belonging to the opposition party in order to keep itself in power. This, it is contended, would be the death-knell of democracy. I agree, that it would be so, if the facts proved are those canvassed in the contention, but in such a case, the order of detention would be struck down on the ground of being *male fide*. The above contention can, however, prove to be of no avail, if the order for detention is not shown to be *mala fide*, and for the purpose of this petition it would have to be assumed, as stated above, that the petitioner has been detained under a lawful and not a *mala fide* order.

I have given the matter my earnest consideration and am of the view that a member of the Legislature or that of the Regional Committee enjoys no special privilege or immunity in the matter of preventive detention and during the period of such lawful detention he cannot claim that the authorities detaining him should arrange for his attendance at the meetings of the Legislature or the Regional Committee.

The petition consequently fails and is dismissed.

K.S.K

INCOME-TAX REFERENCE.

Before S. S. Dulat and Shamsher Bahadur, JJ.

DAULAT RAM NARULA,—*Petitioner.*

versus

COMMISSIONER OF INCOME-TAX, DELHI AND RAJASTHAN,—*Respondent.*

Income-Tax Reference No. 56 of 1962.

1965

September, 2nd

Income-tax Act (XI of 1922)—Ss. 3 and 23—Assessee becoming partner in a firm and entering into partnership with other persons in respect of his share therein—Profit accruing to him from the firm—Whether assessable as his income or the income of himself and his other partners.

The assessee was a partner in the firm Daulat Ram-Hans Raj & Co., to the extent of 47.25 pies in the rupee. In respect of this share there was a partnership between the assessee and nine other persons and the partnership-deed recited that all the ten persons were partners in the share of 47.25 pies held by the assessee in the firm Daulat Ram-Hans Raj & Co., and that the profits and losses arising out of that share were to be divided

among the ten partners in certain proportions, the share of the assessee being 15/47.25. This partnership deed was accepted as genuine by the Tribunal.

Held, on these facts, that the share standing in the name of the assessee, that is, 47.25 pies, in the partnership firm, Daulat Ram Hans Raj and Co., was not entirely the property of the assessee but of himself and nine other persons mentioned in the deed of partnership. It would follow from this that the income derived from that share was the income of the assessee and nine other persons in certain proportions. There is, therefore, a diversion of the income at its source, and, since what is liable to tax in the hands of the assessee is only his own income, the assessee cannot be taxed beyond what his real income is out of that share.

Reference under Section 66(1) of the Indian Income-tax Act (Act XI of 1922) made to the High Court by the Income-tax Tribunal for decision on the following question of Laws:—

"*Whether on the facts of this case the entire sum of* Rs. 1,34,944 being assessee's 47.25/192 share in the registered firm of Daulat Ram-Hans Raj & Co., has to be included in the computation of the assessee's total income or only 15/47.25 of it?"

KIRPA RAM BAJAJ, SENIOR ADVOCATE, WITH YASH PAUL MAHNA, J. L. BHATIA & PREM NATH MONGA, ADVOCATES, for the Appellant.

HARDYAL HARDY, SENIOR ADVOCATE, WITH DALIP K. KAPUR AND S. P. AGGARWAL, ADVOCATES, for the Respondent.

ORDER

Dulat, J.

DULAT, J.—This is a reference under section 66 of the Income-tax Act. The assessee is Lala Daulat Ram Narula and this reference arises out of the assessment of income-tax in respect of the assessment year 1951-52, the relevant accounting year being the financial year ending the 31st March, 1951. The assessee had several sources of income and one of them was his partnership in a firm called Daulat Ram-Hans Raj & Co. In that firm the assessee's share was shown as 47.25 pies in a rupee, there being ten other partners holding various shares. This partnership business concerned certain liquor contracts worked during the year, 1st April, 1950 to 31st March, 1951. It has been found that the assessee's share of profit out of this partnership business came to Rs. 1,34,944 for the relevant year. When this profit was carried to the assessee's account and added to his other income, he protested claiming that the whole of this income, Rs. 1,34,944, was in reality not solely his but there were nine other shares in that income. In support of this he produced a partnership deed, dated the 30th March, 1951 (Exhibit B)

which, among other things, said that the assessee, Lala Daulat Ram and other persons had obtained an excise contract for the sale of liquor for the year 1950-51, and that Lala Daulat Ram had a share of Rs. 0-3-11¼ or, in other words, 47.25 pies, and further that the other nine parties mentioned in the partnership deed of the 30th March, 1951, were partners in the said share of Rs. 0-3-11¼ in the proportion mentioned in that deed, Lala Daulat Ram's share being only 0-1-3. This deed relied upon by the assessee also stated that the partnership was for the period of the liquor contract, that is, from the 1st April, 1950 to the 31st March, 1951, and the profit and loss in the share of Rs. 0-3-11¼ was to be divided in proportion to the share held by the partners including the assessee. The claim thus was that although in the partnership-deed, dated the 1st April, 1950 (Exhibit A), concerning the liquor business the assessee was shown as owning 47.25 pies share, which was of course the correct share of the assessee in relation to his other ten partners, in reality that share was owned by himself and nine other persons in proportion to the shares mentioned in the second deed, dated the 30th March, 1951 (Exhibit B). He, therefore, contended before the Income-tax Officer that the whole of the income from the share of 47.25 pies should not be taken as his income for the purposes of assessment but only a part of it in accordance with the shares mentioned in the second deed (Exhibit B), should be accepted as his real income. The Income-tax Officer, rejected that claim holding that the second partnership deed (Exhibit B), was not genuine. When the matter was taken by the assessee to the Income-tax Appellate Tribunal, it was assumed by that Tribunal that the second partnership deed (Exhibit B), was genuine, but the Tribunal, in spite of that, held as a matter of law that the whole of the income falling to the share of the assessee in accordance with the first partnership-deed, that is, 47.25 pies, must be deemed to be his own income and assessable as such. Before the learned Tribunal reliance was placed on behalf of the assessee on a decision of the Bombay High Court, *Ratilal B. Daftari* v. *Commissioner of Income-tax* (1), which did support the assessee's contention, but the Tribunal chose to rely on a decision of the Calcutta High Court in *Mahaliram Santhalia* v. *Commissioner of Income-tax* (2), as it felt that the second

(1) (1959) 36 I.T.R. 18.
(2) (1958) 33 I.T.R. 261.

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case was more appropriately applicable. The Tribunal observed that these two decisions of the Bombay and the Calcutta High Courts were in conflict and because of that readily agreed that a question of law did arise in the case and, therefore, when the assessee asked that the Tribunal to refer the question of law to this Court, it made a direction to that effect, framing the question of law in these terms—

> "Whether on the facts of this case the entire sum of Rs. 1,34,944, being the assessee's 47.25/192 share in the registered firm of Daulat Ram-Hans Raj & Co., has to be included in the computation of the assessee's total income or only 15/47.25 of it?"

We have to start with the assumption made by the Appellate Tribunal that the deed of partnership, dated the 30th March, 1951 (Exhibit B), is genuine, which means that the material statements contained in it are true. That deed says that the parties 1 to 9, apart from the assessee, were partners in the share of Re. 0-3-11¼ held by the assessee in the partnership firm constituted by the deed of the 1st April, 1950 (Exhibit A), and that the profits and losses arising out of that share were to be divided among the ten partners in certain proportions. If this statement is true, as it must be assumed, then it seems to follow that the share standing in the name of the assessee, that is, 47.25 pies, in the partnership firm, Daulat Ram-Hans Raj & Co., was not entirely the property of the assessee but of himself and nine other persons mentioned in the second deed of the 30th March, 1951. It would follow from this that the income derived from that share was the income of the assessee and nine other persons in certain proportions. There is, therefore, a diversion of the income at its source, and, since what is liable to tax in the hands of the assessee is only his own income, the assessee cannot be taxed beyond that his real income is out of that share—47.25 pies. This was the line of argument accepted by the Bombay High Court in *Ratilal B. Daftari* v. *Commissioner of Income-tax* (1). The assessee in that case was a partner in a registered partnership and in accordance with the deed of partnership his share of the profit was determined as Rs. 14,661. The assessee contended that the whole of that amount did not belong to him but only two-fifths of

it, and he relied upon an agreement between himself and four others, which agreement provided that the five parties were to share the profit in proportion to their contributions. The High Court held that "even in the case of the assessment of a partner of a registered firm what was to be considered was not the income allocated to his share by employing the machinery of section 23(5)(a) but his real income, and that real income was what remained after deducting the amounts which might be said to have been diverted and never constituted his real income and such amounts would have to be excluded to ascertain his real income". The leading authority on this matter is the decision of the Privy Council, *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income-tax, Bengal* (3), which has been approved by our Supreme Court. Lord Macmillan said in that case that "when the Income-tax Act subjects to charge 'all income' of an individual, it is what reaches the individual as income which it is intended to charge". What, therefore, is not the income of the assessee, cannot be charged to Income-tax. The position, of course, is different where an assessee in order to discharge an obligation legal or contractual, disposes of his own income in a particular manner, for such disposal is not diversion of the income at its source. The line of distinction, as pointed out by the Supreme Court in *Commissioner of Income-tax, Bombay City II* v. *Sitaldas Tirathdas* (4), lies "between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee". The Income-tax Appellate Tribunal thought that this decision of the Supreme Court [*Commissioner of Income-tax, Bombay II* v. *Sitaldas-Tirathdas* (4)], shakes the authority of the Bombay High Court decision in *Ratilal B. Daftari* v. *Commissioner of Income-tax* (1), as *Sitaldas Tirathdas' case* had been mentioned in *Ratilal B. Daftri's case*, and the decision of the Bombay High Court in *Sitaldas Tirathdas' case* was reversed by the Supreme Court. Actually, however, it appears that the principle on which the Bombay High Court depended, when deciding *Ratilal B. Daftri's case* was affirmed by the Supreme Court in *Sitaldas Tirathdas' case*, the principle being the same as stated in *Raja Bejoy Singh Dudhuria's case*. What was found by the Supreme Court was that *Dudhuria's case* was not applica-

(3) (1933) 1 I.T.R. 135.
(4) (1961) 41 I.T.R. 367.

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ble to the facts of *Sitaldas Tirathdas' case* and indeed the facts were different. The assessee, Sitaldas Tirathdas, derived income from various sources, and that income was correctly computed by the Income-tax authorities. His wife and children had, however, obtained a decree from a civil Court for maintenance and the assessee claimed that, as he was obliged to pay maintenance under the order of a Court, the amount of maintenance should not be considered his income. The Bombay High Court apparently accepted that submission but the Supreme Court held to the contrary, the reason being that the decretal amount was not a charge on the property, as it had been in *Raja Bejoy Singh Dudhuria's case.* It is clear that on the facts of *Sitaldas Tirathdas' case* the assessee was merely obliged to dispose of his own income in a particular manner and it could not be said that the income itself was the income of his wife and children. No reference was made by the Supreme Court to the case of *Ratilal B. Daftari,* and the decision rested on the ground that although there was an obligation on the assessee to pay maintenance to his wife and children, that was an obligation to dispose of his own income in a particular manner. In view of this decision, Mr. Hardy on behalf of the Income-tax Department presses us to hold that by the partnership deed of the 30th March, 1951, the present assessee merely undertook to divide his income among a number of persons including himself and this was, therefore, a disposal of his own income in a particular manner. He relies for this submission on the statement in the partnership deed that the profits and losses will be divided in certain proportions. The deed of the 30th March, 1951, does indeed say so, but before that it says quite clearly, what Mr. Hardy's argument ignores, that the share itself, from which income arises, was the property of all the partners mentioned in the deed. The words of the deed are—

> "WHEREAS L. Daulat Ram party of the 10th part and other persons obtained an excise contract for the sale of liquor for the year 1950-51 for Bela Road, Sadar Bazar, Pahar Ganj, Sabzi Mandi, Gole Market and Karol Bagh Shops (this refers to the liquor contract obtained by the partnership firm, Daulat Ram-Hans Raj & Co.) and WHEREAS the said L. Daulat Ram has a share of Re. 3/11¼ in the said contract and WHEREAS parties from 1st to 9th parts are

partners in the said share of Re 3/11¼, in the proportion mentioned herein."

If this statement is true, then no doubt remains that the persons mentioned in the deed of the 30th March, 1951, were the owners of the share of Re. 3/11¼, in other words, 47.25 pies in the firm, Daulat Ram-Hans Raj & Co., and once that is clear, it must follow that the income from that share was the income of all the persons mentioned in the deed. On a reading of the deed (Exhibit B), there is, in my opinion, no escape from the conclusion that the 47.25 pies share in the firm, Daulat Ram-Hans Raj & Co., was during the relevant period the property of not only the present assessee but also of the other persons mentioned in the deed (Exhibit B), and, in reality, therefore, the income arising out of that share was not solely the income of the assessee but only a part of that income was his real income.

It remains to consider the Calcutta decision on which the Appellate Tribunal and also Mr. Hardy before us rely. The case is reported as *Mahaliram Santhalia* v. *Commissioner of Income-tax* (2). The facts of that case were similar to the facts of *Ratilal B. Daftari's case*. Mahaliram Santhalia, the assessee, was a partners in a firm called the Benares Steel Rolling Mills and, when an application for its registration was made, the assessee stated that he was a partner of the firm in his 'individual capacity'. Later on, however, when the income falling to his share as mentioned in the partnership deed was taken to his personal account and charged to income-tax, he claimed that the share standing in his name did not belong solely to him but was the property of another firm called Messrs Radhakissen Senthalia of which he was also a partner and only his proportionate share in the income should be assessed. This claim was negatived by the Calcutta High Court. The learned Judges first observed that the assessee, having at one stage stated that he was a partner of the Benares Steel Rolling Mills in his 'individual capacity', could not be later permitted to resile from it and allege to the contrary. The learned Judges then went on to consider the scheme of the Income-tax Act contained in section 23 and they held that under the terms of the Act once the share of a partner in a registered firm was determined and his income in accordance with that share computed, then

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that income had necessarily to be included in his total income and in no circumstances could any deduction be allowed, and, therefore, went on to hold that any agreement, which the assessee may make with other persons, could only be treated as an agreement to dispose of his own income and no question of diversion by superior title could arise. The argument adopted by the Calcutta High Court seems to carry two clear implications—(1) that a person in a firm, which is granted registration under the Income-tax Act, cannot validly be a partner in sub-partnership concerning the share held in his name, and (2) that in the case of a partnership, which is granted registration, the income falling to the share of a partner has necessarily to be treated as his own income even if in fact it is not so, and he is not to be allowed to prove that that income is not entirely his own. I feel doubtful about the validity of these implications. The first clashes with the opinion of the Supreme Court expressed recently in *Commissioner of Income-tax, Madras* v. *Sivakasi Match Exporting Co.* (5), where Subha Rao, J., said that "there was no prohibition under the Partnership Act against a partner or partners of other firms combining together to form a separate partnership to carry on a different business. The fact that such a partner entered into a sub-partnership with others in respect of his share did not detract from the validity of the partnership". A somewhat similar opinion was expressed in a more recent decision, *Commissioner of Income-tax, Gujarat* v. *A. Abdul Rahim and Co.* (6). The second implication clashes with the main principle laid down in *Raja Bejoy Singh Dudhuria's case,* that it is only the income of the assessee that is chargeable to tax under the Income-tax Act. The Income-tax Tribunal preferred the Calcutta view to that of the Bombay Court, but I find the reasoning of the Bombay Court in *Ratilal B. Daftari's case,* more in accord with the reality of the situation and the true intent of the Income-tax Act. The real question, in my opinion, is this : Did the share under discussion, that is, 47.25 pies, in the firm of Daulat Ram-Hans Raj & Co., belong entirely to the assessee or did it belong to him and nine other persons, his share being only 15/47.25 pies ? The answer to that question turns on the meaning of the deed of the 30th March, 1951 (Exhibit B). Mr. Hardy

(5) (1964) 53 I.T.R. 204.
(6) (1965) 55 I.T.R. 651.

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says that the share itself belonged to the assessee and by the deed (Exhibit B), the assessee merely agreed with certain other persons to divide the profit from that share among ten persons including himself. Mr. Bajaj, on the other hand, contends that the true meaning of the deed (Exhibit B) is that the share itself was the property of the ten persons named in that document. The deed (Exhibit B), in my opinion, says clearly that the persons named there were the owners of that share and if that is correct, then the income from the share must be taken to be the income of not only the assessee but of all the ten persons in proportion to the shares mentioned in the deed. I thus find myself of the same opinion, and if I may say so for the same reasons, as mentioned by the Bombay High Court, in *Ratilal B. Daftari's case*. On the assumption, therefore, that the deed (Exhibit B), dated the 30th March, 1951, is genuine, I would, in answer to the question posed by the Income-tax Appellate Tribunal, say that on the facts of the case, the entire sum of Rs. 1,34,944 cannot be included in the computation of the assessee's total income but only 15/47.25 of it. The assessee will get his costs of the reference assessed at Rs. 250.

Shamsher Bahadur, J.

SHAMSHER BAHADUR, J.—I agree.

B.R.T.

REVISIONAL CIVIL

Before R. S. Narula, J.

IQBAL SINGH AND OTHERS,—*Petitioners.*

versus

CHANAN SINGH AND OTHERS,—*Respondents.*

Civil Revision No. 639 of 1965.

1965

September, 2nd

Code of Civil Procedure (V of 1908)—Order 43, Rule 1(r) and Order 39, Rules 1 to 3—Application for temporary injunction—Order declining to pass any order under Rule 1 or 2 of Order 39 and merely issuing notice of the application to defendants—Whether appealable.

Held, that the order granting an injunction, whether *ex parte* or after hearing the parties which falls within the scope of rule 1 or 2 of Order 39 of the Code of Civil Procedure, 1908, is appealable under clause (r) of rule 1 of Order 43 of the Code irrespective of whether a notice of the application is also directed to issue to the defendants or not. But an order declining to pass any order under rule 1 or rule 2 of Order 39 of the Code and merely issuing a notice of the application for temporary injunction to the defendant is not an order under rule 1 or rule 2 of Order