

(1973) 01 BOM CK 0003

In the Bombay High Court

Case No : Appeal No. 102 of 1966 from Miscellaneous Petition No. 42 of 1965

R.H. Muttoo and Another

APPELLANT

Vs

Kasturbai Walchand

RESPONDENT

Date of Decision : 10-01-1973

Acts Referred:

Income Tax Act, 1961 — Section 264, 33A(2), 4(3)
Wealth Tax Act, 1957 — Section 16, 23, 24, 24(1), 24(2)

Citation : (1987) 166 ITR 392

Hon'ble Judges : V.D. Tulzapurkar, J; R.M. Kantawala, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; S.P. Mehta, for the Respondent

Judgement

Tulzapurkar, J.—This appeal has been preferred by the appellants Commissioner of Wealth-tax, Bombay City I, Bombay) against the judgment and order of Thakkar J. dated October 10, 11, 1966, in Miscellaneous Petition No. 42 of 1965, whereby the learned judge set aside the order of the Commissioner dated August 12, 1964, refusing to entertain the revisional application of the respondent and further directing the Commissioner to dispose of the said revisional application in accordance with law.

2. The facts giving rise to the appeal may be stated : The respondent (who was the petitioner in Miscellaneous Petition No. 42 of 1965) was the holder of 149 shares in Walchand & Co. Pvt. Ltd. During the relevant years 1958-59, 1959-60 and 1960-61, and March 31, 1960, the respondent adopted the valuation of the said shares at their break-up values with paid-up capital and reserves, as there was no market quotation for the same. The Wealth-tax Officer, Company Circle I (3), Bombay, by his separate orders for the aforesaid years rejected the valuation of the said shares as claimed by the respondent and estimated their values on the basis of capitalisation of profits at 6% for the assessment year 1960-61 and on the basis of break-up value with certain modifications for the assessment years 1958-59 and 1959-60. The respondent, feeling preferred

appeals to the Appellate Assistant Commissioner of Wealth-tax and the Appellate Assistant Commissioner determined the values of the said shares on the basis of capitalisation of the investment income at 6% and of other income at 12 1/2%, with the result that he partly allowed the appeals of the respondent by his separate orders passed in three appeals dated November 10, 1961. Feeling aggrieved by the said orders of the Appellate Assistant Commissioner, the Wealth-tax Officer preferred appeals to the Income Tax Appellate Tribunal. The respondent did not prefer any appeal to the Tribunal. The Tribunal, by its consolidated order for the assessment years 1958-59, 1959-60 and 1960-61 and a separate order in respect of the assessment for the year 1957-58, dismissed all the appeals preferred by the Wealth-tax Officer. In other words, the enhanced valuation sought by the Wealth-tax Officer was rejected by the Tribunal. In the course of its judgment, the Tribunal, inter alia, observed as follows :

"The matter of valuation of the shares of Walchand & Co. Private Ltd. on the valuation dates relevant to the assessment years now under consideration has been referred to the arbitration of two valuers in the case of another assessee in WTA Nos. 1143, 1144 and 1145 of 1961-62. After examining the merits and demerits of each of the methods adopted by the Wealth-tax Officer and the Appellate Assistant Commissioner, the valuers determined the value of those shares at certain figures. Those figures and the method adopted by the valuers appear to us as reasonable.

The same method, in our opinion, would be a proper method to be followed even in this case. The value of the shares held by the assessee, according to the said method, would work out to figures much less than the valuation figures determined by the Appellate Assistant Commissioner in the respective assessment years. Hence, the question of raising the value determined by the Appellate Assistant Commissioner does not arise. Since the assessee has not filed appeals against the orders of the Appellate Assistant Commissioner, though we feel that the value determined by the Appellate Assistant Commissioner for the shares held by the assessee are excessive, we cannot help the assessee and reduce the figures. There is no merit in these appeals filed by the Wealth-tax Officer."

3. It appears that while the appeals preferred by the Wealth-tax Officer to the Appellate Tribunal were pending, the respondent had on June 29, 1969, filed revision applications before the Commissioner of Wealth-tax (appellant No. 1 herein) u/s 25(1) of the Wealth-tax Act, 1957, in respect of the aforesaid assessment years and she submitted that the valuation of the shares adopted by the Appellate Assistant Commissioner was reasonable and excessive and that the same should be duly modified. Without giving any opportunity to the respondent of being heard, the first appellant, by his order dated August 12, 1964, rejected all the revisional applications of the respondent in limine on the ground that they were incompetent, by observing as follows :

"There are three revision petitions relating to the assessment years 1958-59 to

1960-61. The orders of the Appellate Assistant Commissioner were the subject-matter of an appeal before the Appellate Tribunal. Applications for revision against the orders do not, therefore, lie in view of proviso (b) to section 25(1) of the Wealth-tax Act. The applications are, therefore, rejected."

4. It was this order passed by the first appellant on August 12, 1964, that was challenged by the respondent in Miscellaneous Petition No. 42 of 1965, which he preferred on the original side of this court under article 226 of the Constitution. The said order was challenged on two grounds. In the first place, it was challenged on the ground that it had been passed in violation of principles of natural justice inasmuch as no opportunity was given to the respondent of being heard before the order was passed. Secondly, it was contended that on the basis of a wrong approach adopted by the Commissioner on the question of construction of the relevant proviso to section 25(1), the Commissioner had failed to exercise jurisdiction vested in him by law and as such there was clear error of law apparent on the face of the record justifying interference by this court.

5. The impugned order was sought to be justified on behalf of the Commissioner of Wealth-tax on the basis that the revisional applications were incompetent inasmuch as the orders of the Appellate Assistant Commissioners were the subject of appeals before the Appellate Tribunal and that, therefore, the first appellant had rightly rejected the revisional applications in view of proviso (b) to section 25(1) of the Wealth-tax Act. On consideration of the rival submissions that were put forward before him by counsel for the parties, Thakkar J. came to the conclusion that on a proper construction of proviso (b) to section 25(1), it could not be said that the orders of the Appellate Assistant Commissioners were the subject of any effective appeal before the Appellate Tribunal by the aggrieved party, meaning the party who had preferred the revisions, and that, therefore, proviso (b) to section 25(1) could not be a bar to the Commissioner entertaining the revisional applications. In this view of the matter, he set aside the impugned order dated August 12, 1964, and directed the Commissioner to dispose of the revision applications filed by the respondent in accordance with law. The Commissioner of Wealth-tax has come up in appeal to this court.

6. The short question which falls for determination in the appeal is whether the Commissioner had jurisdiction to deal with and dispose of on merits the revisional application preferred by the respondent, having regard to the fact that the orders of the Appellate Assistant Commissioner were the subject of appeals preferred by the Wealth-tax Officer u/s 24(2) of the Act ? On this question, it would be necessary to note a few relevant provisions of the Wealth-tax Act to which our attention was drawn by Mr. Joshi, appearing for the appellants, viz., provision of sections 16, 23, 24 and 25 of the Act. Section 16 empowers the Wealth-tax Officer to assess the net wealth-tax. Chapter VI contains section 23, 24, and 25, which provide for appeals and revisions against an order passed u/s 16. u/s 23, an appeal against the order of the Wealth-tax Officer can be

preferred by the assessee alone to the Appellate Assistant Commissioner. Naturally, the Wealth-tax Officer himself being the assessing officer, there would be no question of his preferring an appeal has been provided for against the order of the Appellate Assistant Commissioner passed u/s 23 to the Appellate Tribunal by both; sub-section (1) provides for an appeal being preferred by an assessee who feels himself aggrieved by the order of the Appellate Assistant Commissioner, while under sub-section (2) the Commissioner, if he is not satisfied about the correctness of any order passed by the Appellate Assistant Commissioner, has been empowered to direct the Wealth-tax Officer to prefer an appeal to the Appellate Tribunal such an order. The period of limitation for preferring such appeal, either by the assessee or by the Commissioner through the Wealth-tax Officer, is sixty days from the date of the communication of the impugned order appealed against. The come the relevant provisions of section 25, the material portion whereof runs as follows :

"25. Powers of Commissioner to revise orders of subordinate authorities. -

(1) The Commissioner may, either of his own motion or on application made by an assessee in this behalf, call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him, and may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, pass such order thereon not being an order prejudicial to the assessee, as the Commissioner thinks fit :

Provided that the Commissioner shall not revise any order under this sub-section in any case -

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal can be made has not expired or in the case of an appeal to the Appellate Tribunal the assessee has not waived his right of appeal;

(b) where the order is the subject of an appeal before the Appellate Assistant Commissioner or the Appellate Tribunal;.....

Explanation. - For the purposes of this sub-section, -

(a) the Appellate Assistant Commissioner shall be deemed to be an authority subordinate to the Commissioner, and....."

Now, the question is whether having regard to proviso (b) to section 25(1) of the Act, the revision applications preferred by the respondent to the Commissioner were incompetent and could be dismissed in limine, as is done by the Commissioner. On this question, Mr. Joshi has contended before us that since in the instance case, the orders of the Appellate Assistant Commissioner were the subject of appeals before the Appellate Tribunal at the instance of the Wealth-tax Officer, the revision applications preferred by the respondent could not be dealt with or disposed of on merits by the Commissioner. In other words, according to Mr. Joshi, the fact that the Wealth-tax Officer had preferred appeals against the

orders of the Appellate Assistant Commissioner to the Tribunal constituted a bar to the revisional powers of the Commissioner u/s 25 and as such the order dated August 12, 1964, passed by the first appellant was perfectly justified. He pointed out that the words of proviso (b) are to the effect : "where the order is the subject of an appeal before the Appellate Assistant Commissioner or the Appellate Tribunal" and the proviso nowhere indicates at whose instance such appeals should be filed before the Appellate Tribunal and even if an appeal has been preferred to the Appellate Tribunal against the order of the Appellate Assistant Commissioner by the Wealth-tax Officer, that fact was sufficient to exclude the revisional jurisdiction of the Commissioner u/s 25(1) of the Act. He contended that the view taken by Thakkar J., that the statutory right conferred upon an assessee u/s 25 could not be allowed to be defeated at the volition of the Wealth-tax Officer by his preferring an appeal to the Appellate Tribunal was erroneous and was not warranted by the wording of proviso (b). In support of his contention, he relied upon the judgment of the Madras High Court in the case of *C. Gnanasundara Nayagar v. CIT* [1961] 41 ITR 375, where a similar question under proviso (c) to section 33A (2) of the Income Tax Act, 1961 (proviso (c) to section 33A(2) is similar to proviso (b) to section 25(1) of the Wealth-tax Act, 1957), was considered and the court took the view that an order of assessment could not be revised by the Commissioner on an application by the assessee u/s 33A(2) of the Income Tax Act, if an appeal had been preferred against that order to the Appellate Tribunal. He pointed out that in that case, against the order passed by the Income Tax Officer, successive appeals had been preferred by the assessee to the Appellate Assistant Commissioner and to the Appellate Tribunal, but neither at the initial stage before the Income Tax Officer nor at a subsequent stage in any of the appeals which he preferred, had the petitioner made any claim that he was entitled to claim, certain relief u/s 4(3)(xii) of the Income Tax Act, 1961. In other words, the relief under pertaining to deduction of rent u/s 4(3)(xii) of the Income Tax Act was not claimed either before the Income Tax Officer or in the appeals preferred to the Appellate Assistant Commissioner and to the Tribunal by the assessee, but the assessee sought to claim the said relief in the revisional application preferred by him to the Commissioner of Income Tax u/s 33A(2) and it was contended that the revision was competent inasmuch as the relief claimed therein was not the subject-matter of the appeal before the Appellate Tribunal, but the court held that the Commissioner was incompetent to deal with and dispose of the revisional application on merits of relief claimed, because the assessment order had been made the subject of an appeal to the Appellate Tribunal, and the revisional jurisdiction of the Commissioner was barred under proviso (c) to section 33A(2) of the Income Tax Act. In particular, Mr. Joshi placed reliance upon the following observations appearing at pp. 380-381 of the report :

"Therefore, under clause (c) of the proviso, an appeal being preferred to the Tribunal is enough to bar the exercise of revisional jurisdiction. If no appeal has been preferred to the Tribunal, but there is still time to prefer the appeal, clause

(a) comes into play and bars the revisional jurisdiction. If an appeal is preferred, clause (c) comes into play and bars the jurisdiction to revise the order appealed against, the whole or any portion of that order. The finality of an assessment which flows from the order of Tribunal cannot obviously be disturbed by the Commissioner in the exercise of his revisional jurisdiction u/s 33A(2). Consistent with the scheme of the proviso to section 33A(2) that revision and appeal are not concurrent remedies open to an assessee, clauses (a) and (c) bar the revisional jurisdiction, the first, when an appeal is open to the Tribunal, and the second, when an appeal has been preferred to the Tribunal. Running through the entire scheme is the basic concept of the unity of an order of assessment for purposes of appeal or revision."

7. It is impossible to accept the contention of Mr. Joshi for the reasons which we shall presently indicate. We shall refer to the decision in *C. Gnanasundara Nayagar v. CIT* [1961] 41 ITR 375, on which Mr. Joshi has relied, a little later, but dealing with the question on a plain reading of the relevant provision, it seems to us clear that the phrase "where the order is the subject of an appeal before the Appellate Tribunal" in proviso (b) to section 25(1) must mean that the order is the subject of an effective appeal by the aggrieved party. Otherwise on the construction that is sought to be placed upon this proviso by Mr. Joshi, anomalous consequences not intended by the Legislature would follow. The scheme of the relevant sections, viz., sections 16, 23, 24 and 25, brings out two or three aspects very clearly. In the first place, section 23 provides for an appeal to the Appellate Assistant Commissioner against the order of the Wealth-tax Officer at the instance of the assessee alone, while u/s 24, an appeal to the Appellate Tribunal has been provided for both at the instance of the aggrieved assessee as well as the Commissioner, if he is of the opinion that the order of the Appellate Assistant Commissioner is not correct and the period of limitation for either appeal is sixty days. Secondly, the revisional powers u/s 25(1) seems to be exercisable only at the instance of an aggrieved assessee, for sub-section (1) clearly provides that in exercise of the revisional powers, the Commissioner can pass any order but not an order prejudicial to the assessee. In other words, no order which would be favorable to the Department and prejudicial to the assessee can be passed by the Commissioner in exercise of the revisional powers u/s 25(1) of the Act. This suggests that it is only the aggrieved assessee who can invoke the revisional powers of the Commissioner u/s 25(1). Thirdly, the language of proviso (b) also indicates that it was the assessee who was in the view of the Legislature when it made the provision of the type contained in sub-section (1), because proviso (b) runs as follows : "where the order is the subject of an appeal before the Appellate Assistant Commissioner or the Appellate Tribunal." Under the scheme which we have indicated above, there is no question of the Wealth-tax Officer preferring any appeal to the Appellate Assistant Commissioner at all, but it would be the assessee who would be preferring such appeal to the Appellate Assistant Commissioner. Proviso (b) certainly contemplates the order of the Appellate Tribunal and such appeal could be at the

instance of the assessee or the Wealth-tax Officer, but the question is, when such order is made the subject of an appeal to the Appellate Tribunal at the instance of the Wealth-tax Officer, should a revisional application to the Commissioner at the instance of the assessee get barred or should the bar arise when the same party, who is seeking to invoke revisional jurisdiction, has put the order of the Appellate Assistant Commissioner under appeal to the Appellate Tribunal ? We are clearly of the view that it will not be possible to read the proviso in the manner in which Mr. Joshi wants us to read it. We feel that the phrase "where the order is the subject of an effective appeal by the aggrieved party and the reason is that the shame of the relevant provisions clearly gives two remedies to the assessee who may feel aggrieved by the order passed by the authorities subordinate to the Commissioner of Wealth-tax and the scheme also suggests that he should not aggrieved by any order passed by the Appellate Assistant Commissioner, he may either go in appeal to the Appellate Tribunal or waiving his right to prefer the appeal to the Appellate Tribunal, he may approach the Commissioner for invoking his revisional powers but proviso (a) and proviso (b) to section 25(1) clearly suggests that the assessee should not have both the remedies at one and the same time. Implicit in the scheme is the position that the Commissioner shall refrain from exercising his revisional powers when an appeal is pending before the Tribunal and may exercise his powers in such a way as not to get in conflict with the orders passed by the Tribunal. If, therefore, two alternate remedies have been given to the assessee, his remedy to invoke revisional powers of the Commissioner u/s 25(1) cannot be allowed to be rendered nugatory by an appeal being preferred to the Appellate Tribunal by the Wealth-tax Officer. Surely, the Legislature could never have intended that if the assessee were to waive his right of appeal to the Appellate Tribunal and if he were to decide positively that he would follow the other remedy of preferring revisions application to the Commissioner his said right should be allowed to be defeated by an appeal that might be preferred by the Wealth-tax Officer at the instance of the Commissioner u/s 24(2) of the Act. The anomalous consequences which would result from the acceptance of the construction sought to be placed by Mr. Joshi on proviso (b) to section 25(1) can be illustrated thus. Suppose in an assessment proceeding under the Wealth-tax Act five different assets were valued by the Wealth-tax Officer by adopting give different methods of valuation in respect of each asset and the Appellate Assistant Commissioner in an appeal preferred by the assessee confirms the assessment order, including the methods of valuation adopted by the Wealth-tax Officer, it is possible that the assessee may not feel like preferring an appeal at all to the Appellate Tribunal and might think of prosecuting his remedy of revisional application to the Commissioner against the order of the Wealth-tax Officer in respect of the valuation methods adopted in respect of two of his assets and he prefers such a revisional application immediately after the assessment order is passed by the Appellate Assistant Commissioner and much before the Commissioner even decides and directs the Wealth-tax Officer to prefer an appeal to the Appeal Tribunal, and if, in such a situation, at the instance of the Commissioner, the Wealth-tax Officer

qua the three assets to the Appellate Tribunal bar or render ineffective the revisional application of the assessee in respect of his other two assets for no fault of his ? It is also conceivable in the situation envisaged above that the Commissioner Wealth-tax Officer may, without really pressing his appeal, get it dismissed on merits, even then the revisional remedy of the assessee would become barred or rendered nugatory simply because the order of the Appellate Assistant Commissioner was the subject of an appeal before the Appellate Tribunal. We do not think such anomalous results were intended by the Legislature when it enacted proviso (b) to section 25(1) of the Act. In our view, therefore, on a consideration of the entire scheme of the relevant provisions of the Act, we are clearly of the view that the phrase "where the order is the subject of an appeal before the Appellate Tribunal" occurring in proviso (b) to section 25(1) must mean that the order is the subject of an effective appeal by the aggrieved party.

8. Referring to the decision in *C. Gnanasundara Nayagar v. CIT* [1961] 41 ITR 375, on which Mr. Joshi has relied, in our view, that decision is clearly distinguishable on facts and the major point of distinction lies in this, that whereas in that decided case it was the assessee who had preferred an appeal first to the Appellate Assistant Commissioner and thereafter to the Appellate Tribunal, in which he had failed to seek the relief, which was sought by way of a revisional application to the Commissioner of Income Tax, in the instant case the appeal that has been preferred to the Appellate Tribunal is not by the assessee but is by the Wealth-tax Officer at the instance of the Commissioner of Wealth-tax. That this crucial fact considerably influenced the learned judges who decided the case is clearly borne out by the following observations, which appear at p. 380 of the report :

"In the present case, it should be obvious that the petitioner could have claimed the benefit u/s 4(3)(xii) in the assessment proceedings before the Income Tax Officer. Even had he failed to ask for it at that stage, he could have asked for it when he appealed to the Assistant Commissioner. He could have made not only the order of assessment but also the specific claim for relief based on section 4(3)(xii) the subject of the appeal to the Tribunal."

9. At pages 378 and 379 the learned judges have been careful to point out that the revisional applications u/s 33A(2) had been preferred by the assessee on December 10, 1954, while the appeals to the Tribunal were preferred only after January 26, 1955, and even then the position was that the petitioner-assessee asked only the Commissioner to revise the order of assessment in the initial two years, claiming relief u/s 4(3)(xii), whereas he could have asked for the same relief in the appeals that he subsequently preferred to the Tribunal, but he did not. In other words, on the facts of that case, it was clear that it was the assessee who failed to claim the relief which was sought before the Commissioner, at the initial stage before the Income Tax Officer as well as before the Appellate Assistant Commissioner and before the Appellate Tribunal though it

was open to him to do so and it was in those circumstances that the court came to the conclusion that under clause (c) of the proviso to section 33A(2) (which is almost similar to proviso (b) to section 25(1) here) that the Appellate Assistant Commissioner's orders "had been made the subject matter of appeal to the Appellate Tribunal" and, therefore, the said clause barred the revisional jurisdiction of the Commissioner of Income Tax in that case. In the case before us, the appeal had not been preferred by the assessee at all but it had been preferred by the Wealth-tax Officer at the instance of the Commissioner u/s 24(2) of the Act, and at the highest, the contention of the Department that the valuation of the shares should be enhanced was the subject-matter of appeal before the Appellate Tribunal. It was not disputed before us that in that appeal, the Tribunal could reducing the valuation of the assets because case, it is further clear that since the orders passed by the Appellate Assistant Commissioner were in favour of the assessee, as his appeals were partly allowed, he did not think of preferring an appeal to the Appeal Tribunal and instead, during the pendency of appeal by the Wealth-tax Officer to the Appellate Tribunal, he preferred to file the revisional applications u/s 25(1) to the Commissioner of Wealth-tax. It is true that during the pendency of the appeal, the Commissioner of Wealth-tax could not have exercised his revisional powers. It is also true that had the appeal been allowed by the Tribunal, in the sense that the valuation had been enhanced, even then the Commissioner could not have granted relief to the assessee in exercise of his revisional powers, for that would amount to going contra to the Tribunal's view. But after the appeals were dismissed by the Tribunal on the ground that there was no question of enhancing the valuation of shares as sought by the Wealth-tax Officer, there was no reason why the Commissioner should have rejected the revisional applications in limine. Whether, on merits, relief of reducing the valuation of shares should have been granted by him or not was different matter - a matter on which the observations of the Tribunal while dismissing the Wealth-tax Officer's appeal would have been relevant but the revisional applications in the circumstances could not be said to be barred under proviso (b) to section 25(1) of the Act. We are, therefore, of the view that the decision on which reliance has been placed by Mr. Joshi is clearly distinguishable on facts and that the observations on which he laid considerable emphasis will have to be read in the context of the facts of that case.

10. In this context, it would be useful to refer to a decision of this court in the case of Jagmohandas Gokaldas Vs. Commissioner of Wealth Tax, Bombay, , where the self-same proviso, viz., proviso (b) to section 25(1) of the Wealth-tax Act, came up for consideration. In that case, an assessee had preferred an appeal to the Appellate Assistant Commissioner u/s 24(1) and as he was unsuccessful, he preferred an appeal to the Appellate Tribunal against the order of the Appellate Assistant Commissioner. But, later on, he withdrew the appeal with the permission applied to the Commissioner of Wealth-tax u/s 25(1) of the Act for revising the order of the Appellate Assistant Commissioner. The Commissioner rejected his revisional application summarily on the ground that

the order sought to be revised was "the subject of an appeal to the Appellate Tribunal" and he had consequently no power to revise it. This court held that the Commissioner in the circumstances of the case was not justified in dismissing the revisional application filed by the petitioner in limine. The court took the view that the order was not made the subject of an effective appeal inasmuch as the appeal to the Tribunal has been withdrawn and in taking that view the court followed an earlier decision of the Madras High Court in *A. Vs. SREENIVASALU NAIDU v. COMMISSIONER OF Income Tax MADRAS.*, , where when the appeal had been dismissed only on the ground of limitation, it was held that the order had not been made the subject of an appeal within the meaning of clause (c) of the proviso to section 33A(2). The Madras High Court had taken the view that the order could be said to have been made the subject of an appeal only when it is the subject-matter of an effective appeal and observed as follows (vide page 347 of the report) :

"When it was held that there was no appeal when the appeal filed was rejected on the ground it was barred by limitation, it would obviously be unsound to hold that where an appeal had been rejected as out of time, the order had been the subject of an appeal. Indeed, the words "subject of an appeal" imply that the order appealed against has been decided on merits." Relying on these observations, this court, in *Jagmohandas Gokaldas Vs. Commissioner of Wealth Tax, Bombay*, , held that when the appeal before the Tribunal had been withdrawn, the order could not be said to be the subject of an appeal, meaning effective appeal, and as such there was no bar to the exercise of the revisional powers.

Having regard to the above discussion, we are of the view that the construction sought to be placed on proviso (b) to section 25(1) by Mr. Joshi cannot be accepted and the view taken by the learned judge below is right.

11. In the result, the appeal fails and is dismissed with costs.