispute that expenses like overhead expenses, litigation expenses and similar other expenses properly incurred for carrying on the business can be deducted in

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arriving at the net profits. These would not be included within "working expenses" for that expression is usually understood as referring to expenses debitable to the trading account as having been incurred directly in making the income shown there. If this were not the sense in which the expression "working expenses" was used and it was meant to cover all revenue expenses incurred, then there would have been no need to mention interest on loans and depreciation, separately for these latter would have been included as revenue expenses in the expression "working expenses". We are, therefore, inclined to think that there are other items besides those expressly mentioned, which have to be deducted before the net profits can be arrived at.

What then are these other items? That will depend on what the parties must be taken to have had in mind when they used the words "net profits". The intention of the parties as to what they meant by these words can be best gathered by trying to find out what they were about in making the agreement. The parties were a master and a servant and they were fixing the remuneration of the servant. They decided that profits or no profits, the servant would have a certain fixed sum per month. They also agreed that the servant would, besides the fixed sum, have a certain portion of the net profits. The net profits, whatever they were, would of course, be a variable figure; in some years they would be more or less than in other years. The parties, therefore, agreed that the remuneration of the servant would increase or decrease as the net profits were larger or smaller. But why did they do so? Obviously because they thought that it was fair that the servant's remuneration should be commensurate with the benefit that his work produced for the master; the larger such benefit was, the larger the servant's remuneration

and *vice versa*. It is difficult to imagine that the parties agreed that remuneration would be paid for profits earned by the servant's efforts of which the master did not get the benefit. This view of the matter becomes clearer when one remembers that besides the variable remuneration dependent on the profits, the servant had a fixed minimum remuneration. The agreement, therefore, was essentially one to share the profits; the agreement was that part of the profits was to go to the servant and part enure for the master's benefit. If this is the true construction of the agreement, as we think it is, then it follows that the net profits contemplated by the parties are such profits as can be divided between the master and the servant; they are such of which both the master and the servant get the enjoyment in stated proportions. In other words, they are the divisible profits of the company, divisible, that is to say, between the master and the servant. In order that the divisible profits can be ascertained, excess profits tax has, of course, to be deducted. As to that there does not seem to be any doubt, for that part of the profits which is taken away by the State as excess profits tax, is not available either to the master or the servant and cannot, therefore, be divided between them.

It is said that the agreement cannot be construed in this way because that would be adding a word to it; the word 'divisible' not being there, is introduced into the agreement to support this construction. This, however, is not so. No word is being introduced but the words used are only being explained. It is only stating that the parties meant by "net profits", the divisible profits. It is really stating the same thing in different words.

It is also no objection to the view that we take, that excess profits tax is a part of the profits itself.

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It perhaps is so but it is no part of the "net profits" contemplated by the parties. It is a part which has to be deducted in arriving at the net profits, that is to say, the divisible profits which alone the parties had in mind.

As a matter of construction of the agreement before us,—and we do not think that the question involved in this case can be decided in any other way—therefore, we come to the conclusion that the "net profits" mean the divisible profits and are to be ascertained after deduction of excess profits tax which is payable by the assessee.

That is how the matter strikes us apart from any authority. We now turn to some of the authorities which were cited at the bar. They are *In re Condran, Condran* v. *Stark* (1), *Patent Castings Syndicate, Ltd.* v. *Etherington* (2), *Vulcan Motor and Engineering, Co.* v. *Hampson* (3), *Re G. B. Ollivant and Co. Ltd.'s Agreement* (4), *James Finlay and Co., Ltd.* v. *Finlay Mills Ltd.* (5), and *Walchand and Co., Ltd.* v. *Hindusthan Construction Co., Ltd.* (6). These cases, however, all turn on the construction of the agreements involved in them. They are, therefore, not of much assistance in construing the agreement that we have before us, for, each agreement has to be construed according to the words contained in it and the circumstances in which it was made. The judgment in *Re G. B. Ollivant and Co. Ltd.'s Agreement* (supra) referred to earlier is that of the House of Lords. In the judgment delivered in this case by the Court of Appeal reported in (1942) 2. All. E.R. 528 which was affirmed by the majority

(1) (1917) 1 Ch. 639
(2) (1919) 2 Ch. 254
(3) (1921) 3 K.B. 597
(4) (1942) 2 All. E.R. 528
(5) (1945) 47 Bom. L.R. 774
(6) (1943) 45 Bom. L.R. 951

of the House of Lords, Lord Greene M. R. warned that in questions of this kind authorities were of no assistance. Referring to the earlier English cases mentioned above, he said (p. 532):—

> "They decide that on the true construction of the agreements there in controversy, the phrase "net profits" in *Etherington's case,* the pharse "profits earned by the company" in *Vulcan's case* and the phrase "net profits" in *Condran's case,* all meant the divisible profits of the company in the first two cases and of the partnership in the third. They went on to decide a matter which I should have thought was not open to question, namely, that in ascertaining divisible profits excess profits duty fell to be deducted----------But beyond that, those authorities do not appear to me to afford any assistance. The first part of the decisions, as to the meaning of "profits" or net profits in those particular agreements, does not help, because the language is entirely different from that used in the present case; and the second part of the decision, namely, that in ascertaining divisible profits excess profits duty is to be deducted is, as I say, a matter for which I should have thought authority was not required----------."

Like the earlier cases, *Re G. B. Ollivant and Co. Ltd.'s Agreement*(1) also turned on the language of the agreement involved in it and is not, therefore, of any great assistance.

The Indian cases mentioned earlier were also decided on the agreements with which they were concerned. In the *James Finlay and Co. Ltd., case* (2), the agreement provides that the "net

(1) (1942) 2 All. E.R. 529
(2) (1945) 47 Bom. L.R. 774

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profits" were to be ascertained before setting aside any sum "for payment of income-tax, super-tax or any other tax on income". It was held that "any other tax on income" included excess profits tax which could not, therefore, be deducted. Beaumont, C. J., observed in this case that it having been held that income-tax being something which is payable out of the profits and not a liability to be deducted in ascertaining the profits, it was difficult to explain why the same principle should not apply to excess profits duty. He also said that a distinction had been made between the two taxes in the English cases, to some of which we have earlier referred, but he did not think it necessary to consider whether all the grounds of distinction were sound, because in the case before him he thought that excess profits tax had been expressly dealt with. In the *Walchand and Co. Ltd.*, case (1) the agreement was very much like the agreement that we have before us. It provides that the managing agents would be paid ten per cent of the annual net profits earned by the company and also stated that in arriving at the net profits certain deductions would be made which included the working expenses and that certain other deductions would not be made, but no mention was made of excess profits tax as being deductible or otherwise. Beaumont, C. J., who was a member also of the bench which decided this case held that the agreement was a profit sharing agreement and the net profits had to be ascertained after deducting working expenses and that certain other deductions would not be made, but no mention was made of excess profits tax. Now, we do not refer to these judgments as supporting anything that we say but because the High Court unwittingly fell into the error of thinking that the *Walchand and Co. Ltd., case* (1) came before the *James Finlay and Co.*

(1) (1943) 45 Bom. L.R. 951

case (1) and that in the latter case Beaumont, C.J., had doubted the correctness of what he had said in the former. These observations are wholly wrong because, the *James Finlay and Co. Ltd.*, case (1), was decided long before the *Walchand and Co. Ltd.*, case (2), had been decided. Neither do we find that there is any conflict between the two cases. In the *Walchand and Co. Ltd.*, case (2), Beaumont, C.J., gave reasons for making a distinction between income-tax and excess profits tax and thought that the distinction between them made in the English cases to which we have refrred, was not of substance. We do not think it necessary to say anything as to whether Beaumont, C. J., was right in this view.

On behalf of the assessee we were pressed with the same contention that as it has long been held that income-tax could not be deducted in ascertaining the net profits of a company, excess profits tax could not also be deducted for, they were substantially of the same nature each being a tax on the profits. Indeed in *Ashton Gas Company* v. *Attorney-General* (3), where the House of Lords had to construe the provision in the incorporating statute of the Gas Company which provided that the prfits to be distributed among the share-holders in any year should not exceed a given rate, the following observation occurs in the opinion delivered by Lord Halsbury, L. C., at page 12:—

> "Income-tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—You have no right to deduct the income-tax before you ascertain what the profit is, I cannot

(1) (1945) 47 Bom. L.R. 774
(2) (1943) 45 Bom. L.R. 951
(3) (1906) A.C. 10, 12

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understand how you can make the incom-tax part of the expenditure."

Now, it seems to us that there is nothing in the *Ashton Gas Co.*, case (1), which prevents us from holding that in ascertaining the net profits for the purpose of the agreement that is before us, excess profits tax has to be excluded. That was not a case of profit sharing. It was not concerned with deciding what sums are deductible in arriving at the divisible profits in a profit sharing agreement. That is what we have to decide. Therefore, we think that the *Ashton Gas Co.*, case (1), does not assist in answering the question that has arisen in this case.

Nor do we think it necessary in the present case, as we have said earlier, to decide whether there are distinctions between income-tax and excess profits tax. We are not concerned with the question whether income-tax should be deducted before the net profits under the agreement can be ascertained. We will assume that it cannot be. It is comon sense and also firmly established on the authorities to which reference has already been made, that in ascertaining the divisible profits excess profits tax has to be deducted. As we have construed the agreement in this case, net profits mean the divisible profits and, therefore, they can be arrived at only after deduction of excess profits tax.

We wish now to refer to the minority opinions in the House of Lords in *Re G. B. Ollivant and Co. Ltd.'s Agreement* (2) on which the High Court seems largely to have based its decision. The dissenting opinion of Viscount Simon, L. C., arose from the fact that he did not think that the word profits in the agreement then before the House meant the divisible profits. With the reasons for

(1) (1906) A.C. 10
(2) (1942) 2 All E.R. 528

this view we are not concerned for these turned on the wording of that agreement. Having held that the word profits did not mean the divisible profits, he proceeded to consider whether excess profits tax could be deducted in ascertaining the net profits and in doing so said that as income-tax could not be deducted as held in the *Ashton Gas Co., case* (1), neithed could excess profits tax, for, both were parts of the profits. He also said that the Court of Appeal was wrong in thinking that excess profits tax could be debited to the profit and loss account and, therefore, held that the net profit which is usually shown in that account has to be ascertained without deducting excess profits tax. We are not concerned with this part of the opinion of the Lord Chancellor either. It was given on the basis that the profits were not the divisible profits and we are concerned only with divisible profits. The other dissentient speech was by Lord Macmillan. He said substantially what Viscount Simon had said and, therefore, it is unnecesssary to deal with his view separately. It does not, however, appear to us that the dissentient Judges in the House of Lords held that if the profits were the divisible profits, excess profits tax could not be deducted before these could be ascertained. In the view that we have taken of the agreement before us, we cannot, therefore, derive any assistance from the dissentient opinions.

One other case, namely. *N. M. Rayaloo Iyer and Sons* v. *The Commissioner of Income-tax, Madras* (2), was brought to our attention. This case also purports to follow the reasoning adopted in the minority judgments in *Re G. B. Ollivant and Co., Ltd.'s, Agreement* (3) and actually relied

(1) (1906) A.C. 10
(2) (1954) 26 I.T.R. 265
(3) (1942) 2 All. E.R. 528

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on the authority of the judgment under appeal. It is, therefore, unnecessary to refer to it further.

It had been contended by the learned advocate for the appellant that even if the net profits mentioned in the agreement were not the divisible profits and even if income-tax could not be deducted to ascertain these profits, excess profits tax was a proper deduction to be made. It was said that excess profits tax was for this purpose different in nature from income-tax, for, (a) under section 12 of the Excess Profits Tax Act, 1940, excess profits tax was deductible as an expense for the purpose of income-tax assessment; (b) that where the employer is a company, as in the present case, the income-tax paid is refundable to the share-holders which excess profits tax is not; (c) that excess profits tax is a "debt" of the business and, therefore, an outgoing, and (d) that it was in the nature of a license fee upon the payment of which alone the business could be carried on. It is unnecessary to consider these points as in our view the net profits in this case were the divisible profits and whether excess profits tax is distinguishable from income-tax for any of these reasons or not, it is properly deductible.

We should also refer to an argument advanced by the assessee which was founded on section 87-C of the Indian Companies Act, 1913, introduced by an amendment made in 1936, which provides that the remuneration of the managing agents of a company shall be a fixed percentage of its net annual profits, and that in calculating the net profits no deduction in respect of any tax or duty on income is to be made. It is said that the statute incorporates the universal commercial practice and, therefore, in construing the present agreement excess profits tax cannot be deducted.

We are not aware whether the section incorporates any practice but we think that this contention is entirely unfounded for the section was applied only to a managing agency agreement made after the amending Act came into force, while the agreement in the present case was made before that date.

Lastly, we have to point out that nothing turns on the fact that at the date the agreement under consideration was made, Excess Profits Tax Act, had not come on the statute book nor perhaps been thought of, and, therefore, could not have been in the contemplation of the parties. If the net profits are the divisible profits, everything necessary to be excluded to arrive at the divisible profits has to be deducted whether it was in the contemplation of the parties or not. It is easy to imagine instances. Suppose after the agreement the Government imposed a licence fee on the payment of which alone the business could have been carried on and that licence fee was not in the contemplation of the parties when the agreement had been made. None-the-less it has clearly to be deducted in finding out the divisible profits. In the result we would answer the question framed in the affirmative.

The appeal is, therefore, allowed with costs in this Court and in the High Court.

B.R.T.

REVISIONAL CIVIL

Before Falshaw and Dua, JJ.

MANGAL SAIN,—*Appellant*

versus

SHRIMATI SHANNO DEVI,—*Respondent*

First Appeal from Order No. 131 of 1958.

1958

October 3rd

Representation of the People Act (XLIII of 1951)—Section 36—Order of Returning Officer accepting nomination papers—Whether final—Constitution of India (1950)—