P.C. Ray And Co. (India) Private Ltd. vs A.C. Mukherjee, Income-Tax Officer And ... on 15 May, 1958

Equivalent citations: [1959]36ITR365(SC)

JUDGMENT

Chakravartti, C.J.

1. We have had some difficulty in fallowing the appellant's argument in this appeal, because it did not conform too closely to what appears to have been urged in the court below, nor was its rather expanded end quit an expected sequel to the somewhat slender beginning. Nevertheless, We think we are now in possession of what exactly the appellant wishes to say.

2. The appellant is a private limited company, formed under the Companies Act of 1956, to take over the assets and liabilities of another company as also its outstanding contracts. It appears that some time ago the predecessor company obtained a lease of a considerable area of forest land in the North Andaman with a view to exploiting its timber. Andaman timber has hardly any local market and it, therefore, became necessary for the company to secure some means of transport for bringing the timber over to the mainland. For that purpose it chartered from time to time sea-going vessels. One such vessel was "Eastern Venture", owned by Newland Steamship Co. Ltd. of Hongkong, which the predecessor company hired by a charter-party executed in London on August 25,1954. The charter-party was in the form of a uniform time charter. The period covered by it was six months, with an option of another three months for the charter, but it appears that since the expire of the original term, the charter-party has been renewed or its terms extended from time to time. Although the vessel appears to have changed hands at least twice and the period of the origins charter-party also expired, as I have just started, long ago, it is not disputed that terms and conditions of the deed of the August 25,1954, have contained to be in force with one slight modification to which I shall presently refer.

3. We are concerned in this case only with the terms as to the payments of the hire. Clause 6 of the charter-party provided that the charterers were to pay as hire I6s. per ton on the vessel's dead weight of 5,250 tons per 30 This payment of hire was to be made without discount every 30 days in advance and, according to clause 6, it was to be made in cash in Calcutta. Somewhat inconsistently, the charter-party came to contain another provision in clause 26 which said that the hire in accordance with clause 6 was to be paid by telegraphic transfer to London. By an addendum inserted and it was agreed that payment would be made in cash in London or Hongkong.

4. The charter-party contained another provision in clause 14 and it is with that provision that we are principally concerned in this case. Clause I4 read as follows :

> "The charterers or their agents to advance to the Master, if required, necessary funds for ordinary disbursements for the vessel,s account at any port, charging only interest at 6 per cent., p.a., such advances to be deducted form hire."

5. The only other provision to which I need refer is clucks 25 which provided that the owners were to pay a commission of 3 per cent., to Clegg, Cruickshank & Co. Ltd., Calcutta, as also some commission and brokerage to two other parties apparently in London.

6. The vessel was to e employed for the carriage of lawful merchandise only between good and safe ports or places. In the main, it appears to have plied between Calcutta and the North Andaman. In order to be allowed to leave the Calcutta port, it required a port clearance certificate and in order that a port clearance certificate could be obtained from the customs authorities, it was necessary to produce before them an income-tax clearance certificate. It appears that Clegg, Cruickshank and Co. Ltd., who were the local agents of the owners, and thereafter the appellant company itself, undertook to the Income-tax authorities to pay any income-tax for which the owners, might be liable on their freight earnings. Apparently on the faith of that guarantee, the Income-tax Officer went of issuing clearance certificate during the initial period without any question and that state of things went on till February 1956. In February 1956, the Income-tax Officer, then dealing with the matter, became a little more inquisitive and following some discussion with the representatives of the appellant company, he required them by a letter, dated February 21,1956, to let him know whether the hire for the ship had been paid to the owners in accordance with clause 6 of the charter-party and if it had been, what the actual amount of the hire, taken along with all other expenses, paid or payable on behalf of the non-resident owners, was. It will be recalled that According to clause 6, the hire was payable in Calcutta and the Income-tax Officer must have thought that if payment had been made in accordance with that clause, a non- resident was receiving payments within the taxable territories and, therefore, it would be necessary to collect tax on such payments. The company replied to the Income-tax Officer, s letter on March 6, 1956, and informed him that the hire had been paid as per clause 26 of the charter-party, irrespective of clause 6. That statement meant that the hire had not been paid in Calcutta, but had been paid in London. The appellant, however, annexed to its letter a statement "showing the actual amount of hire, commission and other expenses paid and net amount remitted."

7. The statement, so annexed, was prefaced by something in the nature of an abstract. The figures entered in that abstract are not very intelligible and I shall put them on one Side. The statement itself was in the form of entries made in four columns, the first of which gave the period concerned, the second, the total amount of the monthly hire, the third, the disbursements and the fourth, the net amount remitted. The figures entered in the third column showed the between September 1954 and March 1955 the total amount of the disbursements had been Rs. 52,109-11-0; and similarly between April 1955 and February 1956 the total amount of the disbursements had been Rs. 69,768-13-6. The disbursements consisted of advances made to the master, costs of repairs and commission paid to the local agents of the owners. What was remitted to London was only the balance of the total amount of the hire after deduction of the amount of the disbursements.

8. On a perusal of the statement furnished by the appellant, the Income- tax Officer took the view that the amount of the disbursements constituted payment in India to a non-resident of a chargeable sum, to which section 18(3B) of the Income-tax Act applied. Accordingly, on March 17,1956, he addressed a letter to the appellate company in the following terms :

> "Kindly refer to your letter No. 97A/1324/56, dated March 6,1956. It is aparent from the enclosures to the said letter that Rs. 52,109 and Rs. 69,768 were constructively received in India by the non-resident owner of the above mentioned vessel during 1954-55 and 1955-56 respectively.
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> You should have, therefore, deducted and paid tax under section 18(3B) in respect of such income. As this has not been done, you have rendered yourself liable for laymen of such taxes under section 18(7) of the Income-tax Act, 1922. I am accordingly enclosing necessary chilliness for payments of such taxes. Kindly note that these taxes should be paid within March 1956."

9. The appellant did not admit its liability to make the payment demanded and some discussion with the Income-tax Officer appears to have followed. In the meantime, the vessel had changed hands a second time, passing first from the ownership of the Newland Steamship Co. Ltd. to that of Pan Norse Steamship Co. S.A. of Panama, and Next to the ownership of Messrs. Wallem & Co. Ltd. It appears that the newest owners, Wallem & Co. Ltd., while repudiating liability to pay any Indian income-tax, nevertheless, offered as a measure of compromise to pay a sum of Rs. 5,000 as representing their proportionate share of the tax which was said to be due from the owners. The Income-tax Officer did not agree to accept that payment, not did he modify the demand he had made of the appellant company. In the end, the appellant company paid the tax demanded by three chilliness on May 18,1956.

10. Thereafter, on May 18,1956, the appellant moved this court under article 226 of the Constitutions for a rule on the Income-tax Officer, directing him to show cause why a writ in the nature of certiorari should not be issued, commanding him to certify and return to this court the records relating to the proceedings and for a peremptory order quashing the proceedings, if the Income-tax Officer made no answer or made an insufficient or false answer. A rule was issued on that application, but at the final hearing it was discharged by Sinha, J. It is against the order discharging the rule that the present appeal is directed.

11. According to the judgment of Sinha, J., the appellant's case before him was put in the following way : The amounts paid on account of disbursements had been paid under the provisions of clause 14 of the charter-party and having been so paid, they constituted loans advanced to the owners and not part payments of the hire. Assuming the amounts were not loans, but part payments of the hire, they were still not chargeable to tax under the provisions of the Indian Income-tax Act, because the part payments had not been received by the owners bin India. They were also not chargeable within the meaning of section 18(3B), because, in any event, they were merely gross receipts in the hands of the owner and no one could say that they constituted income till all other items of receipt and the expenses incurred in connection therewith had been taken into account and some taxable income

found. The learned Judge repelled each one of those three contentions.

12. Before us Mr. Mitra, who had appeared before the learned trial Judge as well, repeated his contention that the amounts of the disbursements were mere loans and since the Income-tax Act did not charge borrowings, they were not chargeable under the provision of the Act. He disclaimed altogether the second contention attributed to him by the learned judge and submitted that the point about the sits of the receipts had really been raised on behalf of the Department and the cases which the learned Judge had mentioned as cited by him had really been cited by the Department's counsel. Indeed, he stated categorically that the amounts paid by the appellant as disbursements had been, according to him also, paid in Calcutta, Nor did he indicate in his opening address that he wished any longer to contend that the amounts of the disbursements could not be treated as amounts chargeable under the providence of the Act, for the reason that, in any view, they were merely gross receipts in the hands of the owners. The only other points besides the point that the advances were loans, which Mr. Mitra formulated, was that the amounts concerned, having been paid for disbursements, were obviously earmarked for the expenditure and consequently they could not be chargeable as income. as, however, the argument proceeded, Mr. Mitra came to think that he ought also to press the point the, in any event, the payments were merely some revenue receipts in the hands of the non-resident owners sand could not be held to be chargeable to tax as income. He reverted to this points after I had occasion to call the attention of the parties to the decision in Commissioners of Inland revenue v. Corporation of London. The points ultimately argued were thus the three I have indicated.

13. Before proceeding to deal with the contentions of Mr. Mitra, it will be convenient to read section 18(3B) of the Act. I need not read section 18(7), for that sub-section only provides that if any person, being responsible for deduction of tax under section 18, fails to do so, he himself shall be treated as in default in respect of the tax. The main section with which we are concerned is section 18(3B) which, so far as material, rags as follows :

> "Any person responsible for paying to a person not resident in the territories any interest not being 'interest on securities on securities', or any other sum, chargeable under the provisions of this Act shall, at the time of payment, unless he is himself liable to pay any income-tax and super-tax thereon as an agent, deduct income-tax at the maximum rate."

14. It is clear from this language that in order that the sub-section may be attracted, it is necessary that there should be a person responsible for making a payment to non-resident and that the payment concerned should be either of interest, on securities, or of any other sum chargeable under the provision of the Act. There is no question in the present case that the appellant company was responsible for making certain payment to a non-resident. The only question is whether the payments with which this case is concerned, namely, the payments made on account of disbursements, were amounts chargeable to Indian income- tax.

15. I would at this stage point out to curious instances of oversight with appear to have occurred on the part of everyone in the Cases I have pointed out, the statement furnishes by the appellant

company to the Income-tax Offer showed clearly enough that what is called disbursements had been paid on three accounts, namely, on account of commission wish was subsequently explained to be commission paid to Clegg, Cruickshank and Co. Ltd, advance to the ship's master for disbursements and cost of repairs. Indeed, the petition with which the appellant came to the court itself stated in paragraph 21 that of the sums paid out on account of disbursements on which the Income-tax Offer had levied tax, Rs. 32,092-5-9 had been paid to Clegg, Cruickshank and Co. Ltd., and Rs 9,028 had been paid to over repairs to the vessel and the cost of bunker at the time of re-delivery to various persons resident in the India. In spite of these statements as to the true nature of a part of the disbursements, the case proceeded before the learned trial Judge on the footing that the whole amount had been paid the appellant company under clause I4 of the charter- party 'for ordinary disbursements for the vessel's account". It is admitted", observed the learned Judge, "that moneys have been paid under clause I4 by the petitioner in India and they have been deducted from hire. The amount also is not in disputes." Clause I4 the charter- party, however, makes no mention of payments of commission to local agents the owners, nor of any payments on accounts of repairs to the ship. how the payments made on those two accounts could also have been treated as payments made under clause I4 of the charter-party, it is impossible to see. Mr. Mitra told us candidly that it was an oversight on his part that in of definite instructions on the matter received from his clients, he had not distinguished between the payments made of ordinary disbursements on the vessel's account and the payments made as commission to the agents of the owners or for repairs to the ship. The distinction is not without importance, because, the whole of the first arguments of Mr. Mitra was that under the very terms of clause 14 of the charter-party, the advances made under its provisions would be loans granted to the owner, at an interest. It there were payments to which clause 14 did not apply and if there was nothing to show how or by what authority the appellant company had made those payments, it is obvious that the argument that the payments other then those payments, it is obvious that the arguments that the payments other than those for ordinary disbursements, were also loans cannot possibly be sustained. I do not, however, propose to pursue the distinction in this appeal and shall deal with the contentions raised at the bar on the footing that the whole of the advances were made under the provisions of clause 14 of the charter-party. I am doing so particularly because even the Department was remiss in this respect and did not point out to the learned Judge the distinction which the petition itself disclosed.

16. The other oversight, if oversight it was, appears to me to be far more material. One of the reasons advanced in support of the contention that the amounts paid for disbursements were loans was that under the provisions of clause 14, they were to carry interest. It appears, however, as far as can be seen from the materials on record, that the appellant company never treated these payments as loans at all, but treated them as per-payments of the freight. There is no statement in the petitions that the appellant company had ever charged interest on the advances or that, treating itself as a creditor in respect of the advances made, it had repaid itself by setting off its claim against that of the owners and deducting from the hire amounts advanced withe interest thereon. On the other hand, the statement furnished to the income-tax authorities, to which I have already referred, shows that, invariably and in each month, the company remitted to the owners the entire balance of the hire after making a deduction of only the actual amount paid by it for the disbursements. If one takes the figures in respect of any month and adds up the amount entered in the third column, which is the amount of the net sum remitted, one always gets the total amount of the hire chargeable

under the charter-party. The total amount of the hire was for a certain time Rs. 56,097-6-3, but it was subsequently increased to Rs. 96,470-6-3. The statement shows that in each one of the months of the two income-tax years concerned, the master, or the master and the local agents of the owners, got a portion of the hire and the owners got the entire balance, Nor is that all. Under clause 26 of the charter-party, it is the charters who have to apply for and obtain exchange amounts which they wish to remit to England. For what amounts the appellant asked for exchange control approval will appear from what is stated in paragraph 14 of the petition and from a letter of the Assistant Director General of Shipping, dated November 17,1955, and appearing at page 41 of the paper book which shows what sterling exchange was made available to the appellant at its request. It appears, that the appellant asked for a release of sterling exchange on the basis of the agreed hire for he vessel, less only 3 per cent., brokerage payable to Clegg, Cruickshank and Co. Ltd., and disbursements, if any, made by it on behalf of the owners. There was no deduction made on account of interest. The appellant thus appears to have proceeded throughout on the footing that of the total amount of the agreed hire, it was paying a part in India to the master for his ordinary disbursements or for the repairs of the vessel and to the local agents of the owners as their commission and it was paying the entire residue by transmitting the same to England. It is true that clause 14 of the charter-party mentioned advances and some interest to be charged thereof, but the actual acting of the appellant company seems to have been on an altogether different basis. On the basis on which the appellant company acted, it appears to me impossible to-reconcile what it did with the notion that it was advancing loans to the owners.

17. Since, however, the case proceeded in the court below with the consent of the everybody concerned that the payments were made in accordance with clause 14 of the charter-party and the incidents of payments under that provision, as mentioned there, have to be regarded, I shall examine that position as well.

18. The first question is whether - and I am proceeding now on the basis that the entire amount was advanced to the ship's master for ordinary disbursements-the amounts paid were loans and not part-payments of the hire. The arguments before us turned on the construction of the particular chart-party before us which was entirely proper, but it also proceeded on the footing that the matter was free of authority. In fact, there is a very extensive literature on the subject which has been discussed in all the leading text-books on charter-party before us which was entirely proper, but it also proceeded on the footing that the matter was free of authority. In fact, there is a very extensive literature o n the subject which has been discussed in all the leading text-books on charter-party before us which was entirely proper, but it also proceeded on the footing that the matter was free of authority. In fact, there is a very extensive literature on the subject which has been discussed in all the leading text-books on charter-parties or shipping, for example, Maclachlan on Merchant Shipping, 7th Ed. p. 434 et seq., Carver on Carriage of Goods by Sea, 3rd Ed., p. 664 et seq. and Abbott on Law of Merchant Ships and Seamen, The main proposition which does not require any authority naturally it that whether money advanced by a merchant is to be considered as a loan to be reimbursed by the owner or as part payment of the freight not dependent upon that determination of the voyage must depend upon the terms of the written instrument, upon the construction of which the question arises. "But the very elaborate discussion of the case law, particularly in About, is illuminating. The leading authority on the subject is the decision of the house of Lords in the case of

allison v. Bristol Marine Insurance Co.

19. The question whether an advance made by a charter to the ship's master for ordinary disbursements is a loan or a part-payment of the freight is of importance not for taxing purposes alone, but for another vital purpose as well. Under the relevant rule of Enaglies law which eminent Judges have declared to be anomalous, but have, at the same time, found it impossible to disturb, because of the depth of is roots in precedents, per-payment of a part of the freight can never be recovered from the owner of the ship, even though the goods may be lost by the loss of the ship or otherwise, in which case the freight is never really earned. On the other hand, if an advance is a mere loan, its incidents are in no way linked with the incidents of the contract of carriage and it is always recoverable as money lent. A provision that the charter will advance to the master of the ship such amounts as he might require for ordinary disbursements is now a common feature of all charter-parties, whether they relate to a voyage charter or they relate to a time charter and the question whether such advances are loans and, therefore, recoverable, irrespective of the fortunes of the voyage or are part-payments of the freight and, therefore, every recoverable is one of not infrequent occurrence. The law, however, has long been well established, seeing that all the leading authorities are authorities of great age. The principle which one can deduce from the authorities of great age. The principle which one can deduce from the authorities is that if the terms of the charter-party show that the advance was intended to be a part-payment of the freight may be direct as well as indirect. One indication which has always been held to be conclusive is where the owner takes the advance and agrees to allow a rebate for the cost of taking out an insurance in respect of the prepaid freight. A provision of that character is regarded as conclusive, because while pre-paid freight can be insured, a mere loan cannot be.

20. The charter-party in the present case provides for advances to be made by the charterer for ordinary disbursements for the vessel's account. It allows the charterer to charge interest on the advances made by it, but, at the same time, provides that it will be entitled to deduct its dues on account of such advances from the hire payable to the owner. On the one hand, there is thus a provision for charging interest and, on the other, there is a provision for deducting the advance made from the amount of the hire. The effect of a provision for deduction can be seen from the observations of some of the learned Judges in the well- known case of Manfreld v. Maitland. That was a case where one-half of the freight was to be paid in cash on unloading and right delivery of the cargo and the remainder by bill on London at four months' date; and then the charter-party provided that the captain was to be supplied with case for the ship's use. The question being whether amounts paid to the master under the last provision for the which the master had drawn a bill was a loan or a payment of freight in advance, the Court of King's Bench unanimously held that it was a loan. The reason for the decision was that the provision for advances to the captain came last in the charter-party after full provision had been made for the payment of the freight and that, there was nothing whatever to show that the rights regarding the freight and the liability for the advances made to the captain were intended to be inter-linked. "In the previous part of the instrument", observed Bayley, J., "there is an express stipulation as to the manner in which the freight is to be paid, but it is altogether silent as to any deduction for advances from the freight. The stipulations is that one- half of the freight shall be paid in cash on unloading, and the remainder by a bill on London at four month's date. Now instead of this, there would have been added, deducting there out

the money, previously advanced, if such deduction had been intended to be made. It seems to me, therefore, that in the absence of any such stipulation, this was money to be advanced as a loan by the freighter." The import of the observation of the learned Judge obviously is that if there had been a provision for the deduction of the amount advanced from the amount of the freight, he would not have held that it was a loan, but would have held that it was a part- payment of the freight.

21. The other provision in the charter-party before us is the provision regarding the payment of interest which undoubtedly suggests at first sight that the amount advanced is at least initially a loan. On the turn effect of a provision regarding interest, there is an illuminating analysis in the case of Allison v. Bristol Marine Insurance in the speech of Lord Hatherley. The question before the House in that case was, in the words of Lord Chelmsford : "Was it an advance in the nature of a loan, or was it a per-payment of half the freight ?" Under the charter-party, freight was to be paid on unloading and right delivery of the cargo at the after the rate of 42s. per ton of 20 cwt. on the quantity delivered. It was then provided that such freight was to be paid, say, "one-half in cash on signing bills of lading less four months' interest at bank rate, but not less than 5 per cent., per annum, 5 per cent., for insurance and 2 1/2 per cent .,on gross amount of freight in lieu of consignment at Bombay, and the remainder of the right delivery of the cargo, less cost of coals short delivered, in cash." Dealing with that provision, Lord Hatherley observed as follows :

> "What seems to have happened is that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid during a long voyage being kept for a long time out o their many have entered into tan arrangement with the charter to this effect : I shall wish to have my money in hand, to some amount at all events, upon this charter of freight; I, therefore, stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment, and I will give a farther rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it back in the event of there being a loss of the cargo, the risk becomes yours and not mine."

22. The effect of this observation again is that a provision for an interest does not necessarily indicate that the amount advanced is a loan, but it may merely be a method providing for granting the charter, who makes an advance payment, a rebate in consideration of the commendation extended by him.

23. On the basis of the authorities to which I have just referred and the principles to which I have adverted it appears to me that advances stipulated for in clause 14 of the charter-party in the present case were not loans, but were per-payments of a part of the hire, for which the charter agreed to allow a certain amount of rebate in the form of interest. Particularly is that conclusion passed upon me by the provision that the charterer will be entitled to deduct its dues from the hire.

24. It appears to me, however that for the purpose of the present case the question weather the advances made under clause 14 were or were not initially loans is not of much consequence. What we have to see is whether any payment was made by the appellant company to the non- resident

owner within the taxable territories. If such payments were made, then apart form the other questions as to whether they were chargeable under the provisions of the Act, section 18(3B) will obviously be satisfied. Even assuming that the advances when made were loans, it is nobody's case that they remained unpaid. In order that they could be repaid money belonging to the ship's owners would have to be applied to their repayment. If, as I have assumed, at the time the advances were made, the amounts were advanced as loans, then in spite of such advances, the entire amount of the hire payable at the commencement of the next month remained outstanding in the hands of the charter, unreduced by an payment. If the charter paid itself subsequently out of the amount of the hire, it could do not only by taking therefore an amount equivalent to its dues as money belonging to the owners and as paid by them in liquidation of the debt constituted by the advances. Surely, the charter could not pay itself with its own money. Whether the procedure is called a set-off or first a national payment of the money to the owners and then repayment by them through the charters, the hire due to the owners was received and utilised by them in Calcutta, because it was with that portion of the hire and nothing else that the advances made by the charterer to the master on the owners' account were repaid by them here. I am entirely unable to see how the charter could repay itself, unless the money with which it repaid became, before such repayment, the money of the debtor, that is to say, the money of the owners. If the requisite portion of the hire had to become the owners' money in Calcutta before it could be applied to the repayment of the charterer's debt, it was to my mind, constructively received by the owners in Calcutta, as rightly held by the Income-tax Officer.

25. The matter will appear exceedingly simple if one only looks at the statement furnished by the appellant itself. Taking the first of the months recorded there, namely September 1954, the total hire is shown as Rs. 56,097-6-3, disbursements are shown as Rs. 1,682-14-9 and the net amount remitted is shown as Rs. 54,414-7-6. According to this statement the owners received in London only the sum last mentioned and if the balance of th hire did not remain unpaid, as nobody's contention is that it did, one may pertinently enquire when that balance was paid and with whose money. I have already pointed out that the course actually pursued by the appellant company itself excluded altogether the idea of a loan and indicates that the appellant was paying commission to the local agents of the owners or paying the ship's master the amounts required by him for disbursements on the basis that it was paying of a part of the freight. But assuming that the charterer had initially advanced loans and that it had ultimately deducted its dues from the hire, the loan was obviously repaid by the deduction and, therefore, repaid by the application of the corresponding amount out of the amount of the hire and application thereof as the owner's money. On the statement, the difference between the full amount of the hire and the amount remitted to London in each individual month could only have been paid to the owners in Calcutta, because it is nobody's case that it was paid in London, nor anybody's case that it was to paid at all.

26. For all the above reasons, I am of opinion that the advances made in the present case were not loan, but pre-payments, of portions of the hire; that even assuming that they were loans, that character borne by them initially is immaterial for our present purposes, because even if they were loans, they were repaid in Calcutta by deduction from he hire due to the ship's owner's and the process of deduction involved a conversion of a corresponding amount out of the hire into money paid to the owners and received by them in Calcutta, before it was applied to the repayment of the

advances. The first ground urged by Mr. Mitra must, accordingly, fail.

27. The next of Mr. Mitra's contention was that even assuming that the advances made to the ship's master were part-payments of the hire, they were yet not chargeable under the provisions of the Indian Income-tax Act and, therefore, not within the ambit of section 18(3B). I am of opinion that this contention also cannot succeed.

28. Even on the footing that the advances were loans and were repaid by deduction from the hire, the position was, as I have endeavored to show, that money belonging to non-resident owners was applied under their instruction to the payment of their creditors in India. If so, the amounts were received by them in India, as is established by the decision in Keshav Mills Ltd. v. Commissioner of Income-tax to which the respondent referred. The question whether, although received in India the were chargeable under he provisions of the Income-tax Act within the meaning of section 18(3B) however remains.

29. If "chargeable under the provisions of this Act" means actually liable to be assessed to tax, in other words, if the sum contemplated is taxable income, a difficulty is undoubtedly created as to complying with the provisions of the section, It appears that before the trial Judge, Mr. Mitra referred to the difficulty in the of its forms. A lay person having to make some payment to a non-resident and required to decide whether the amount he would be paying would be actually taxable in the hands of the payee would find himself faced with an almost impossible task. It was that difficulty which made me think at one stage of the argument that the expression "any other sum chargeable under the provisions of this Act" could perhaps be legitimately construed in the sense in which the expression "annual payment", occurring in the old rule I of Case III of Schedule D to the English Income Tax Act, had been construed in England and I referred to the decision in Commissioners of Inland Revenue v. Corporation of London (as conservators of Epping forest). Under rule I of Case III, tax is payable on "any interest of money or annual payment" and a person, making an annual payment" and a person, making an annual payment to another, is authorized or indeed required by rule 19 to deduct therefrom the appropriate amount of tax. The assessee in the case to which I have just referred, raised exactly the question that Mr. Mitra raised here and contended that the expression "annual payment" could not cover payments which, in the hands of the recipient, would be mere trading receipts, against which expenses would have to be set off before it could be determined whether or not they contained any taxable income. The argument was founded on the famous dichotomy introduced by Lord Grain, M.C., in the notion of "annual payment" by his judgment in In re Hanbury. The learned Master of the Rolls had there said that there were tow classes of "annual payments" those which represented "pure income profit", that is to say, which would be taxable income in the hands of the recipient without any deductions, such as intrest or annuities, and payments which would be, in the hands of the recipient, mere trading receipts in a profit and loss account and would have to be taken into the reckoning merely as an item in the computation of the profits. The case had a chequered career, but ultimately in the House of Lords the contention was accepted. Lord Reid, who put the matter most directly, observed that although thee was no qualification or limitation in the words "annual payment", as appearing in rule I of Case III, a limitation had to be implied so as to exclude payments which, or the whole of which, could not be said to be income in the income-tax sense, He instanced particularly trading receipts

and pointed out that since a trader's income from his trade could be determined only after he had deducted his expenditure from his reputes, such receipts, when received from another person, could not be "annual payment" by the latter within the meaning of the rule. On the facts of the case, the House of Lords held that the amount contributed by the Corporation of London to themselves as Conservators of the Epping Forest were not of the nature of trading receipts, but were what Lord Greene had called "pure income profit." But their Lordships recognized the distinction between "pure income," that is to say, receipts which, in the words of Sir Remained Evershed, as he then was, had the "character of income chargeable itself as such to tax" and receipts against which expenses had to be set off in order to determine whether three was any taxable income. Their Lordships also held that the expression "annual payment" in rule I of Case III of Schedule D to the English Act contemplated payments of the former kind.

30. The provisions of section 18(3B) of the Indian Act are not dissimilar to those of rule 1 of Case III of Schedule D to the English Act. The subject-matter of tax under the former is interest other than interest on securities and any other sum chargeable under the provisions of the Act. The subject-matter of taxation under the latter is interest or other annual payment. Both require the payer to deduct the appropriate amount of tax from the sum payable to the payee. It, therefore, appeared to me at one stage of the argument that it might be correct to interpret the words "any other sum chargeable under the provisions of this Act" in the same way as the words "annual payment" had been interpreted in England. Earlier, however, I had also thrown out the suggestion that probably section 18(3B) could be satisfactorily construed and difficulties avoided, if the world "chargeable" was taken to mean not "assessable to tax", but as liable in its nature to be brought into computation in an assessment, that is to say, as belonging to one or other of the heads of income, as set out in section 6 of the Act. In that view, if the amount payable to a non- resident appeared to be, say, income from property or profits and gains of business, profession or vocation or income from other sources, it would come within the purview of the section : but if it was an amount of a kind exempt from tax, such as agricultural income, it would be outside its preview. On a fuller consideration of the terms of the section and the relevant authorities, I have reached the conclusion that the view which I suggested earlier is the correct view. I am led to that conclusion, particularly by the provisions of section 18(3C) of the Act which suggests unmistakably that payments which, on receipt by the recipient, would be gross receipts in his hands, only a part or no part of which might be taxable, are not outside the contemplation of the section. Section 18(3C) Provides :

> "Where the person responsible for paying any sum chargeable under this Act other than interest, to a person not resident in the taxable territories, considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Income-tax Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable and upon such determination tax shall be deducted therefrom by the person responsible for making such payments in accordance with the provisions of sub-section (3B)."

31. This section can leave no doubt that it is not merely amounts, the whole of which are taxable without deduction, that is to say, amounts which Lord Greene called "pure income profit," which were contemplated by sub-section (3B), but amounts of a mixed composition, a part of which only

may turn out to be taxable income, are also contemplated. In taking that view, I am fortified by the authority of the Supreme Court. In the case of Aggarwal Chamber of Commerce Ltd. v. Ganpat Rai Hiralal, the Supreme Court had to consider where a particular party could be treated as an agents of a non-resident for the purposes of section 40(2) and section 42(1) on the basis of his having been in receipt of income, profits or gains chargeable under the Act, on behalf of the non-resident. Although the case was directly concerned only which sections 40, 41 and 42, the Supreme Court had occasion to refer also to section 18 which, indeed, is expressly mentioned in the fist proviso to section 42(1). The argument before the Supreme Court was that the total world income of the non-resident was not taxable and, therefore, the party in receipt of payments on its behalf was not receipt of profits and gains and could not, therefore, be treated or treat or treat itself as its agent. The contention thus was exactly the same as that advanced before us and it was to the effect that in order that a person might be an agent of a non-resident, he must be in receipt of an amount of taxable income on the non-resident's behalf. The Supreme Court negatived that contention with the following words :

> "If the Hapur firm rightly paid the tax on the profits, the respondent cannot be allowed to challenge the amount on the ground that his total world income was not taxable and he was entitled to his profits without deductions. That is a question which has to be agitated by the non-resident assessee at the time at his assessment. Those persons who are bound under the Act to make deduction to the time payment of any income, profits or gains are not concerned with the ultimate result of the assessment. The scheme of the Act is that deductions are required to be made out of 'salaries', 'interest on securities' and other heads of 'income, profits and gains' and adjustments are made finally at the time of assessment. Whether in the ultimate result the amount of tax deducted or any lesser or bigger amount would be payable as income-tax in accordance with the law in force would not affect the rights, liabilities and powers of a person under section 18 or of the agent under sections 40(2) and 42(1)."

32. This passage, to my mind, furnishes a complete answer to the contention advanced before us and fortifies me in the construction I have suggested of section 18(38).

33. Mr. Mitra sought to distinguish the decision of the Supreme Court on the ground that what the party, treated as an agent in the case cited, had received on behalf of the non-resident and paid tax on, was the amount of the profits of certain transactions between them. The sum which was received was thus, according to Mr. Mitra, not a gross sum, but an amount of profit and if it was profit, it was clearly chargeable under the provisions of the Act and, therefore, income, profits and gains in the restricted sense which he would ascribe to the words. The contention is fallacious on the face of it, because the so-called profits of a single mercantile adventure or a series of such adventures, which mean the surplus over the expenditure so far as those transactions are concerned, are bean means profits, that is to say taxable profits, in the income-tax sense. If Mr. Mitra's main contention be correct, namely, that the words "any other sum chargeable under the provisions of the Act" in section 18(38) and "income, profits and gains" in section 40(2) or 42 mean net income found to be taxable under the Act, gross receipts, the taxability of which or of a portion of which still remains to be determined, are not within the contemplation of either section. The so-called profits which had

been received by the Hapur firm in the case before the Supreme Court were no less gross receipts than any other receipt for the purposes of the assessment of the non-resident, because against them, and such other receipts of a revenue character that the non- resident might have against the totality of its receipts, would have to be set of its expenses before it could be ascertained whether there was any taxable income. The decision of the Supreme Court cannot, therefore, be distinguished on the ground which Mr. Mitra put forward.

34. The case before the Supreme Court bears a close analogy to the case in Nielsen, Anderson and Co. v Collins : Tarn v. Scanlan, which was cited before us on behalf of the respondent. One of the questions there was whether section 41 of the then English Act, which made tax chargeable in the name of "a factor, agent or receiver having the receipt of any profits or gains arising as herein mentioned," meant that the profits contemplated were net profits or gains on which the tax would actually be imposed and not gross profits or gains which on examination and when proper deductions had been made, would fade away and leave nothing upon which tax could be payable. The Court of Appeal in England held that gross profits were included. Lord Handowrth, M.R., held, in agreement with what Lord Justice Fry had said in an earlier case, that the words "factor or agent having the receipt of any profits or gains" contemplated gross profits or gains in which there might be wrapped up some net profits or gains, ultimately to be found chargeable to income-tax. I do not see why any other principle should apply to the construction of section 18(3B) and, in any event, the point seems to me to concluded by the decision of the Supreme Court, which mentions section 18 as well.

35. The second contention of Mr. Mitra must, therefore, also fail.

36. The third contention was that, in any event, the payments in the present case had been made for ordinary disbursements on the vessel's account and, therefore, the amounts concerned were clearly earmarked for expenditure. If they were amounts which the non-resident owner had to spend for the maintenance or the running of the chartered vessel, they were clearly not income in his hands and, therefore, could not be chargeable as such under the provisions of the Income-tax Act. This contention is also plainly not tenable, for it is one of the fundamental principle of income-tax law that one cannot determine for income-tax purposes the nature of a payment by inquiring what becomes of it or what must become of it after the payee has received it. It appears that a contention of the precise nature was advanced before the House of Lords in the case of Commissioners of Inland Revenue v. Corporation of London (as Conservators of Epping Forest) which I Have already cited. The payment there concerned was a payment made by the London Corporation under an Act called the Epping Forest Act, 1878, in order to make good deficiencies in the income of themselves as the Conservators of the Forest. The Act provided that if, at the end of a year, it appeared that the liabilities of the Conservators for expenditure incurred on account of the forest exceeded their receipts, the London Corporation would make good the deficit by making a contribution of an equal amount. The amount paid by the London Corporation in any particular year would thus be an amount intended to meet items of expenditure. It was contended that being so intended and destined, the amount of the contribution could not be income in the hands of the Conservators of the Forest.

> "The appellants point out," observed Lord Reid, "that no part of the sums paid by the city in this case can ever be profit in the hands of the Conservators, because the amount of any sum payable is measured by the amount of the Conservators' deficit, and, therefore, the whole of it must go to pay expenses and no part of it can ever be profit."

37. It will be noticed that the contentions was identical with that advanced before us by Mr. Mitra. It was disposed of by Lord Reid with the observation that the argument was based on a misunderstanding of what the Income tax Act meant by income or profit. An amount of the receptor surplus, the learned Lord pointed out, was none the less income, because the recipient was bound to use it in a particular way and could not enjoy it as a profit in the ordinary sense : see page 329. There were observation to the same effect by Lord Normand which appear at page 324 of the report. I do not think I need say anything further to dispose of the third and the last contention of Mr. Mitra.

38. I have now discussed all the contention, on the merits of the case raised before us on behalf of the appellant. On behalf of the respondent, it was contended that no writ of certiorari could issue in the facts of the present case, because the Income-tax Officer had undoubted jurisdiction to deal with the question of the appellant's liability to tax under section 18(7) of the Act and that worst that could be said was that he had committed a mistake of law in exercising his jurisdiction. If, it was contended, the Income-tax Officer had jurisdiction to take season of the case, he had jurisdiction to decide wrongly as well as rightly the question of the appellant's liability and the mere fact that, the view of the appellant, he had decided it wrongly, or even if he had really decided it in an erroneous manner, such error was not amenable to correction by the issue of a writ of certiorari. When the argument was presented before us in that form, I myself had occasion to recall an old case of the English court, reported, in Rex v. Inspector of Taxes and Commissioners of Income Tax. There, applications were made by any assessee for writs of prohibition, certiorari and mandamus with respect to certain additional assessments of income-tax and rules nisi having been issued, they were ultimately discharged. Lord Hewart, C.J., as well as Lush and Bailhache, JJ. all held that since the Surveyor of Taxes had jurisdiction to deal with the matter he had dealt with, he had acted within his jurisdiction, even if he had taken a mistaken view and, therefore, no high prerogative writ could lie. This case, however, reflects a view of the writ of certiorari which must now be held to be outmoded. As pointed out in the case of Rex v. Northumberland Compensation Appeal Tribunal, Ex parte shaw, the writ of certiorari had at one time fallen into desuetude and the courts were limiting its use strictly to cases of want or excess of jurisdiction. Since then, the true scope of the writ has been made clearer and it has, as has been observed, been revived and now errors of law are considered to be amenable to correction by the writ, if such errors appear on the face of the record. The supervision by means of the writ of certiorari goes, as the Privy Council observed in the case of Rex. v. Nat Bell Liquors Ltd., to two matters, one being the area of the inferior jurisdiction, together with the qualifications and conditions of its exercise and the other being the observance of the law in the course of its exercise. Mistakes in the observance of the law in the course of the exercise of jurisdiction are thus not outside the scope of a writ of certiorari. I must, therefore, hold that the mere fact that the Income-tax Officer had jurisdiction to deal with the question of the appellant's liability will not by itself exclude the issue of the writ asked for.

39. In order, however, that an error of law may be corrected by certiorari, it has to be an error apparent on the face of the record. As it has been otherwise expressed, the order, alleged to be vitiated by the error, must be a speaking order, that is to say, an error giving its reasons for the view taken therein and such reasons being manifestly wrong. It was contended that there was no speaking order in the present case and no error apparent on the face of the record. I am afraid, I am unable to accept that contention, because, in my view, the Income-tax Officer's letter of March 17, 1956, which contains his order, clearly speaks. Had it merely said that the appellant was liable for payment of certain taxes under section 18(7) of the Act, it might be a mute order with a closed mouth which no writ of certiorari could open. But the letter also says that the to amounts of Rs. 52,109 and Rs. 69,768 had been "constructively received in India" by the non- resident owner of the vessel. I think it cannot possibly be contended that the Income-tax Officer's letter does not contain an order or that the order gives no reasons and says nothing, by reason of which it may be condemned out of its own mouth. The whole basis of the Income-tax Officer's finding that the appellant had made itself liable under section 18(7) to pay tax which it ought to have deducted under section 18(3B) is that the amounts of disbursements, which it had paid to the non-resident, had been constructively received by the non-resident in India. I am, therefore, of opinion that whether there is or is not an error the finding of the Income-tax Officer - and I have found that there is none - it cannot are said that, as a matter of procedure, the remedy of a writ of certiorari could not be available against it, for the reason that it was a non-speaking order.

40. There is, however, another ground upon which the appellant's right to a writ was questioned. Since we have held against the appellant on the merits the matter is of little importance, but I consider it necessary to deal with it, because it involves an important question of propriety and procedure with which the right to a writ is also bound up. I have already stated that having paid the tax on May 8, 1956, the appellant moved this court under article 226 of the Constitution on the 18th of May. In paragraph 26 of the petition it stated that it had no other alternative or adequate remedy. Yet it now transpires that it actually preferred an appeal against the very order which it was challenging by the petition on June 7, 1956. The respondent, in paragraph 24 of his affidavit-in-opposition, denied that the petitioner had no they alternative or adequate remedy and asserted that he had ample remedy within and under the Act. The denial was traversed by the appellant in paragraph 18 of its affidavit-in-reply where it repeated it submissions made in paragraph 26 of the petition. The affidavit-in-reply was affirmed on September 3, 1956. It thus appear that although the appellant had actually filed and appeal before the Appellate Assistant Commissioner as long ago as on June 7, 1956, it was insisting even on September 3, 1956, and against the denial of the respondent, that it had no adequate or legal remedy. Indeed, even in the course of the argument before us, no mention was made on behalf of the appellant that it had also preferred an appeal and the matter was brought to our notice only by an affidavit on the behalf of the respondent. It is stated in the affidavit that the deponent had come to know of the pendency of appeal only on May 6, 1958, when he had discovered it accidentally from a list of appeal pending before the Appellate Assistant Commissioner.

41. On the facts above stated, that question before us is not whether a writ of certiorari can be asked for or issued when there is an alternative remedy. It is well known that the existence of alternative remedy is no bar, or at lead not an absolute bar, to the issue of a writ of certiorari when the

circumstances call for its issue, although the fact that such a remedy exists may be taken into consideration by the courts approached for a writ. Nor is the present case one where the chain of the alternative remedies was pursued up to the end and the petitioner having exhausted those remedies and obtained to relief, was turned to the remedy by way of a writ under the Constitution. Mr. Mitra cited to us a recent decision of the Supreme Court in the case of State of U.P. v. Mohammad Nooh, but all that the case holds is that the superior courts may issue a writ of certiorari in particular cases, even if there be an alternative remedy and if an appeal to an inferior court or tribunal was available, but not availed of, or recourse had been had to it with the result that the order questioned had been confirmed. The principle laid down by the Supreme Court must be accepted and applied, but I do not see that it covers the present case. The present case is one where it is not merely the position that an alternative remedy existed when the appellant approached the court, but one where, after moving this court for a writ and after obtaining a rule, it went to pursue simultaneously a parallel remedy way of an appeal under the ordinary law and kept its recourse to the alternative remedy from the knowledge of the court up to the last moment. We are informed that the appellant's appeal before the Appellate Assistant Commissioner is still pending. In that state of the facts, the respondent has contended that we ought to follow the principle laid down by the Supreme Court in Rashid and Sons v. Income-tax Investigation Commission. The facts in that case were that an assessee, aggrieved by a decision of the Income-tax Investigation Commission, made a number of applications before the Punjab High Court under article 226 of the Constitution, but the applications were turned down in the view that it was the Allahabad High Court which would have jurisdiction to entertain them and not the Punjab High Court. The reason for the view taken by the Punjab High Court was that although the Investigation Commission had its headquarters at Delhi and had in fact decided the petitioner's case there, the petitioner and his source of income were all within the jurisdiction of the Allahabad High Court and, therefore, on the principle laid down by the Judicial Committee in the case of Ryots of Garabandha v. Zamindar of Parlakimedi, it would be the Allahabad High Court which would have jurisdiction to deal with the applications. After the dismissal of his four applications, the assessee preferred as many appeals to the Supreme Court. The Supreme Court held the view taken by the Punjab High Court as regards the jurisdiction to be erroneous and it then fell to the court to consider what order it would make. It was brought to the notice of the court that the assessee had already caused a reference to be made to the High Court of Allahabad of the points involved in these cases under section 18(5) of the Investigations Commission Act and that the reference was still pending. "In these circumstances," observed the Supreme Court, "we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under article 226 of the Constitution at the present state." It was also contended that the income-tax authorities had not referred to all the matters which the petitioner had desired them to refer, but the Supreme Court pointed out that, for such omission, the Act itself contained ample remedies which might be pursued.

42. On the authority of the above case, it has been contended by the respondent that just as the Supreme Court refused to issue a writ at the instance of the petitioner before them on the ground that he had already caused a reference to be made under the provisions of the Investigation Commission Act and was pursuing a parallel remedy, so must we decline in the present case to issue a writ, even if the appellant proved itself otherwise to be entitled to it, because it had initially been lacking in candor with the court in failing to bring to the court's knowledge that it had also preferred

an appeal and because having elected to pursue another remedy, it must held thereto. This court, it has been argued, ought not to engage in deciding cases on applications for a writ simultaneously with other tribunals - in this case in inferior tribunal, deciding the same point at the same time. It was contended by Mr. Mitra in reply that the case decided by the Supreme Court was not an appropriate precedent to be followed in the present case, for the alternative remedy there was being pursued before the High Court whereas in the present case it was being pursued only before an Appellate Assistant Commissioner. I do not see that this difference in the facts makes any distinction and if anything, makes and position worse. In any event, it would be odd indeed and inconvenient in the highest degree if this court, while exercising jurisdiction under article 226 of the Constitution, took one view of the matters involved in the case and another division of the same court, while dealing with a reference of the same points, which might conceivably come up before this court in the chain of remedies under the Income-tax Act, took a different view. In my opinion, quite apart from the fact that the appellant was disingenuous with the trial court, the pendency of an appeal preferred by it against the same order would be sufficient reason for our not issuing a writ of certiorari, even if we were convinced on the merits that the appellant was entitled to a writ. I may add that when the difficulty which the appellant had created for itself by preferring the appeal was being discussed and it was discussed at great length it was not suggested on its behalf that it would be prepared to withdraw the appeal.

43. On the question, the case in Rex v. Inspector of Taxes, to which I have already referred, is of some assistance. There ask the assessee had preferred an appeal, although he had moved the High Court for a writ, but it does not appear clear whether the appeal was preferred prior to applying for a writ or afterwards. In any event, at the time when the rules nisi came to be heard, the appeals were pending. The court gave that circumstance as one of the reasons for refusing the writs and observed as follows :

> "What the court sees before it is undoubted jurisdiction, decision within the ambit of the jurisdiction, a right of appeal whereby incorrect conclusions may be corrected, and an actual recourse to that appeal by the applicants who are before the court seeking these rules."

44. In those circumstances, the court observed that each of the applications must fail.

45. Mr. Mitra submitted in the end that whether the appeal preferred by his client was maintainable or not was a matter of great doubt and, therefore, the tendency of that appeal ought not to be a bar to the issuance of a writ. Since we have held against the appellant on the merits, it will not be right for me to make any observation as to whether the appeal is or is not maintainable, but it is pertinent to point out that the appellant has itself taken the view that an appeal lies and has in fact preferred an appeal. We are concerned, while considering the propriety or otherwise of the appellant's conduct and the expediency or otherwise of issuing a writ, to take into account only the basis on which the appellant has proceeded. It has taken the view that an appeal lies and is prosecuting an appeal and, therefore, we must proceed on the view that it is pursuing an alternative remedy in which it believes. As I have stated already, the question as to whether a writ of certiorari could or could not be issued in the present case in view of the appellant having preferred an appeal is of no

importance, since we have held against it on the merits.

46. The reasons in support of our decision on the merits has been given earlier. It was contended at one stage that the question of the true construction of section 18(3B) had been decided by Das Gupta, J., and myself in Appeal No. 151 of 1958, Dutt v. Anglo-India Jute Mills Co. Ltd. decided on March 21, 1957, but on going through the judgment, I do not think that it can be taken as a direct decision on the point. The question involved in that case was whether the residence contemplated by section 18(3A), now section 18(3B), was physical residence or residence in the income-tax sense, but the question as to what sums were chargeable under the provisions of the Act within the meaning of the sub-section did not call for any decision. There are one or two observations in the judgment made on the footing that the payments may be payments which are gross receipts in the hands of the recipient, but I cannot regard those observations as constituting a decision.

47. For the reasons I have given earlier, this appeal is dismissed with costs S.C. Lahiri, J.

48. I agree.

49. Appeal dismissed.