

PETITIONER:
M/S HASIMARA INDUSTRIES LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX WEST BENGAL-IX AND ANOTHER

DATE OF JUDGMENT: 13/05/1998

BENCH:
SUJATA V. MANOHAR, S. RAJENDRA BABU

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Rajendra Babu, J.

This appeal by special leave under Article 136 of the Constitution of India is preferred by an assessee under the Income Tax Act against an order made on 29th August, 1986 by the High Court of Calcutta in Income Tax Reference No. 683 of 1979. The question that fell for consideration of the High Court is as to deductibility of a sum of Rupees twenty lakhs out of the assessee's profits as sum was given by way of advance to M/s Saksaria Cotton Mills Ltd. for modernisation of its plants.

When Saksaria Cotton Mills Limited was in the process of Liquidation the assessee-company which owned tea estates filed a scheme in those proceedings and entered into a leave and licence agreement with that company. Originally the agreement was for a period of three years from 1st April, 19*63 to 31st March, 1966 which was extended by mutual agreement upto 30th June, 1966. Clause 13 which is relevant for our purpose in the agreement reads as follows:-

" In the event of any new and complete unit or plant and/or machinery and/or reequipment being installed by the licence at the licensee's own costs within the licensed premises no depreciation will be paid by the licensee to the licensor in respect there of and on the expiry of the period of the licence or its earlier determination by the licensee, the licensee will be entitled to remove and take away at the licensee's own cost such new plant, machinery and equipment provided that the licensee will in that event restore the licensed premises to the contention in which they were at the time of commencement of the license and make good the damage, if any, caused to the license and

make good the damage, if any, caused to the licensed premises by removal of such new plant, machinery and equipment. Mills machinery, plant, equipment, fittings and fixtures being provided by the licensee in replacement of any existing part or parts of such machinery, the licensee will be entitled in lieu thereof to retain such sold part or parts of such machinery so replaced and to deal with the same in such manner as the licensee deems fit. If the licensee desires that the licensor shall bring any new plant, machinery or equipment or unit it will be in the absolute and uncontrolled discretion of the licensor whether to do so or not and on such terms as may be agreed to at that time."

The amount of Rupees twenty lakhs is said to have been given by way of advance in terms of the said clause.

Before the Assessing Officer the assessee claimed the advance of Rupees twenty lakhs as deductible on the ground that it became irrecoverable on account of the incapacity of M/s Saksaria Cotton Mills Limited to repay the same. The Assessing Officer disallowed the claim stating that the amount represented as advance to M/s Saksaria Cotton Mills Limited for modernisation of its factory and the said amount was not taken into consideration in computing the income of the assessee in any assessment year. He also held that the said sum did not represent the money lent in the ordinary course of business. He further noticed that even otherwise the said sum was not entitled to deduction because it had not become a bad debt in the relevant year of account and the assessee made no effort to recover the same. On appeal against the assessment order, the Appellate Assistant Commissioner held that the advance given by the assessee Company could not be recovered from M/s Saksaria Cotton Mills Limited and had to be allowed as a deduction as revenue expenditure. He was of the view that assessee-Company could not have removed the plant and machinery and the debenture holders of M/s Saksaria Cotton Mills Limited had lien over the entire plant and machinery. Thus, the said amount represented loss incurred by the assessee in the course of carrying on of its business and should be allowed as deduction on account of ordinary commercial principles. The matter was carried in appeal by the Department to the Income Tax Appellate Tribunal. The Tribunal noticed that the said amount of Rupees twenty lakhs which was advanced was to be treated as capital investment as per the resolutions of the Board of Directors of the assessee Company. Thus, the assessee had acquired an advantage of enduring nature and the claim of the assessee was not allowable as business loss. The amount having been spent on the improvement of the mill was not advance in the ordinary course of assessee business nor was it incidental to such business.

Aggrieved by the order of the Tribunal on a reference made to the High Court at the instance of the assessee, the High Court at the instance of the assessee, the High Court held that it is a settled principle that loss of money lent or advanced would be a capital loss unless the loan was made by a money lender for whom money was his stock-in-trade and

such a situation would arise in case of a banking or money leading business where money is treated as stock-in-trade. It was also noticed by the High Court that although assessee had some money lending business, the amount of Rupees twenty lakhs was not lent to M/s Saksaria Cotton Mills Limited as a loan transaction, but pursuant to clause 13 of the Agreement. It was also noticed by the High Court that it was not a trade dept and the assessee advanced a sum of Rupees Twenty lakhs so that new plants and machinery could be bought by M/s Saksaria Cotton Mills Limited for the benefit of the assessee during the period of the agreement. Thus, the assessee had the advantage of using a new and more modern profit-making apparatus. When the Company itself had not treated the advance of Rupees twenty lakhs to M/s Saksaria Cotton Mills Limited as by way of a loan transaction and the amount had been treated by the assessee as the capital advance as evidenced by the resolutions based by the Board of Directors at the time of granting of loan, the High Court held that the findings of the Tribunal should be affirmed and answered the question referred for its opinion against the assessee. It is against this order the present appeal is filed by special leave.

Ms. Radha Rangaswami, learned counsel for the appellant submitted that though the assessee had made a lumpsum payment not in order to gain an enduring benefit, out only to augment income in the course of its ordinary business and sought exemption was not capital in nature being allowable as revenue expenditure and in terms of Section 37 of the Income Tax Act.

The learned counsel for the Department contended that the view of the decision of this Court in Hasimara Industries Limited vs. Commissioner of west Bengal and Another (1998) 1 SCC 503 in the very case of the assessee there was hardly any thing left for decision by us. He submitted that the agreement which is subject matter of consideration in these proceedings was also considered in that decision and in the context of another transaction had been interpreted.

Undaunted by the submission of the learned counsel for the Department, Ms. Radha Rangaswami persisted in her argument. She relied on Alembic Chemical Works Co. Ltd. Vs. Commissioner of Income Tax, Gujarat 177 I.T.R. 377. That was the case where the assessee who was engaged in manufacture of antibiotics including penicillin acquired knowhow to produce higher yield and sub-culture of strains of penicillin and there was no evidence to indicate that this was not in the line of existing manufacturing operations and, therefore this Court took the view that the payment was made in the course of carrying on an existing business and the outlay was incurred for the purpose of acquiring the technical knowhow in relation to its business and considering the rapid strides in science and technology is to pigeonhole an outlay, such as in this case as capital. It was on that basis the Court held that though lumpsum payment had been made once for all it was not capital in nature and attracted the deduction under Section 37 of the Income Tax Act.

Again, the learned counsel for the assessee relied upon the decision in Commissioner of Income Tax, Kerala vs. Malayalam plantations Ltd. 53 I.T.R. 140 wherein estate duty was paid on the death of non-domiciled shareholders and was "for the purpose of the business" and "for the purpose of earning profits" and therefore, allowable as business expenditure. However that is not the position in the present case wherein the assessee has given an advance in a sum of

Rupees twenty lakhs for a purpose not in the line of its business as found by the Tribunal which is the last fact finding authority. In *Empire Jute Co. Ltd. Vs. Commissioner of Income Tax 124 I.T.R.1* certain loom hours were purchased by one member of an assessee from another member and the members in the Association had bound themselves to work their mills for limited hours per week and in those circumstances the price paid was held to be in the nature of revenue expenditure in terms of Section 10(2) (xv) of the Indian Income Tax Act, 1952 and not deductible. The test adopted in that case is the nature of the advantage in a commercial sense and where it is only the advantage in the capital field, the expenditure cannot be allowed, but if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitable while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The purchase of loom hours did not create any new asset and there was no addition to or expansion of the profit-making apparatus of the assessee nor the permanent structure of which the Income was the product remained the same. It was not enlarged nor did the assessee acquire a source of profit of income when it purchased the looms in question. The expenditure incurred was primary and essentially related to the operation or working of the looms which constituted the profit making apparatus of the assessee and was expenditure laid out as part of the process of profit earning. It was on that basis the claim was allowed. Therefore that decision will not help the assessee in the present case.

In *Commissioner of Income Tax vs. Hashimara Industries Limited. 175 I.T.R. 477* the very agreement with which we are concerned itself was subject matter of consideration by the High Court. Pursuant to the agreement amount was deposited with the cotton mills for acquiring profit making apparatus. Then there was closing down of the cotton mill and loss of deposit constituted capital loss. It was held in that case that the assessee's ordinary business was manufacture and sale of the tea and it started cotton manufacturing business acquiring the right to operate the mill belonging to another company for a specified period under a leave and licence agreement after depositing certain sum in terms of the agreements. After the expiry of the agreements M/s Saksaria Cotton Mills Limited itself managed the cotton mills out suffered loss and went into liquidation. Consequently, the sum deposited by the assessee remained unpaid. In those circumstances, it was held that the loss of the deposit was in the capital account and not business expenditure of assessee. That matter was carried in appeal to this Court in *Hasimara Industries Limited. vs. Commissioner* this Court upheld the view taken by the High Court.

It is clear from the findings recorded by the Tribunal and the High Court that the assessee's business is manufacture and sale of tea and is not engaged in cotton manufacturing business at all; that while it intended to enter into cotton manufacturing purposes did not set up a cotton mill, but obtained operating rights from another company under the leave and licence agreement for the purpose of acquiring the profit making apparatus for a duration of three years or a little more; that the business of running a cotton mill was not its own, but was only operating the said mill under leave and licence agreement; that the amount of advance in a sum of Rupees of twenty lakhs was given not for its own purpose by way of business

expenditure for modernising the mill, but as capital to the lessor who in turn had to modernise the mill. In the resolutions made by the Board of Directors it was clear that the transaction entered into was not in the nature of a loan transaction or a money lending transaction and thus the loss suffered by the assess was a capital loss and hence the amount could not be deducted from the assessee's income as business loss.

In the results, the view taken by the High Court affirming the view of the Tribunal appears to us to be correct and we dismiss this appeal. In the facts and circumstances of the case, there shall be no order as to costs.