

(1974) 12 AHC CK 0010

In the Allahabad High Court

Case No : Income-tax Reference No. 360 of 1971

Deep Chandra and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 02-12-1974

Acts Referred:

Income Tax Act, 1922 — Section 2(4)

Citation : (1977) 107 ITR 716

Hon'ble Judges : M.N. Shukla, J;K.C. Agrawal, J

Bench : Division Bench

Advocate : Shanti Bhushan and R.K. Gulati, for the Appellant; R.R. Misra, for the Respondent

Final Decision : Disposed Of

Judgement

K.C. Agrawal, J.—The assessee, Deep Chandra & Co., is a registered partnership firm consisting of five partners, viz., Deep Chandra, Amba Prasad, Parmeshwari Dass, Hardwari Lal and Shambhu Dayal. The partnership agreement was entered into on the 8th April, 1944. The relevant facts are as follows :

Deep Chandra was a big zamindar, who owned considerable agricultural lands in Muzaffarnagar. One Sajjad Ali Khan, who was another big zamindar of Muzaffarnagar, entered into an agreement to sell his zamindari property comprised in Khewat 4/1 of Mohd. Rustam Ali Khan, village Yusufpur, Pargana and Tahsil Muzaffarnagar with Deep Chandra. Sajjad Ali Khan subsequently refused to execute a sale deed in pursuance of the said agreement. Consequently, Deep Chandra filed a suit for specific performance of the agreement to enforce the same. The suit was, however, dismissed by the civil judge in April, 1943. Deep Chandra preferred an appeal against this decree of the civil judge in this court.

2. During the pendency of this appeal Deep Chandra thought that he was involving himself in a big litigation, the prosecution of which required huge

expenditure and possible loss; he accordingly, in order to lessen his burden, entered into a partnership agreement with the persons named above on April 8, 1944. The partnership deed provided that the same was entered into "to share profits and losses arising out of the said land in litigation", It further defined respective shares and interests "in the fortunes of litigations and the profits and losses arising therefrom" of the various partners in the said partnership.

3. The appeal filed in this court against the decree of the civil judge dismissing the suit for specific performance of Deep Chandra was ultimately allowed in 1949 in his favour. As the tenants were in possession he succeeded only in obtaining constructive possession of the land in 1950. Actual possession could, however, be had only in 1956. There is some dispute between the parties about the actual user of the land, possession of which was obtained by Deep Chandra between the years 1950 and 1956-But it is beyond controversy that in 1956 the assessee obtained permission from the Town Planner, U.P., Lucknow, and parcelled out the lands and sold several plots year after year. The assessee-firm realised the following amounts during the period 1956 to March 31, 1960 :

Rs.

1.

Sale proceeds of the year ending 31-3-57

31,085

2.

Sale proceeds of the year ending on 31-3-58

27,685

3.

Sale proceeds of the year ending on 31-3-59

30,714

4.

Sale proceeds of the year ending on 31-3-60

65,035

4. The assessee firm reimbursed its total litigation expenses, cost of the land, cost of acquisition of tenancy rights from the realisation made in the first four assessment years ending on March 31, 1960, and showed a surplus of Rs. 23,553 in the assessment year 1960-61. In subsequent years as well more plots were sold and the total surplus shown in them were as follows:

Rs.

Surplus realisation shown in the year ending 31-3-61

19,896

Surplus realisation shown in the year ending 31-3-62

28,692

Surplus realisation shown in the year ending 31-3-63

64,184

5. Surplus income thus shown was in four assessment years, that is, 1960-61, 1961-62, 1962-63 and 1963-64. The Income Tax Officer held that the activity of sale of land transacted by the assessee being an adventure in the nature of trade was "business" within the meaning of that term as defined in Section 2(4) of the Indian Income Tax Act, 1922. On this view he treated the surplus realisations made by the assessee-firm as profit for the purpose of taxation under the head "business".

6. Feeling aggrieved by the order passed by the Income Tax Officer, the assessee went in appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner concurred with the findings given by the Income Tax Officer and dismissed the appeals. The assessee then preferred four appeals before the Income Tax Tribunal challenging the assessment orders given against it with respect to the four assessment years. Before the Tribunal the assessee contended, as before the Income Tax Officer and Appellate Assistant Commissioner, that the transactions of sale and purchase of lands were not adventure in the nature of trade but investments made for capital gains. The Income Tax Tribunal did not accept the contention of the assessee and, holding in conformity with the subordinate authorities, dismissed all the four appeals by means of a consolidated order. At the instance of the assessee the Tribunal thereafter referred the following question for answer by the High Court:

"Whether, on the facts and in the circumstances of the case, surpluses realised by the assessee on the sale of the land were income, profits or gains from an adventure in the nature of trade within the meaning of Section 2(4) of the Act of 1922 chargeable to tax under the head "business" in the assessment years 1960-61, 1961-62, 1962-63 and 1963-64?"

7. The assessments in the instant case with respect to some assessment years have been made under the provisions of the Indian Income Tax Act, 1922, while assessments of some other years have been made under the Income Tax Act, 1961. But, as there is no difference between these two Acts so far as the controversy in question is concerned, we, therefore, propose to refer to the provisions of the Indian Income Tax Act, 1922, alone for the purpose of finding out a solution to the problem. Section 10 of the said Act makes profits and gains of business, profession or vocation liable to taxation under the head "business". The word "business" has been defined in this Act in Section 2(4) as :

""business" includes any trade, commerce or manufacture or any adventure or

concern in the nature of trade, commerce or manufacture."

8. The object and purpose of including an "adventure" in the definition of trade is to rope in receipts from adventure to tax as receipts from trade proper. This expression "adventure" has not been defined in the Act. To make an attempt to give an exact and precise meaning, or to find set form of words in which it can be prescribed or statement of ingredients be detailed is a difficult or rather impossible task. It is this difficulty which led the Supreme Court to observe in several cases which came up for decision before it that there was no general principle which could be laid down in this respect. The first decision of the Supreme Court which may be noticed in this connection is Commissioner of Excess Profit Tax, Bombay City Vs. Sri Lakshmi Silk Mills Ltd., . In this case the Supreme Court clearly indicated that no general principle could be laid down which could be applicable to all cases and that each case would have to be decided with reference to the facts arising in that case. The next important case is G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, . Expressing an opinion to the same effect the Supreme Court observed (pages 609, 610):

"As we have already observed it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the borderline that cause difficulty...it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any one of them may help the court to draw a similar inference ; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction.....".

9. These observations of the Supreme Court require a court to decide the question of a transaction being an adventure in the nature of trade on the basis of the total impression formed. It is not open to consider one or other circumstances alone and treat the same as decisive or conclusive. No general or absolute test can be applied to each and every case to determine the character of the transaction. In P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala, the Supreme Court was again required to decide the same controversy, and while enunciating the law, it observed :

"The question whether a transaction is an adventure in the nature of trade must be decided on a consideration of all the relevant facts and circumstances which are proved in the particular case. The answer to the question does not depend upon the application of any abstract rule or principle or formula but must depend upon the total impression and effect of all the relevant facts and circumstances

established in the particular case."

10. Although it is correct that it is not possible to formulate a single criterion, yet there are, however, certain tests which can be culled out from the various decisions and may prove helpful in determining the nature of a transaction. In P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala, the Supreme Court has mentioned those factors at page 739 of the said report in the following words:

"For instance, if a transaction is related to the business which is normally carried on by the assessee, though not directly a part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and is subdivided, altered, treated or repaired and sold or is converted into a different commodity and then sold. The magnitude of the transaction of purchase, the nature of the commodity, the subsequent dealings of the assessee, the nature of the organisation employed by the assessee and the manner of disposal may be such that the transaction may be stamped with the character of a trading nature.""

11. In G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, as well, the Supreme Court had enumerated various tests which may be taken into consideration in determining the character of the transaction. These factors are also more or less the same as subsequently reiterated in P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala, .

12. Before we discuss the relevant facts and circumstances of the instant case for finding the true character of the transactions involved, it is necessary to refer to the controversy raised at the Bar in respect of the scope and power of the High Court u/s 66(1) of the Income Tax Act, 1922. The contention of the learned counsel for the assessee in this regard is that a question about the nature of a transaction is a mixed question of law and fact and, therefore, the High Court can examine the findings given by the Tribunal for the purpose of ascertaining whether the assessee had embarked upon a business or had simply made investments for capital gains. The counsel appearing for the revenue, however, urged that the finding that a particular transaction is an adventure in the nature of trade postulates the existence of a certain state of facts and, therefore, a finding given on this controversy is a question of fact and thus beyond the power of scrutiny given to the High Court u/s 66(1) of the Income Tax Act.

13. We have considered the respective contentions of the counsel appearing for either parties and are inclined to hold that it is now settled that the question whether profit earned in a transaction has arisen out of adventure in the nature of trade is a mixed question of law and fact. An examination of the question whether a transaction is an adventure in the nature of trade involves, as it does, the application of the relevant provisions of law and an interpretation of the statutory enactment relating to the same. In every case the question which may arise is, whether an authority is justified in treating the profit in question as

assessable to Income Tax, such a question is not one which can fall within the realm of facts exclusively. It is, therefore, not possible to accept the contention of the counsel for the revenue in this respect. The Supreme Court has exhaustively dealt with the aforesaid controversy in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, . The ultimate decision on the said point is to be found at page 607, where the relevant observations made are in the following words:

"As we have already indicated, to avoid confusion or unnecessary complications, it would be safer and more convenient to describe the question about the character of the transaction in the context as a question of mixed law and fact."

14. In determining the character of a transaction generally either the question of the application of legal principles is involved or the examination of drawing of inferences from proved facts has to be looked into. In either case it will be a question which would attract the provisions of Section 66(1) of the Income Tax Act. The view taken by the Supreme Court in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, has been reiterated in *Saroj Kumar Mazumdar Vs. The Commissioner of Income Tax, West Bengal, Calcutta*, and *Janki Ram Bahadur Ram Vs. Commissioner of Income Tax, Calcutta*, . The submission of counsel for the revenue, therefore, is not correct that the determination of the question relating to the character of the transaction is a question of fact and is beyond the power of investigation given to the High Court u/s 66(1) of the Income Tax Act. He had also cited some authorities on the said controversy. We do not think it necessary to discuss those cases in any detail for we find that most of them are clearly distinguishable in material respects having been decided on their special facts. In a recent decision in *D.S. Virani v. Commissioner of Income Tax* [1973] 90 ITR 255 all the relevant case law on the above controversy has been considered by a Division Bench of the Gujarat High Court and it has been found that the question relating to the determination of the character of a transaction as being an adventure in the nature of trade is a mixed question of law and fact. We, respectfully, agree with this view of the Gujarat High Court.

15. Counsel for the revenue, however, pointed out that the form in which the question has been referred to the High Court assumes that the finding relating to the transaction being an adventure in the nature of trade is a finding of fact and, therefore, the High Court cannot go behind the question for the purpose of giving redress to the assessee. He relied upon an authority in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, in support of his contention. He submitted that when the question referred to the High Court speaks of "on the facts and in the circumstances of the case", it requires the High Court to decide the question referred to it on the assumption that the finding given by the Tribunal is a finding on which the High Court has to proceed and it cannot reappraise the evidence itself for coming to a different finding. In the case cited by the counsel for the respondent the point involved was whether the receipt

held by the Income Tax Officer as income from other sources should have been held to be income from business. Dealing with this controversy the Supreme Court held that the question on that controversy was related to the facts and that the High Court had to accept them as found by the Tribunal and also it should have answered the question referred to it on the basis of those facts. In the present case the question involved is altogether different. The High Court is required to find whether the Tribunal was justified in drawing legal inferences and applying legal principles to the question related to the determination of the character of the transaction. As observed earlier, such a question is necessarily a mixed question of law and fact and, therefore, there is no occasion to apply the law laid down by the Supreme Court in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, .

16. Counsel for the revenue is, however, also not right in suggesting that the form in which the question was referred to the High Court assumes that the impugned finding is a finding of fact. The question referred really requires a decision whether on the facts and in the circumstances proved in this case the inference that the transaction is an adventure in the nature of trade is in law justified. Reference to the relevant provisions made in the question also lends support to this conclusion. As a matter of fact, it is only with reference to certain facts that a question can be properly framed. None the less, the High Court can still go and examine whether there was some material to support the finding given by the Tribunal. It is undesirable that such an investigation raises a question of law falling within the scope of Section 66(1) of the Income Tax Act. In substance and in effect, the High Court has been required by the question referred to answer whether the Tribunal had applied the relevant legal principles correctly or not. We, therefore, do not find any merit in this submission of the counsel for the revenue.

17. The next preliminary point which deserves to be examined at this place is related to the burden of proof which lies on a party in a controversy like the present. There are numerous cases where these questions have been considered by various courts. In *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, as well as in *Saroj Kumar Mazumdar Vs. The Commissioner of Income Tax, West Bengal, Calcutta*, the Supreme Court had examined this question and found that the burden lay on the revenue to establish that the profit earned in a transaction was revenue realisation and not capital gain.

18. We have already observed in the beginning that according to the settled view no individual or single fact has a decisive role in finding the correct nature of a transaction entered into and it is the cumulative outcome of all the facts and circumstances which has to be taken into account for the said purpose but the Supreme Court did point out some of the common factors which are relevant in this regard. Applying the aforesaid guides or factors, counsel for the assessee urged that the nature of the transaction is a very important factor for the purpose of finding out the character of the transaction. He submitted that in the

present case the transactions were in regard to sale of land by the assessee. The land, according to his contention, is an item which, for several centuries, has been considered as an item of investment and is not like a commercial commodity which is purchased with a view to reselling it to gain profits. He submitted that there is a strong presumption with regard to the purchases of land, that the same is made for the purpose of investing money and the mere fact that a person or investor has a design to resell at a profit in future if occasion arises, does not destroy the character of the transaction being investment to trade or business.

19. It cannot be denied that the land is not a commercial commodity. Land only is also not a trade in itself. Keeping these considerations in account the Supreme Court observed in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, :

"Normally the purchase of land represents investment of money in land." The same view was reiterated by it in *Janki Ram Bahadur Ram Vs. Commissioner of Income Tax, Calcutta*, in the following words :

"These are cases of commercial commodities. But a transaction of purchase of land cannot be assumed without more to be a venture in the nature of trade.""

20. Counsel for the assessee is, therefore, right that from the nature of the property involved in this case it has to be accepted normally that the purchases made by the assessee represented an investment of money in land. Counsel for the revenue, however, stressed that it is not every purchase of land which has to be considered as a case of investment. The purchase of land made for the purposes of reselling and earning profit according to him is not one where the money was spent by the purchaser for the purpose of acquiring capital gains but for the purpose of engaging in the business of sale and purchase of land ; therefore, in such a case he submitted that the court should find that the transaction is an adventure in the nature of trade. The submission of the counsel for the revenue, however, does not appear to be correct. An investment in purchasing a property is also made with a view to earning return on the sum invested. Therefore, the mere fact that a person invested money for the purpose of reselling whenever a suitable opportunity arises, does not give a sufficient ground to hold that the transaction is in the nature of trade.

21. Lord Buckmaster dealing with the above controversy in *Leeming v. Jones* [1930] 15 TC 333 observed as follows :

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

22. Dealing with the same question Lord Dunedin observed as under (page 360) :

"The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the

nature of trade in respect of his investments, but per se it leads to no conclusion whatever."

23. These two observations were subsequently referred to and relied upon in the decision of the House of Lords in *Commissioners of Inland Revenue v. Reinhold* [1953] 34 TC 389 .

24. The Supreme Court has also taken the same view in *Saroj Kumar Mazumdar Vs. The Commissioner of Income Tax, West Bengal, Calcutta*, and in *Janki Ram Bahadur Ram v. Commissioner of Income Tax* [1965] 57 ITR121 . In the latter case Shah J. observed as follows (page 26):

"It may be emphasised from an analysis of these cases that a profit motive in entering into a transaction is not decisive, for, an accretion to capital does not become taxable income, merely because an asset was acquired in the expectation that it may be sold at profit."

25. The Supreme Court reiterated the same view in *Raja Bahdur Kamakhya Narain Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*, when it said :

"The fact that the original purchase was made with the intention to resell if an enhanced price would be obtained is by itself not enough.,...."

26. We, therefore, do not find any substance in the submission of the counsel for the revenue that simply because a purchase is made with an intention to resell in future in case its price rises, that is a ground for holding that the money spent was not by way of investment but was a trading venture. A case of commercial commodity certainly stands on a footing different from that of land. In such commercial commodity it is easier to find the purpose, as such commercial commodities are generally purchased with a view to reselling for the purpose of earning profits.

27. A case, where the initial intention solely and exclusively from the stage of purchase is to buy the property and to resell it, stands on a different footing. In such a case the purchaser is not interested in investing his surplus money but in selling it at a profit whenever an occasion for the same arises. The dominant intention is to earn and make income by trading in the sale of landed property unlike the transactions of investment where a person can hold and enjoy the property as well if a really high price is not offered. But in "business" the intention predominantly is to dispose of the land without the least desire to keep and enjoy the same in possession. Counsel for the revenue strenuously urged that in the instant case as well, the partnership was constituted only with a view to acquiring the land and to selling the same, therefore, the assessee should be held to have purchased the property with the intention of resale and this activity of the assessee amounted to a venture in trade. Be that as it may, when we come to discuss the case on merits we will examine this aspect of the case with reference to the facts on the record of this case. Suffice it to say at this place, as

observed by the Supreme Court in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , in such an eventuality this factor will raise a strong presumption of the transaction being adventure in the nature of trade. But the mere fact that the land is purchased with a view to reselling if a favourable condition exists does not by itself give rise to a circumstance, which may establish in law that the act of purchase of the land was adventure within the meaning of Section 2(4) of the Income Tax Act. Rather such a course of conduct of a purchaser is in consonance with a case of investment and money earned on resale would not be liable to taxation as revenue receipts but can be treated only as capital gains. We, therefore, conclude that in the absence of any other circumstance which may lead us to hold that the transaction was a venture, counsel for the assessee is right in his submission that the surplus money received is capital gains.

28. The second factor relied upon by the assessee's counsel was that the purchase of land in the instant case was an isolated act not in line of the business of the assessee, hence the singleness of the transaction was wholly insufficient to hold that the assessee traded in sale and purchase of lands within the meaning of Section 2(4) of the Income Tax Act. In a case of single or isolated transaction the profit was in the nature of a capital profit on investment and should not be held liable to payment of tax on income earned from "business".

29. Dr. R.R. Misra, appearing on behalf of the revenue, however, contended that a case of isolated or single transaction of sale and purchase can also be one which may be considered as adventure in the nature of trade. He referred to and relied upon a number of authorities in support of his contention. These authorities include *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , *Leeming v. Jones* [1930] 15 TC 333 , *Inland Revenue Commissioners v. Fraser* [1942] 24 TC 498 , *Rellim Ltd. v. Vise* [1952] 22 ITR (Supp) 51 and the cases of *Janki Ram Bahadur Ram Vs. Commissioner of Income Tax, Calcutta*, and *Raja J. Rameshwar Rao Vs. Commissioner of Income Tax, Hyderabad*, , whereas Sri Shanti Bhushan, counsel for the assessee, strongly relied on the decisions in *Saroj Kumar Mazumdar Vs. The Commissioner of Income Tax, West Bengal, Calcutta*, , *Leeming v. Jones* [1930] 15 TC 333 and *Californian Copper Syndicate v. Harris* [1904] 5 TC 159 .

30. A close reading of these reported decisions cited by the counsel for the parties, however, indicates that it is not possible to evolve a single or universal formula with regard to an isolated transaction of purchase and sale which may be applicable to all the cases similar to the one now before us. The Supreme Court also found that the line of demarcation that could distinguish one class of cases from the other was very thin. It is thus not possible to accept either of the two extreme propositions of law advanced on behalf of these parties. The ultimate decision will have to rest on the total impression which may be formed from the facts and circumstances of the case. When we come to consider the facts of the present case we will deal with the effect of the isolated transaction with reference

to the circumstances of this case.

31. Adverting to the facts it may be recalled that initially Deep Chandra entered into the agreement to purchase the Khewat 4/1 Rustam Ali Khan. Under this agreement Deep Chandra would have been entitled to get proprietary or zamindari rights alone. The entire land comprised in this Khewat was occupied by sitting tenants. Since Sajjad Ali Khan, the vendor, refused to honour the agreement. Deep Chandra had to file the suit for specific performance. In the meantime, Sajjad Ali Khan sold this property to M/s. Durga Prasad Miri Mal of Muzaffarnagar. Deep Chandra filed the appeal in the High Court. He could, however, visualise a long drawn litigation involving huge expenditure with no certainty of success. He was not prepared to bear the entire risk himself. So, in order to share the fortunes of litigation, he entered into the partnership agreement. This partnership deed is unusual in many respects. The main and predominant object of this deed was to provide finances for the litigation. No one at that time had any idea of the property which could ultimately come in the partnership. It is more so as the fight then was for the proprietary rights. The opening part of para. 2 suggests that the partners could even hold and retain the property for the benefit of the partnership. It is true that the disposal of the property is also mentioned as one of the ways to distribute the property amongst the partners. But that was only one of the many ways of dealing with it, in case the litigation was finally decided in favour of Deep Chandra. Emphasis of the counsel for the revenue that since the duration of the partnership was to last till the disposal of the land, the sole and exclusive intention to acquire or purchase the property was to enter into the trading, venture, appears to be unjustified. Paragraph 3 of the agreement dealing with duration has to be read along with paragraph 2 of the said agreement. If read together, it only means that when the property was received and ultimately disposed of in one of the manners provided therein the partnership would automatically come to an end.

32. It is to be remembered that the partnership was entered into at a time when India was still under the British rule. The question of abolition of intermediaries was not within anticipation. As a matter of fact, purchasing of zamindari property was a recognised form of investment, where zamindars of the properties purchased could realise rents from the tenants occupying land. Realisation of rent used to be a regular source of income. The fact that these properties were inheritable is another feature indicating that the intention was to make investment. In these circumstances, the purchase of land was not made with an eye on the realisation of profits from the sale of property and was, therefore, not a venture.

33. Counsel for the revenue thereafter referred to paragraph 5 of the agreement and submitted that the manner of accounting contemplated by this clause is also indicative of the motive of the partners, which according to him, was embarking upon the trading venture. He urged that the question of accounting could not arise in case the parties simply desired to make investments of their funds in

purchasing the property. We do not find any substance in this submission. There is nothing in this paragraph which may be inconsistent with the case of investment. Such an agreement to supply funds to carry on a litigation in consideration of having a share in the property, if recovered, is a recognised mode of helping a person in straitened circumstances. Furthermore, the idea involved in a business in partnership is that of joint operation for the sake of gain. In order to do business it is also necessary that there should be a continuous exercise of activity. Both of these attributes are missing in the instant case. The agreement was arrived at for the purpose of financing litigation. Incurring of expenses in the litigation by the partners was an investment made for gains which could accrue only when the litigation was won. Highly speculative character of the agreement is also indicative of the nature of the transaction being investment and not an embarkment upon trade.

34. It is also noteworthy that the partners had not decided about the manner, in which the property, if received, was to be dealt with. Paragraph 2 of the agreement reads as follows:

"That the property of the partnership, when and if acquired, shall be held or disposed of as such for the benefit of the partnership as a whole. It would not be open to any partner to claim partition thereof but the land in part or in whole may be partitioned between the partners with the mutual consent of all the partners."

35. This shows that the partners could also hold or partition the property amongst themselves. Paragraph 5 provides for the distribution of surplus receipts after adjustment of litigation expenses in proportion to the shares of the partners by the end of March each year. This paragraph is incapable of conveying any idea about the intention of the partners to indulge in trading activity. It only says that surplus or loss would be distributed each year according to shares. Making of provision for distribution of surplus does not lead us to any result. Surplus or profits could accrue to the partners without sale of land as well, they could hold the land and distribute the receipt from rental income annually in the manner provided therein. Manner of distribution of profits, as mentioned in this paragraph, could also be consistent with the case of investment. We, therefore, do not find any substance in this argument of the counsel for the revenue.

36. As stated above, it was for the revenue to bring the assessee within the taxing provisions of the statute and this they can do only when they establish that the assessee was caught by Section 2, Sub-section (4), of the Income Tax Act. In a case of purchase and sale of land it is not possible to assume it to be an adventure in the nature of trade unless something more is established. Burden on the revenue in such case is not a light one. This burden will have to be discharged with reasonable certainty by pointing out such circumstances as could lead to the infallible result that the transaction was in the nature of trade. In the instant case the department has relied upon the deed and the subsequent conduct of the assessee of obtaining the permission from the Town Planner and

selling the land in several pieces. We have already referred to the deed and fail to find anything in it which could justify the inference drawn by the Tribunal from the recitation of the deed that "this was clearly an activity in the nature of business....." This inference is founded on the fact of the partners entering into partnership and on the decision to dispose of the fortunes of litigation in future. We have already indicated above that the disposal of the land was not the sole and exclusive intention for which the partnership was entered into. Moreover, entertaining of some indefinite and hazy idea of selling the land in future, if profitable, would not per se be enough to draw an inference of trading activity being indulged in. As a matter of fact, on the facts and in the circumstances of the present case, mere entering into the partnership for the purpose of financing the litigation does not justify in law the finding that the partnership entered into was an adventure in the nature of trade, specially when financing of litigation cannot by itself be regarded as business.

37. Other grounds found by the Tribunal were that there was neither any vagueness in the objective of the firm for which the same was constituted nor was there anything to indicate that the land was acquired for cultivation. We are unable to find any substance in either of those two grounds. The first ground out of the two mentioned above is in fact ambiguous and incapable of conveying any definite idea behind it. If, however, the Tribunal desired to infer that the firm was formed for doing business in the trade of sale and purchase of land by subdividing it, it is not possible to agree with the same. We have already analysed the deed above and are unable to find on the interpretation of the deed anything therein which could give any definite idea about the future use of the property. At a stage when the partners did not know about the property which they were going to get, it is difficult to think that the assessee had a clear objective before it. So far as the question of putting the property to agricultural use is concerned, it would suffice to mention that the land comprised in the Kheu at purchased was not such as could be readily available for agricultural use. It was in possession of tenants, who must have been cultivating it and, therefore, the mere omission to cultivate is not a factor which could be taken against the assessee. The Tribunal is again wrong in drawing an inference from the period during which the partnership was to continue that it was formed for trading. This fact rather helps the assessee in showing that the firm was not constituted for trading in land, otherwise its life would not have been limited to the period of disposal of land. This paragraph shows that the partners were only interested in dividing the benefits of investments, if possible, and thereafter to wind up its affairs. For the reasons already indicated earlier in this judgment we are unable to uphold the finding of the Tribunal that the manner of accounting contemplated by paragraph 5 shows that "the main activity was to be the disposal of land and its exploitation in any other manner".

38. Another reason which impels us to hold against the revenue is that if the partnership was really constituted for trading, one would have expected some other or similar purchases of land by the firm for the purpose of selling them at a

higher price after development. It has come in the judgment of the Income Tax Officer that all the five partners were rich. If that was so and they had entered into the partnership for the purpose of earning profits what was there to check them from purchasing more land. The absence of further purchases is a strong circumstance in favour of the assessee that it was not formed for entering into business of sale and purchase of land. This was an isolated transaction and, therefore, in the absence of any other evidence, it is not possible to hold the same was done with the intention of entering into a venture.

39. We have already mentioned the cases cited by the counsel appearing for the assessee. We, however, do not consider it necessary to discuss them in detail. Counsel for the revenue, however, submitted on the basis of the law laid down in *Martin v. Lowry* [1926] 11 TC 297 that:

"A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters of trade"

40. Proposition of law as provided on the basis of the above authority is indisputable. But each case will have to be decided with reference to its own facts, as observed in this very case :

"Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it ; much depends on the circumstances."

41. Counsel for the revenue also relied upon *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, , Raja J. Rameshwar Rao Vs. Commissioner of Income Tax, Hyderabad*, and *P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala*, in support of this proposition and urged that in each of these three cases single purchase and sale of land had taken place but the Supreme Court still held that the transaction amounted to trading.

42. Analysing the facts of the case of *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, ,* it will be found that the Supreme Court held in that case that the property was purchased with the sole intention of selling them on profits. Its findings were :

"Thus the appellant purchased the four plots during two years with the sole intention to sell them to the mills at a profit and this intention raises a strong presumption in favour of the view taken by the Tribunal. In regard to the other relevant facts and circumstances in the case, none of them offsets or rebuts the presumption arising from the initial intention : on the other hand, most of them corroborate the said presumption. We must, therefore, hold that the High Court was right in taking the view that, on the facts and circumstances proved in this case, the transaction in question is an adventure in the nature of trade."

43. So far as the case reported in *Raja J. Rameshwar Rao Vs. Commissioner of Income Tax, Hyderabad*, is concerned, in that case as well, the assessee of that case had purchased 217 acres of land. After constructing a ganj and shops he sold the rest of the land for Rs. 75,820. The Income Tax Officer treated it as

receipt from business. The Supreme Court held on appeal filed by the assessee that when a person acquired the land with a view of reselling it later after developing it, he was carrying on an activity which would ultimately result in profit.

44. In *P.M. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala*, one A.V. George purchased an estate called Kuttikal Estate from a company. The area of the estate was 477 acres and 71 cents. Under the agreement entered into between the aforesaid parties it was settled that the company would execute the conveyance either in favour of A.V. George or his nominee. Later, on August 15, 1955, A.V. George entered into an agreement with P.M. Mohammed Meerakhan, whereby he agreed to purchase 447.71 acres out of 477.71 acres. The assesses, that is, P.M. Meerakhan, subsequently divided the area of 447.71 acres into 23 plots and found purchasers for 22 plots. P.M. Meerakhan subsequently retained 104.13 acres of land for himself and sold the rest of it for valuable consideration. The Income Tax Officer found that the profits made by P.M. Meerakhan from sale represented assessee's profit from an adventure in the nature of trade and assessed him to tax on that basis. It is this order which was ultimately confirmed by the Supreme Court and it was held that the transactions of the assessee constituted an adventure in the nature of trade. The facts of this case are distinguishable, as from the very beginning, the intention of the assessee of that case was to resell the plots after demarcation.

45. All the three decisions relied upon are distinguishable, being based on the ground that in each of these three cases the dominant and sole intention of each of the assessees was to resell the land acquired by them. As noticed in the instant case the revenue has not adduced any evidence which could establish this intention. The revenue only relied upon the partnership deed and the subsequent sales of land made by the partnership. We have already dealt with the said deed. We will now deal with the subsequent conduct of the parties.

46. The argument advanced by the counsel for the revenue in this respect is that even though a property may not have been initially acquired with any thought of trade, it may afterwards become the subject-matter of trade due to its subsequent dealings. He invited our attention to the finding recorded by the Tribunal in this regard wherein it was found that the partnership parcelled out the plots and sold the same after obtaining the permission of the Town Planner. He drew our attention to the finding of the Tribunal in this regard which is as under:

"There was an unmistakable scheme of profit-making right at the foundation of the firm and that stamped the transaction undertaken by it with the character of an adventure in the nature of trade. The manner in which the land was disposed of also underlines the same conclusion. Parcelling out of land and getting the permission from municipal authorities for turning it to non-agricultural use may themselves not be decisive in determining the nature of the transaction. But in the background of the formation of the firm they can have no other meaning except to suggest that they were modes of commercial exploitation of the land

which it was sought to dispose of in a commercial manner."

47. We have given our careful consideration to this submission of the learned counsel but find ourselves unable to accede to the same. The activity of parcelling out the land, thereafter selling them in the market, was designed to enhance the value of the land in which the money was invested. A person who has no intention of engaging himself in trade of buying and selling property cannot be considered to be a person engaged in an adventure in the nature of trade simply because by taking some steps he might succeed in receiving higher price of land in the market.

48. For the view which we are taking we find strong support from a recent decision in *Taylor v. Good* [1974] 1 WLR 556 . One Walter Marcus Taylor, who carried on two businesses, purchased a house in an auction. At the time of the auction the taxpayer had not decided what to do with the property if he bought it. Subsequently he went with his wife to see the house. In view of his wife's attitude Walter Taylor abandoned the idea of living in the house. He, therefore, obtained planning permission and ultimately sold the property to a firm of developers. The plan involved erection of 90 dwellings over 91/2 acres of land. Taylor was then assessed to Income Tax on the amount which was the difference between the sale price and purchase price on the basis that the purchase and resale of the property constituted an adventure or concern in the nature of trade. Taylor appealed to the Special Commissioner. The appeal was dismissed. The matter was thereafter taken to the High Court and was decided by Megarry J. Taylor felt aggrieved and filed an appeal before the Court of Appeal. The Court of Appeal held that the mere fact of obtaining planning permission did not convert the transaction from its character of investment to trade. The relevant observations are as follows (page 560):

"All these cases, it seems to me, point strongly against the theory of law that a man, who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.

I turn now to the *Mitchell Bros. v. Tomlinson* [1957] 37 TC 224 . In that case there were 60 houses bought before 1939 for investment. Some of those were later sold at a profit, but they were not embraced in the assessment. From 1942 to 1948, another 239 houses were bought at the bottom of the market, of which 58 were sold, some within that period. It does not seem to me that this decision contradicts in any way the basis of the earlier decisions. If you find a period in which there are purchases and sales, it is not difficult to find a trade of dealing in land, whatever may have been the original motive or purpose of acquisition. But here we have, we must assume, no purchase at all with an eye on realisation.

If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or

bought for investment only, have been brought into the stock-in-trade of that trade. To such circumstances I would relate the dicta relied upon in the other three cases referred to by Megarry J. But where, as here, there is no question at all of absorption into a trade of dealing in land, of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the Commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law."

49. The Court of Appeal had referred to Hudson's Bay Co. Ltd. v. Stevens [1909] 5 TC 424, C.H. Rand v. Alberni Land Co. Ltd. [1920] 7 TC 629 and Alabama Coal, Iron, Land and Colonization Co. Ltd. v. Mylam [1926] 11 TC 232 in its judgment and after relying upon them reached the conclusion mentioned above. In Hudson's Bay Co. Ltd. v. Stevens [1909] 5 TC 424, the Court of Appeal accepted the finding of the Commissioner that it was not engaged in the trade of buying and selling land and stated that:

"In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of an estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to resale; the company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their charter."

50. Summarising the above decisions the Court of Appeal observed in Taylor v. Good [1974] 1 WLR 556, that:

"...the fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not constitute a trade, nor the fact that he may have expended money in getting the property up for sale: it was no different, it was said, in substance from an ordinary landowner, who sells parts of an estate which he acquired by purchase."

51. From the facts of the present case as well, it is proved that due to influx of a large number of refugees and consequent increase in demand for houses the assessee realised enhanced value of their investments. Merely because permission for development was obtained from the Town Planner, and the land was thereafter parcelled out into plots, and sold, surplus money realised cannot be regarded as profits from business and not capital gain.

52. In D.S. Virani v. Commissioner of Income Tax [1973] 90 ITR 255 the Gujarat High Court was called upon to consider a similar assertion raised by the revenue about the taxability of the sum realised from sale of land. In this case D.S. Virani and his three brothers jointly purchased some land in 1951. D.S. Virani was a dealer in land since 1946-47. The land purchased by them was subsequently

agreed to be sold to one Bhagwanji Khatau-bhai on October 2, 1959, at the rate of Re. 1 per square yard. It was revealed from the evidence that under the said agreement D.S. Virani and his brothers received only some earnest money from Bhagwanji Khataubhai, and the balance of the price was to be received by the assessee as and when the land was sold by Bhagwanji Khatau after dividing into plots and laying out roads. Bhagwanji Khatau divided the land into 115 plots and as a formal sale deed had not been executed by the assessee in favour of Bhagwanji Khatau, therefore, the assessee executed sale deeds in favour of persons by whom the plots were purchased from Bhagwanji Khatau. The assessee received surplus money in these transactions. The tax authorities claimed tax on surplus on the basis of business profit whereas the assessee asserted the same to be capital gain. Finally, this controversy came up for decision before the High Court in a reference u/s 66(1) of the Income Tax Act, The High Court held that since D.S. Virani was a dealer in real property since 1946-47, the income earned by him from the sale of his one-fourth, share, being from a transaction in the line of his business, was liable to be taxed as profit from income. But the cases of the other three assesseees were distinguished and the view of the High Court was that the income derived by them from sale of plots was capital gain from investment. We respectfully agree with the view taken in this case and in agreement with the same hold that the mere fact that the assessee succeeded in obtaining enhanced value of their land due to future development of that area or subsequent rise in the price of land on account of influx of refugees or some activities carried on over the land, would not in law be sufficient to treat the income as accruing from business. The surplus realised by the assessee was capital gain. The Tribunal was, therefore, in error in taking the view that the transaction of sale and purchase of the land was an adventure in the nature of trade.

53. Our answer to the question referred by the Delhi Bench of the Income- tax Appellate Tribunal is that surpluses realised by the assessee on the sale of land were capital gains and not income or profits from an adventure in the nature of trade within the meaning of Section 2(4) of the Act of 1922 and was thus not chargeable to tax under the head "business" in the assessment years 1960-61, 1961-62, 1962-63 and 1963-64. The assessee will get costs of Rs. 300.