CIVIL REFERENCE

Before Bhandari, C.J. and Chopra J.

BALBHADAR MAL KUTHIALA AND OTHERS,—*Petitioners.*

versus

THE COMMISSIONER OF INCOME-TAX PUNJAB, ETC,—*Respondents*

Civil Reference No. 6 of 1952.

1957

Feb. 6th

Income-tax Act (XI of 1922)—Sections 63 and 66—Jurisdiction of the High Court under section 66—Nature and extent of—Paper book in a case of reference—Documents to be included therein stated— Section 63—Meaning of—Evidence Act (I of 1872)—Sections 16 and 114—Presumption as to service by post—Registered letter returned as 'refused'—Whether sufficient service—Presumption attaching to postal peon's reports.

Held, that it is a well-settled principle of law that the jurisdiction of the High Court, which is only advisory and a limited one, is confined to the determination of the questions raised and referred by the Appellate Tribunal. The High Court cannot raise and start determining any question which has not been referred either under subsection (1) or (2) of section 66. The section makes it further clear that reference can only be made with respect to a question of law which arises out of an order of the Appellate Tribunal under subsection (4) of section 33 of the Act. No reference would, therefore, be permissible from an order of the Tribunal made under any other provision of law or in exercise of its inherent jurisdiction.

Held, that under subsection (4) to section 66, the High Court may refer the case back to the Appellate Tribunal to make additions thereto or alterations therein if the Court is satisfied that the statements in the case referred are not sufficient to enable it to determine the question raised by the Tribunal. Here again, no new questions can be raised or required to be raised. The case can be sent back for clarification of the statement or filling up any lacuna that may be found therein, but this ought to be with a view to enable the High Court to determine the questions that have actually been raised. Section 66(4) has no application to a

case where the Appellate Tribunal states a case with regard to certain questions of law but refuses to state a case with regard to some other questions which the assessee or the Commissioner, as the case may be, wants to raise. For this purpose the assessee or the Commissioner can only make an application to the High Court under sub section (2) to section 66.

Held, that the paper book in a case referred to the High Court under section 66(1) of the Income-Tax Act can only consist of the statement of the case and the documents which the Tribunal considers should be included in the paper book and that the assessee has no right to incorporate in the paper book a document with regard to which the Tribunal refuses to give its permission for being so included.

Held, that Section 63 of the Indian Income-tax Act provides that a notice or requisition under the Act may be served on the person therein named either by post or, as if it were a summons issued by a Court under the Code of Civil Procedure, 1908. It means that where the Income-tax authorities choose to serve the requisition by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post the letter containing the requisition.

Held, that where a properly addressed registered letter is received back with the endorsement "refused" made by the postman, the letter may be presumed to have been refused by the addressee, even without examination of the postman or other evidence regarding tender and refusal. Undoubtedly, the presumption is one of fact and rebuttable, it can never be regarded as conclusive.

Held, that it is not correct to say that the presumption of service arises only in cases where the letter sent by post is not returned by the postal authorities as undelivered and that where it is so returned, for whatever reason, there is a direct and self-evident proof of the fact that the letter was not delivered. The presumption equally attaches to the postal peon's report "refused" because the report is made in the usual course of business and it is open to the Court to presume that the usual course was followed in the particular case. When a letter is duly addressed and posted particularly when it

is also registered, the presumption is that the postman did tender the letter to the addressee. The fact that the letter came back does not in itself rebut the presumption that it was tendered. The writing of endorsement "refused" falls within the ambit of "common course of business" of the postman and, therefore, even without any formal proof, involves the presumption that it was written on a refusal by the addressee.

Case law discussed.

Case referred under Section 66(1) of the Indian Income-tax Act, 1922, by the Income-tax Appellate Tribunal (Delhi Bench),—vide *his No. R. A. 46 of 1950-51.*

The facts of the case are as follows:—

This application by the assessee under section 66(1) of the Income-tax Act, 1922, is granted, as in our opinion a question of law does arise out of the order of the Tribunal.

2. Income-tax Appeal No. 1002 of 1949-50 against the assessment of the year 1945-46 was preferred by the assessee by post to this Bench on 6th June, 1949. The address given as that to which notice might be sent to the appellant was Jodha Mal, Simla. The memorandum of appeal was sent for registration to the Head Office of the Tribunal at Bombay, where it was registered on 29th June, 1949. On 10th October, 1949, the appeal was fixed for hearing for 6th December, 1949. Notice of the date fixed for hearing was issued to the appellant by registered post, pre-paid, acknowledgment due, to the address given in the appeal memorandum. The postal receipts show that the registered letter was handed in at the post office on 28th October, 1949, and reached Simla on 29th October, 1949. There is an endorsement, presumably by the postman at Simla, which is not wholly decipherable but that part of which can be read is (in Urdu) "house is shut". The letter seems to have been redirected from Simla to Kuthiala House, Hoshiarpur. There is a postal seal of Hoshiarpur on the letter. There is a red ink endorsement in Urdu, dated 3rd November, 1949, to the effect "not found". On the next day there is a pencil endorsement, also presumably by the postman, in Urdu, to the following effect "Inkariwalla hai" which means "in the category of refusal". The letter was returned to the office of posting a few days later. On 6th December, 1949, when the

appeal was called no one appeared for the appellant. The Tribunal dismissed the appeal for the default of appellant's appearance, observing that the notice was returned by the post office with the remark that the addressee refused to receive the service of the notice, and that the refusal was tantamount to service. We have to add here that on the side of the cover, other than the one on which the postman's endorsement appears, the English words "refused" and "Delhi" appear, written in ink. These words must have been written in the Hoshiarpur Post Office when the postmaster decided to return the undelivered letter to the sender. They are not vouched by any one's initials.

3. The appellant coming to know that his appeal had been dismissed applies for a reference to the High Court of the following questions of law:—

(i) Whether, in the circumstances of the case, the order of dismissal of the appeal, preferred by the appellant, *in limine* is an order valid in law?

(ii) Whether, in the circumstances of the case, the Tribunal was in law justified to draw the conclusive inference that the notice of hearing was in fact served upon the assessee?

(iii) Whether, in the circumstances of the case, the Tribunal did give in law a real opportunity to the appellant of being heard?

4. It is urged for the applicant that Section 27 of the General Clauses Act, 1897, is not of direct application as it says nothing about a registered notice being returned undelivered for whatever reason; and that in any case the presumption raised by it is a rebuttable one. It is further urged that in view of the stringent provisions of Rules 17 to 19 of Order V, First Schedule to the Civil Procedure Code, 1908, also referred to in section 63(1) of the Income-tax Act, 1922, in the absence of evidence on oath or by affidavit about the fact of refusal of the registered notice and the identity of the person, if any, to whom the notice was tendered, it must be inferred that service by post referred to in section 63(1) must be actual personal service, and not constructive service by reason of an alleged refusal, for the reason that as the presumption raised by section 27, General Clauses Act, 1897 is only "unless a

different intention appears" and the different intention sufficiently appears here from the reference in section 63(1) of the Income-tax Act, 1922, to service "as if it were a summons, issued by a Court, under the Code of Civil Procedure, 1908".

5. We, therefore, frame the following questions of law for determination by the High Court:—

(i) Where a properly addressed registered letter, postage prepaid, is returned by the post office with an endorsement by a postman "Inkariwalla hai" (in the category of refusal), does a presumption arise of due service of the letter on the addressee ?

and, following as a corollary,

(ii) If the answer to the above question is in the negative, whether the order of the Tribunal, dismissing the appeal for default, is not liable to be recalled on the ground that it is null, as the appellant had not been given an opportunity of being heard in support of his appeal ?"

6. The draft statement of the case was placed on the table. The Commissioner offered no suggestions. Some verbal amendments suggested by the assessee are made. The assessee also wants reference to be made to his making a miscellaneous application to set aside the Tribunal's order, dated 6th December, 1949, and to his filing an affidavit, dated 13th February, 1950 denying that the notice was tendered to or refused by him. But these are events which happened subsequent to the Tribunal's order, and no question relating to them can arise out of the Tribunal's order.

D. K. MAHAJAN and D. N. AWASTHY, for Petitioner.

S. M. SIKRI and H. R. MAHAJAN, for Respondent.

ORDER OF THE HIGH COURT.

Chopra, J.

CHOPRA, J.—This is a reference by the Appellate Tribunal under section 66(1) of the Income-tax Act, for determination of the following questions:—

"(i) Where a properly addressed registered letter, postage prepaid, is returned by the

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post office with an endorsement by a postman 'Inkariwala hai' (in the category of refusal), does a presumption arise of due service of the letter on the addressee?

and, following as a corollary,

(ii) If the answer to the above question is in the negative, whether the order of the Tribunal, dismissing the appeal for default, is not liable to be recalled on the ground that it is null, as the appellant had not been given an opportunity of being heard in support of his appeal?"

The facts giving rise to the reference are—

The petitioner Balbhadhar Mal Kuthiala preferred an appeal before the Income-tax Appellate Tribunal against an assessment of the year 1945-46. The appeal was submitted by post and it reached the Tribunal on 6th June, 1949. The appeal was fixed for hearing for 6th December, 1949, and a notice thereof was issued to the petitioner at his Simla address, as given in the memorandum of appeal, by registered post prepaid and acknowledgment due. The registered letter was delivered to the post office on 28th October, 1949. The addressee being not available in Simla, the post office there redirected the letter to Kuthiala House, Hoshiarpur. The postal authorities at Hoshiarpur returned the cover to the office of posting with an endorsement in pencil 'Inkariwala hai' (refuses to accept), presumably made by the postal peon. On 6th December, 1949, when the appeal was called for hearing, no one was present on behalf of the appellant. On 13th December, 1949, the Tribunal dismissed the appeal with the following order:—

"A notice fixing the hearing of assessee's appeal for 6th December, 1949, was issued by

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the office on 27th October, 1949. The notice was issued to the assessee under Registered Post, Acknowledgment Due, it was returned by the Post Office with the remarks that the addressee refused to receive the service of the notice. This refusal is tantamount to a service. Nobody was present on the date of the hearing. The appeal is, therefore, dismissed for default of appellant's appearance."

Information of this order reached the assessee on 7th February, 1950. On 13th February, he submitted an application to the Tribunal for restoration of his appeal and for its decision after affording an opportunity to him of being heard in support of the contentions raised in the appeal. This application was accompanied by an affidavit of the petitioner stating that no registered letter purporting to be from the Income-tax Appellate Tribunal was ever presented to him by the postal authorities and that he had never refused to accept the same. The Tribunal rejected the application,—*vide* their order, dated 27th October, 1950, mainly on the ground that the Tribunal had no inherent power of reviewing or setting aside their own order.

Simultaneously, the petitioner had presented another application to the Tribunal under section 66(1) of the Income-tax Act praying that a statement of the case be drawn up and the following questions referred for determination of the High Court:—

(i) Whether, in the circumstances of the case, the order of dismissal of the case preferred by the appellant, *in limine* is an order valid in law?

(ii) Whether, in the circumstances of the case, the Tribunal was in law justified to draw

the conclusive inference that the notice of hearing was in fact served upon the assessee ?

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(iii) Whether, in the circumstances of the case, the Tribunal did give in law a real opportunity to the appellant of being heard?

The Appellate Tribunal accepted this application, but confined the reference to the questions reproduced above. The assessee wanted that the draft statement should also include a reference to his having made a miscellaneous application for setting aside the Tribunal's order, dated 6th December, 1949, to his filing an affidavit denying that the notice was tendered to or refused by him and to the order of the Tribunal rejecting the application. This prayer of the assessee was refused on the ground that these were events which happened subsequent to the Tribunal's order, and no question relating to them could be said to arise out of that order.

These subsequent events and the facts relating thereto were stated by the assessee in a petition under section 66(4) of the Income-tax Act, read with Articles 226 and 227 of the Constitution, presented to this Court on 12th May, 1952.

Mr. Mahajan, learned counsel for the assessee, contends, that this Court while answering the questions should take regard of the events that subsequently happened and take into consideration the documents relating thereto. It is, further, submitted that the Appellate Tribunal be required to state the case including the subsequent events and refer it, under subsections (2) or (4) of section 66. Now, it is a well-settled principle of law that the jurisdiction of the High Court, which is only advisory and a limited one, is confined to the determination of the questions raised and referred by the Appellate Tribunal.

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The High Court cannot raise and start determining any question which has not been referred either under subsection (1) or (2) of section 66. The section makes it further clear that reference can only be made with respect to a question of law which arises out of an order of the Appellate Tribunal under subsection (4) of section 33 of the Act. No reference would, therefore, be permissible from an order of the Tribunal made under any other provision of law or in exercise of its inherent jurisdiction. In *Commissioner of Income-tax, Madras* v. *Mtt. Ar. S. Ar. Arunachalam Chettiar* (1), it was held that the jurisdiction of Tribunal and of the High Court, under subsection (1) and (2) of section 66, is conditional on there being an order by the Appellate Tribunal, which may be said to be one under section 33(4) and a question of law arising out of such an order. It was, further observed that if the question of law arises out of an order made by the Tribunal on any miscellaneous application, which does not clearly fall within the four corners of section 33(4) but purports to have been made in exercise of what it regarded as its inherent powers, then the Appellate Tribunal would have no jurisdiction under subsection (1) of section 66 to refer a case, nor would the High Court have jurisdiction under subsection (2) of that section to direct the Tribunal to do so.

Under subsection (4) to section 66, the High Court may refer the case back to the Appellate Tribunal to make additions thereto or alterations therein, if the Court is satisfied that the satements in the case referred are not sufficient to enable it to determine the question raised by the Tribunal. Here again, no new questions can be raised or required to be raised. The case can be sent back for clarification of the statement or filling up any lacuna that may be found therein, but this ought to be with a view to enable the High Court

(1) 23 I.T.R. 180.

to determine the questions that have actually been raised. No such flaw is shown to exist in the present case. The statement does not appear to be in any way incomplete or wanting in the narration of material facts necessary for the determination of the questions raised therein.

Section 66(4) has no application to a case where the Appellate Tribunal states a case with regard to certain questions of law but refuses to state a case with regard to some other questions which the assessee or the Commissioner, as the case may be, wants to raise. For this purpose the assessee or the Commissioner can only make an application to the High Court under sub-section (2) to section 66. No such application has been presented by the assessee in this case. Moreover, as already observed, the questions of law which can be raised under section 66 are those and those alone which arise out of an order of the Appellate Tribunal under section 33(4).

Evidently, therefore, I am here to answer only those questions which have actually been referred and not to raise and determine any new or additional questions. The events that took place after the order of the Tribunal dismissing the appeal under section 33(4) cannot be gone into or taken into consideration. As a matter of fact, the documents relating thereto should not have been included in the paper book. The Tribunal had refused to include in the statement any reference to the assessee's application for restoration of the appeal, his affidavit in support of the facts stated in the application and the order of the Tribunal dismissing that application. In *Purshottam Laxmidas* v. *Commissioner of Income-tax, Bombay City* (1), it was held that the paper book in a case referred to the High Court under section 66(1) of the Income-tax Act can

(1) 30 I.T.R. 143.

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only consist of the statement of the case and the documents which the Tribunal considers should be included in the paper book and that the assessee has no right to incorporate in the paper book a document with regard to which the Tribunal refuses to give its permission for being so included. The subsequent events or the documents relating thereto cannot, therefore, be taken into consideration, nor can any decision be based thereon.

Let me now proceed to consider the questions referred by the Tribunal.

Section 27 of the General Clauses Act lays down—

> "27. *Meaning of service by post.* Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Section 63 of the Indian Income-tax Act, provides that a notice or requisition under the Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908. It means that where the Income-tax authorities choose to serve the requisition by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post the letter containing the requisition.

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Under section 16 of the Evidence Act, to prove that an act has been done it is admissible to prove any general course of business or office according to which it would normally have been done, there being a probability that the general course was followed in the particular case. Thus, where the question is whether a particular letter reached A, the facts that it was posted in due course and was not returned through the dead-letter office are relevant [Illustration (b) to S. 16].

According to section 114, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The Court may thus presume that the common course of business or of any office has been followed in the particular case. The presumption of the course of business having been followed is specially strong in the case of public offices, e.g., the post office.

Mr. Mahajan contends that the presumption of service arises only in cases where the letter sent by post is not returned by the postal authorities as undelivered, but where it is so returned, for whatsoever reason, there is a direct and self-evident proof of the fact that the letter was not delivered. According to him, the report of the postman that the addressee had refused to accept the letter cannot be taken notice of or admitted into evidence without formal proof, and there would be no presumption of service in such a case. Reliance is being placed upon *Gobind Chandra Shaha and another* v. *Dwarka Nath Pattita* (1), *Jagan Nath Brakhbhau* v. *J. E. Sassoon and others* (2), *and Butto Kristo Roy and others* v. *Gobindaram Marwari and others* (3). I do not see any force in the contention.

(1) 19 C.W.N. 489.
(2) 18 Bom. 606.
(3) A.I.R. 1939 Pat. 540.

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The presumption equally attaches to the postal peon's report "refused", because the report is made in the usual course of business and it is open to the Court to presume that the usual course was followed in the particular case. When a letter is duly addressed and posted, particularly when it is also registered, the presumption is that the postman did tender the letter to the addressee. The fact that the letter came back does not in itself rebut the presumption that it was tendered. The writing of endorsement "refused" falls within the ambit of "common course of business" of the postman and, therefore, even without any formal proof, involves the presumption that it was written on a refusal by the addressee. There is ample authority in support of this view.

Mohan Lal Kayriwal v. *Sundar Lal-Nand Lal Saraf and others* (1), is a decision of my Lord the Chief Justice in which it was held that when a registered letter addressed to a person is received back with the remark "refused" a presumption arises that the letter was refused by such person himself even though the word "refused" is not proved to be in his handwriting. A similar view was taken by Zafar Ali, J., in *Sher Afzal* v. *Mohan Lal* (2), and by Addision, J., in *Raunaq Ram and others* v. *Prabh Dayal and others* (3), and it was observed that where a notice sent by post in a registered cover is returned by the postman with a note that the addressee refused to receive it, and the posting of the notice has been proved, there arises a presumption under section 114, Evidence Act that the addressee did refuse to receive it.

In *Shri Bhagwan Radha Kishan* v. *Commissioner of Income-tax, U.P.* (4), a notice fixing the date of

(1) A.I.R. 1949 E.P. 295.
(2) A.I.R. 1926 Lah. 520.
(3) A.I.R. 1930 Lah. 439.
(4) 22 I.T.R. 104.

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hearing of the appeal was sent to the appellant by the Appellate Tribunal by registered post at the address given by him for service. The notice came back with the endorsement by the postal authorities as "refused". The Tribunal, thereupon dismissed the appeal for default. On an application by the assessee under section 66(1) of the Income-tax Act, one of the questions referred to the High Court was—

> "Whether the mere endorsement of 'refusal' to accept the service of the notice of hearing of the appeal made by the postal authorities was sufficient in the eye of law to justify the presumption of service of the notice on the applicant?"

The question was answered in the affirmative and it was held that the mere endorsement of "refusal" made by the postal authorities was sufficient in the eye of law to justify the presumption of service of the notice on the appellant.

Certain *obiter* remarks made in the course of the decision in *Gobinda Chandra Shaha and another* v. *Dwarka Nath Pattita* (1), no doubt, support Mr. Mahajan's contention that the endorsement of "refusal" is required to be proved and that a letter returned by the postal authorities as having been refused does not justify the presumption that the refusal was made by the addressee. The dispute in the case was confined to the particular date on which the notice to quit under section 106 of the Transfer of Property Act was served upon the defendant, and the ultimate decision was that the endorsement of refusal made by the postal authorities on the cover was not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the date of the endorsement. The

(1) 19 C.W.N. 489.

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case thus contains no final decision that the endorsement, such as it was, could not be taken into consideration unless the postman was examined.

Directly, the matter came up for decision of the same Court in *Nirmalabaia Debi* v. *Provat Kumar Basu* (1). Reliance on *Gobind Chandra Shaha and another* v. *Dwarka Nath Pattita* (2), was placed in support of the contention that since the registered letter had come back the presumption that it had been delivered in due course to the addressee was rebutted and, since the postman had not been examined to prove the endorsement of refusal, there was no evidence that the letter had been tendered to the addressee. The argument was not accepted by Chakravatti, J., and it was held that where a notice addressed to a person and sent by registered post is returned to the sender with an endorsement "refused" made by the postman, the notice would be presumed to have been duly served upon the addressee without the examination of the postman or other evidence regarding tender and refusal.

The next decision relied upon by Mr. Mahajan, *Jagannath Brakhbhau* v.*J. E. Sassoon and others* (3), was given before section 27 of the General Clauses Act was enacted and is, therefore, not of much assistance. A contrary view was, however, taken by the same Court in *Aga Gulam Hussain* v. *Albert David Sassoon* (4), and again in *Baluram Ramkissen and others* v. *Bai Pannabai and another* (5). In this last case a summons was sent by registered post addressed to the defendant in accordance with the provisions of Order 5, rule 25, C.P.C., and the cover was returned with the endorsement "refused" to

(1) 52 C.W.N. 659
(2) 19 C.W.N. 489
(3) 18 Bom. 606
(4) 21 Bom. 412 at p. 418
(5) 35 Bom. 213

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take", it was held that as it appeared that the cover was properly addressed to the defendant and had been registered, duly stamped and posted, the Court was entitled to draw the inference indicated in section 27 of the General Clauses Act and to hold that there was sufficient service.

The decision in *Butto Kristo Roy and others* v. *Gobindaram Marwari and others* (1), cannot be regarded as an authority for the contrary view, because it simply follows the above quoted remarks in *Gobind Chandra Shaha and another* v. *Dwarka Nath Pattita* (2), and contains no independent discussion. Moreover, in this case also, the point was not material for final decision of the case. This is apparent from the following observation of Chatterji, J., at page 547—

> "But even assuming that this notice was served on the plaintiffs, it does not improve the defendants' position at all".

For the reasons already stated, I am of the view that where a properly addressed registered letter is received back with the endorsement "refused" made by the postman, the letter may be presumed to have been refused by the addressee, even without examination of the postman or other evidence regarding tender and refusal. Undoubtedly, the presumption is one of fact and rebuttable, it can never be regarded as conclusive. I would, therefore, answer the first question in the affirmative. The second question could arise only if answer to the first had been in the negative.

Mr. Mahajan lastly submits that the order of the Tribunal, dated 27th October, 1950, refusing to

(1) A.I.R. 1939 Pat. 540.
(2) 19 C.W.N. 489.

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restore the appeal dismissed for default be quashed in exercise of the powers of this Court under Article 227 of the Constitution. It is argued that the order was based on the wrong notion that the Appellate Tribunal had no inherent power of reviewing their own order and restoring the appeal dismissed for default and that the Tribunal had, therefore, refused to exercise jurisdiction vested in them by law. The matter, in my opinion, cannot be gone into because of there being no proper petition before us in this connection. In the application, dated 12th December, 1952, with the heading "Petition under section 66(4) of Indian Income-tax Act, read with Articles 226 and 227 of the Constitution of India", the relief claimed is stated as follows:—

> ".........that the statement of case submitted by the Appellate Tribunal be referred back to them with the direction that a reference to the Miscellaneous application aforesaid and the Tribunal's order thereon be included in the statement of case which should be returned to this Hon'ble Court with those additions thereto and the documents referred to in para 11, above."

The respondents, therefore, have had no notice of the fresh case sought to be made out by the assessee during arguments. The assessee may, if so advised, present a fresh application for the purpose. This application of his stands dismissed. In view of the peculiar circumstances of the case no order is made as to costs.

Bhandari, C.J.

BHANDARI, C.J.—I agree.