

favour of borrowers and against rapacious money-lenders. I find myself in such complete agreement with the judgment impugned, that I do not find it necessary to cover the same ground.

I would, therefore, dismiss the appeal with costs.

BY COURT.—In view of the majority judgment of the Court, this appeal will be allowed and Mittra's Suit No. 105 of 1947 dismissed with costs throughout.

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Haridas Mondal  
v.  
Anath Nath Mittra

Hidayatullah J.

THE COMMISSIONER OF INCOME-TAX,  
BOMBAY

v.

M/s. FILMISTAN LTD.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

*Income-tax—Penalty for failure to pay tax—Appeal within time—Tax due paid after the period of Limitation—Appeal if barred—Indian Income-tax Act, 1922 (II of 1922), ss. 30, sub-ss. (1) and (2), 46(1).*

Against an order imposing penalty under s. 46(1) of the Indian Income-tax Act on account of failure to pay an instalment of Income-tax, an appeal was preferred. Though the memorandum of appeal was presented within the period of limitation, the tax was paid after the period of limitation prescribed for presenting the appeal had expired.

*Held*, that the expression "No appeal shall lie" in the proviso to s. 30(2) of the Indian Income-tax Act means that the appeal cannot be held to be properly filed until the tax is paid, and not that no memorandum of appeal may be presented.

The effect of proviso to s. 30, sub-s. (1) read with sub-s. (2) of the Act is that the appeal will be deemed to be filed on the date when the tax due is paid and the question will then have to be decided whether there is sufficient cause for condonation of delay.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 451 of 1960.

Appeal from the judgment and order dated September 18, 1957, of the Bombay High Court in I.T.R. No. 8 of 1957.

K. N. Rajagopal Sastri and D. Gupta, for the appellant.

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Commissioner of  
Income-tax,  
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v.

M/s. Filmistan Ltd.

Kapur J.

*Bishan Narain, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, for the respondent.*

1961. February 21. The Judgment of the Court was delivered by

KAPUR, J.—This is an appeal pursuant to a certificate of the High Court of Bombay under s. 66A(2) of the Indian Income-tax Act (hereinafter called the "Act"). For the year of assessment 1949-50 the respondent was assessed to a sum of Rs. 1,80,646/14/- as income-tax and super-tax on June 2, 1954. A notice of demand under s. 29 of the Act was served on the respondent to pay that amount on or before July 17, 1954. On his application the respondent was allowed to pay by instalments. The last instalment of Rs. 30,646/14/- was payable on or before March 20, 1955. As there was a default in the payment of this instalment the Income-tax Officer on March 31, 1955 imposed a penalty of Rs. 3,000/ under s. 46(1) of the Act. On April 20, 1955 the respondent filed an appeal to the Appellate Assistant Commissioner but by that date the last instalment had not been paid and it was paid on May 16, 1955. The Income-tax Officer raised a preliminary objection before the Appellate Assistant Commissioner that the appeal was not competent because the last instalment of the tax had not been paid. This was upheld by the Appellate Assistant Commissioner. Against this order the respondent took an appeal to the Income-tax Appellate Tribunal which held that the right of appeal was conferred by s. 30(1) of the Act and is not taken away by s. 30(2) of the Act, only the remedy is barred. It further held that as the right had not been destroyed the appeal became good appeal as soon as the assessee paid the arrears of tax and the only effect of the payment on May 16, 1955, was that the appeal shall be taken to have been preferred before the Appellate Assistant Commissioner on that date and it was then for the Appellate Assistant Commissioner to decide whether it was a fit case for extension of time and condonation of delay. The Tribunal therefore directed the Appellate Assistant Commissioner to dispose of the appeal in accordance with law. At the instance of the Commissioner

of Income-tax, who is the appellant before us, the Tribunal stated the following question of law to the High Court :—

“Whether the appeal filed before the Appellate Assistant Commissioner on 20th April, 1955, became a proper and complete appeal though barred by limitation and the Appellate Assistant Commissioner should have decided the question of the condonation of delay ?”

The High Court answered the question in the affirmative. The Commissioner of Income-tax has come in appeal against this judgment.

Appeals are provided against assessments under s. 30 of the Act. There is a proviso to s. 30(1) in regard to the payment of taxes in the following words:

“Provided that no appeal shall lie against an order under sub-section (1) of section 46 unless the tax has been paid.”

The controversy between the parties revolves round the words “no appeal shall lie.” The contention which was raised before us was that these words mean that there is no right of appeal till the tax is paid and therefore if the tax has not been paid the memorandum of appeal cannot be filed and if filed it is merely a waste paper. In our opinion the meaning of the words “no appeal shall lie” in the proviso is not that no memorandum of appeal can be presented. All that it means is that the appeal will not be held to be properly filed until the tax has been paid. If, for instance, the memorandum of appeal is filed on the 20th day, i.e., 10 days before the period of limitation expires and the tax is paid within the rest of the 10 days, the appeal will be a proper appeal; it will be within time and no question of limitation will arise but if the tax is paid after the period of limitation has expired it will be taken to have been filed on the day when the tax is paid even though the memorandum of appeal was presented earlier and within the period of limitation. The question will then have to be decided whether there was sufficient cause for condonation of delay and that is exactly what the Tribunal had ordered

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and that in our opinion is the effect of the proviso to s. 30(1) read with sub-s. (2) of s. 30 of the Act. It is unnecessary therefore to refer to the two cases referred to by the High Court, i.e., *Raja of Venkatagiri v. Commissioner of Income-tax* (1) and *Kamdar Brothers v. Commissioner of Income-tax* (2).

The appeal is without force and is therefore dismissed with costs.

*Appeal dismissed.*

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## DEVIDAS AND OTHERS

v.

## SHRISHAILAPPA AND OTHERS.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

*Mortgage—Non-joinder of parties—Proper, but not necessary, party added beyond limitation—Suit instituted on behalf of joint family—Plaintiff not described as manager in the plaint—Maintainability of suit—Indian Limitation Act, 1908 (9 of 1908), s. 22.*

The manager of an undivided Hindu family consisting of himself, his brother and their step-mother, instituted a suit for recovery of the amount due under a mortgage belonging to the family. The step-mother who was interested in the mortgage right was not made a party to the suit. Though the manager (the first plaintiff) did not describe himself as the manager in the plaint, the allegations in the plaint showed that the suit was filed on behalf of the joint family. No objection as to non-joinder was raised in the trial court, but when the appeal was pending in the High Court the step-mother was added as a party on her application. The contesting defendants pleaded that as all persons having an interest in the mortgage security were not joined as parties within the period of limitation prescribed for a suit to enforce the mortgage, and the first plaintiff did not, in any case, purport to institute the suit in his capacity as the manager, the suit must fail.

*Held:* (1) that the failure to join a person who is a proper but not a necessary party does not affect the maintainability of the suit nor does it invite the application of s. 22 of the Indian Limitation Act, 1908 ;

(2) that the question whether a suit was instituted by the manager of an undivided Hindu family in his personal capacity or as representing the family depends upon the circumstances of each case and that the failure of the plaintiff to describe himself as the manager in the plaint is not decisive of the question.

(1) [1955] 28 I.T.R. 189

(2) [1955] 27 I.T.R. 176.