of the assessee and in our opinion this was such a case.

In the result the appeals, are allowed. A writ of Certiorari will issue and the order of the Income-tax Officer will be quashed. The Income-tax Officer will, however, be free to take such action as may be open to him. In the circumstances of the case, the parties will bear their costs here and in the High Court.

Appeals allowed.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY II, BOMBAY

v.

M/s. JADAVJI NARSIDAS & CO.

(J. L. KAPUR, A. K. SARKAR and M. HIDAYATULLAH, JJ.)

Income Tax—Set-off—Profits of registered firm and loss incurred in unregistered firm—Findings of Tribunal—When binding on High Court—Indian Income-tax Act, 1922 (11 of 1922), ss. 24, 66 (2).

The respondent, a firm consisting of four partners, was registered under the Indian Income-tax Act, 1922. For the assessment year 1946-47 it claimed to set off a sum of Rs. 1,05,641, as its share of the loss in respect of certain transactions said to have been carried on in the name of D by another partnership between it and D, which was not registered. The income-tax authorities rejected the claim and the Appellate Tribunal agreed with their decision on the grounds (1) that it being admitted that the *ankdas* were in the name of D, there was no satisfactory evidence that the assessee did business in the joint account, and (2) that, in any case, the assessee could not claim the set-off as the loss was suffered by an unregistered firm.

1962

Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

On a reference, the High Court held (1) that there was no legal admissible evidence to justify the Tribunal's finding that the transactions in question were not those of the assessee, and (2) that the assessee firm could claim a set-off in respect of the share of loss in the unregistered firm "if the income-tax authorities did not proceed to determine the losses of the unregistered firm and did not bring it to tax as permitted by s. 23 (5) (b)."

Held, that the High Court erred in its view that the assessee firm could claim a set-off in respect of the loss incurred in the unregistered firm.

Held, further (*per* Kapur and Hidayatullah, JJ.) : (1) that if under s. 66 of the Indian Income-tax Act, 1922, a finding given by the Appellate Tribunal is to be considered final, it is necessary that the reasons for reaching it should be stated by the Tribunal with sufficient fullness to inform all concerned what they are.

(2) that there could not be a partnership between D and the registered firm. If there was a partnership it was between D and the four partners of the assessee firm in their individual capacity, and under the provisions of s. 24 of the Act the loss of Rs. 1,05,641 could not be set off against the profits of the registered firm.

Per Sarkar, J.—In view of the decision in *Dulichand Lakshminarayan* v. *The Commissioner of Income-tax, Nagpur*, [1956] S. C. R. 154, that a firm as such is not entitled to enter into partnership with another firm or individuals, the assessee firm could not in law enter into partnership with D, and the questions answered by the High Court did not really arise in the present case.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 545 of 1961.

Appeal from the judgment and order dated October 23, 1958, of the Bombay High Court in Income-tax Reference No. 23 of 1958.

K. N. Rajagopal Sastri and *R. N. Sachthey*, for the appellant.

Purushottam Trikamdas, S. N. Andley, Rameshwar Nath and *P. L. Vohra*, for the respondent.

1962

Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullah, J.

1962. October 12. The following judgments were delivered. The judgment of Kapur and Hidayatullah, JJ., was delivered by Hidayatullah, J., Sarkar, J., delivered a separate judgment.

HIDAYATULLAH, J.– This is an appeal by the Commissioner of Income-tax, Bombay, against the judgment and order of the High Court of Bombay dated October 23, 1958, by which the High Court answered two questions referred to it under s. 66 (2) of the Income-tax Act in favour of the respondent Jadavji Narsidas & Co. The High Court certified this case as fit for appeal to the Supreme Court and hence this appeal.

The facts are simple. The year of account is the S. Y. 2001 corresponding to October 10, 1944, to November 4, 1945, and the assessment year is 1946-47. The respondent is a firm consisting of four partners and was registered under section 26A of the Income-tax Act for the relevant year. The assessee firm carries on business which is mainly speculation. In the year of account it claimed *inter alia* a loss of Rs. 1,05,641 which it was said, arose in speculation in a venture of the assessee firm with one Damji Laxmidas. This venture was carried on in the name of Damji Laxmidas on behalf of an alleged firm in which Damji was said to have a share of -/6/- and the assessee firm the balance. A deed of partnership dated November 14, 1944, was also produced before the Income-tax Officer. The sum of Rs. 1,05,641 represented half the losses of the joint venture, the other half being claimed by Damji in his own individual assessment. The so-called firm of Damji Laxmidas and the assessee firm was an unregistered one. The Income-tax Officer, Bombay, disallowed these losses and added back this amount along with some others to convert a loss of Rs. 55,931 declared by the assessee firm into a profit of Rs. 1,88,575. This profit was carried by him in accordance with the share of the partners into their individual assessment.

1962

Commissioner of Income-tax. Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullah J.

In the assessment of Damji, it may be stated here, the loss was not allowed on the ground that having arisen in an unregistered partnership, it could only be considered in the assessment of the unregistered partnership. In rejecting the evidence of the loss of Rs. 1,05,641 in the assessment of the assessee firm the Income-tax Officer gave three reasons (i) that the *ankdas* were in the name of Damji Laxmidas and not in the name of the unregistered firm or the assessee firm, (ii) that the assessee firm claimed only -/8/- of the losses and not -/10/- according to its share and (iii) that the assessee firm which was a well-known firm doing extensive business was said, surprisingly enough, to have entered into a partnership with an insignificant person like Damji Laxmidas to carry on this vast business. He held that the assessee firm had purchased these losses from Damji Laxmidas to be able to set them off against its profits to avoid tax. The Appellate Assistant Commissioner dismissed the appeal filed by the assessee firm and so also the Appellate Tribunal. The two members of the Appellate Tribunal gave different reasons. The Judicial Member (Mr. A. R. Aggarwal) observed :

> "So far as the last item No. (3) is concerned we are not satisfied that really the loss of Rs. 1,05,641/- was the loss of the assessee. It is admitted by the assessee that the ankdas are in the name of Damji Laxmidas. By no evidence we are satisfied (sic) that really the assessee did business in the joint account. Consequently, this claim of the assessee is disallowed."

The Accountant Member (Mr. P. C. Malhotra) observed :

> "I agree with my learned brother in the order which he has passed. I would, however, like to add a few words. It is not even the assessee's case that loss of Rs. 1,05,641/- was suffered by it.

According to the assessee it did some joint venture transactions with Damji Laxmidas. Damji Laxmidas came in appeal to the Tribunal in respect of his share of the loss. It was held that the loss arising to a person in a joint venture cannot be allowed in his personal assessment as the loss is suffered by an unregistered partnership. It can only be carried forward in the account of the unregistered firm."

The assessee firm applied to the Tribunal asking that a case be stated to the High Court but failed. The assessee firm then moved the High Court under section 66 (2) of the Income-tax Act and under the High Court's direction the Tribunal stated a case on the following questions :—

"(1) Whether there was any legal, admissible evidence to justify the Tribunal's finding that the transaction in question was not the transanction of the assessee.

(2) If not, whether the assessee can claim the set-off of such loss although it is the loss of an unregistered partnership."

The first question arises out of the observations of the Judicial Member and the second question from those of the Accountant Member. The High Court answered both the questions against the Department. It held that there was no legal, admissible evidence to justify the finding that the transactions in question were not those of the assessee firm and further that the assessee firm could claim a set-off in respect of the share of loss in the unregistered firm "if the Income-tax Authorities do not proceed to determine the losses of the unregistered firm and do not bring it to tax as permitted by s. 23(5)(b)."

On the first question the appellant argues that the High Court has decided the case as an Appeal

1962

Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullah, J.

Court which it was not entitled to do. This is not a true representation of what the High Court did. Whenever the question propounded is whether there is any material on which a finding can be given the discussion savours of an appellate approach but it is not so. The High Court noticed that the Tribunal had picked up only one reason from the order of the Income-tax Officer and held that the assessee firm had "purchased losses" from Damji Laxmidas but said nothing about the other reasons which had influenced the Income-tax Officer. The High Court, however, examined all the reasons given by the Income-tax Officer and reached the conclusion that there was *no evidence* to justify the finding which had been given in the case.

Before examining the evidence ourselves to see which conclusion is justified, we wish to make a few general observations. In a reference under s. 66, a finding given by the Tribunal is considered final and the High Court accepts it without examination of the material. The High Court does not hear an appeal but answers certain questions of law in the light of the facts proved. If a finding is final in this way, one does expect that the reasons for reaching it will at least be stated with sufficient fullness to inform all concerned what they were. Even if the reasons given by an inferior Tribunal are not restated, at least a general approval of them, or such of them as are acceptable, should appear. In the present case, all that is stated is :

> "It is admitted by the assessee that the ankdas are in the name of Damji Laxmidas. By no evidence we are satisfied (sic) that really the assessee did business in the joint account."

This, by itself, is hardly a fair disposal of the question whether the assessee firm did business in a joint account with one Damji Laxmidas. The solitary ground for rejecting the claim is too indefinite to

warrant this conclusion. It is contended that we should take into account also the reasons given by the Income-tax Officer which were before the Income-tax Tribunal and which have also been mentioned in the statement of the case. The High Court did so and we allowed those reasons to be brought before us. We would, however, have preferred if the order of the Tribunal in the appeal filed by the assessee firm had even briefly expressed their approval of those reasons and not left them to be mentioned in the statement of the case.

The question, then, is whether there was evidence to justify the Tribunal's finding that the transactions with Damji Laxmidas were not the transactions of the assessee firm. In such an inquiry the Court looks not to the sufficiency of the evidence but whether any evidence exists at all. Even if there be slight evidence which was believed by the Tribunal and on which the conclusion can be rested, such question must be answered in the affirmative. But the finding must not proceed upon conjecture, suspicion or surmise. If there is not a scintilla of evidence, the finding cannot be sustained because the proved facts would not then support the inference.

In this connection, the Income-tax Officer gave three reasons. The most important of which being the *ankdas* were in the name of Damji. According to the deed of partnership, which has been produced in the case, the four partners of the assessee firm and Damji had entered into a partnership to do business together, specifying the shares of the partners of the assessee firm which shares *inter se* are in the same proportion as their interest in the assessee firm. The new firm was not given a trade name. This is no doubt an unusual feature. But if no name was given then business could be carried on only in the name or names of one or more partners. That Damji's name was chosen, and not any other, does not lead to the inference that business was not done. If Damji's

1962

Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullah, J.

name was used then it is reasonably clear that the *ankdas* would be in his name and that is how the matter stood.

The next reason is that the losses were claimed on the basis of half and half by the assessee firm and Damji, in their respective assessments contrary to the proportion of -/10/- and -/6/- as in the deed. Whatever may be said of the losses claimed by Damji which were in excess of the agreed share the same cannot be said of the assessee firm which is claiming a share of losses which is less than the agreed rate. But sometimes additional responsibility is shouldered by a partner because of some action taken by him not meeting with the approval of the others. Often enough the shares are readjusted by agreement. There may be many reasons why the loss claimed by the assessee firm was less than what it could have really claimed but this hardly leads to the inference that no business was done. This circumstance also does not lead to the inference which has been drawn from it.

The third reason is that it is unlikely that the partners of a big firm like the assessee firm would enter into an agreement with a comparatively small man for doing such vast business. It is pointed out that Damji had at no time paid Income-tax in excess of Rs, 1,300. The accounts of the new partnership have been exhibited in the case. They show a long course of business. The total business done was to the tune of Rs. 9 lacs odd. As speculative business is made up, almost always, of either loss orprofit we should also look to the extent of the profits made and not merely the losses. In this case, but for one or two transactions which miscarried, Damji would have made a huge profit. It is possible that he was chosen as a partner in view of his acumen in these matters rather than his ability to finance the projects. This is not to say that 'buying of losses' is not common or that men of straw are not taken on as partners to give up

their losses to equalise profits elsewhere. The fact remains, as pointed out by the High Court, that losses can only be bought if they have been incurred and in the present case there is a long course of business which at certain stages was profitable though ultimately it showed a loss. It is impossible to say in this case that the assessee firm took over losses without actually having done business in company with Damji. There is no foundation, whatever, for the inference that the losses were purchased by the assessee firm from Damji whether we take the reasons given by the Income-tax Officer individually or collectively. We are of the opinion that the High Court did not exceed its powers in examining the evidence in support of the inference of the Income-tax Officer that no business was done in company with Damji but the assessee firm took over some of his losses. The answer of the High Court to the first question is therefore upheld.

This brings us to the second question and it is whether the assessee firm can set off the loss of Rs. 1,05,641 against its other profits from its other business? The High Court has held that it can do so. In our opinion, and we say it with great respect, the High Court was in error in reaching this conclusion.

To begin with the assessee firm as a firm could not enter into a partnership with Damji. Damji could be admitted into the assessee firm or the members of the assessee firm could enter into a partnership with Damji in their individual capacity. The assessee firm however could not do so as a firm. This was held by this Court in *Dulichand* v. *Commissioner of Income-tax*(1). There was thus a partnership between Damji and the four members of the assessee firm acting for themselves and indeed the deed which has been produced in this case shows as much. In the affairs of the unregistered firm, the assessee firm had no *locus standi*. There were thus two distinct

(1) [1956] 29 I. T. R. 935.

1962

The Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullh, J.

partnerships. One was the assessee firm which was registered consisting of four partners and the second was an unregistered firm consisting of five partners of whom the fifth was Damji.

The provisions which bear upon the question are many and need not be set out at length. The gist of the relevant sections will be stated by us in this judgment. Under s. 24(1) an assessee sustaining a loss of profits in any year under any of the heads mentioned in s. 6 is entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year. From April 1, 1953, loss sustained in speculative transactions can only be set off against profits arising in the same kind of business. In the present case, both the profits of the assessee firm and the loss in the transactions with Damji arose out of speculation and no difficulty arises. By assessee in the section is meant the person by whom tax is paid and in every instance it is necessary to find out who that assessee is. In this case the assessee is a registered firm of four partners and these partners did business resulting in profits as members of the assessee firm and also as members of another unregistered firm which led to a loss.

Now the assessment of firms is done differently accordingly as they are registered or unregistered. Section 23 (5) states that when the assessee is a firm the total income of the firm must be assessed but if the firm is a registered firm the tax payable by the firm is not to be determined but the total income is to be carried to the assessment of the partners in accordance with their shares and the profits or losses, as the case may be, must be assessed as part of their other income. But when the assessee is an unregistered firm, the assessment is of the firm itself unless the Income-tax Officer finds that by assessing the unregistered firm as a registered firm more tax is likely to result. The assessment otherwise is of the unregistered firm and not of the partners in their

private assessment. This is the gist of the rule contained in the fifth sub-section of s. 23.

There are, however, other provisions which must also be noticed. The first provision to notice is s. 16 (1) (b) which says that when the assessee is a partner of a firm, then whether the firm has made a profit or loss, his share (whether a net profit or a net loss) is to be computed in the stated manner and if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of s. 24.

Section 24 then provides for the set off of the loss as well as the carrying forward of the loss. The second proviso deals with the question of set off in relation to both registered and unregistered firm. It says that when the assessee is an unregistered firm (not assessed as a registered firm) the loss can only be set off against the income, profits and gains of the firm and not those of partners, but if the assessee is a registered firm, the loss which cannot be set off against the income, profits and gains of the firm shall be apportioned among the partners and they alone shall be entitled to have the amount of loss set off under the section. Shortly stated, the losses incurred by an unregistered firm can be set off only against its own profits while the net losses of a registered firm are apportioned among the shareholders and they alone are entitled to set them off.

Then come the provisions with regard to the carrying forward of the losses under section 24 (2). Here also there is a difference between registered and unregistered firms. The difference continues the distinction made by the proviso to sub-s. (1) which we have just noticed. Proviso (c) deals with a registered firm and partners in unregistered firms in the same manner as the proviso to sub-s. (1) above analysed. It says that (a) a registered firm is not entitled to carry forward and set off any loss apportioned

1962

The Commissioner of Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Hidayatullah, J.

between the partners and (b) partners in unregistered firms assessed as such are likewise not entitled to carry forward and set off against their own income losses sustained by the firm. An unregistered firm assessed as a registered firm comes under (a) above.

What then is the position here ? The unregistered firm has not been assessed. The assessee firm alone has been assessed and on its own assessment it has shown a profit. It seeks to set off against its profits a loss of Rs. 1,05,641 which, it is said, was incurred by it in partnership with Damji. We have shown above that there can be no partnership between the assessee firm and Damji. There was however a partnership between Damji and the four partners of the assessee firm in their individual capacity. Now under s. 24 (1) 2nd Proviso the losses of the unregistered firm of Damji and these four partners can only be set off against the income, profits and gains of the unregistered firm and not those of its partners. The loss of Rs. 1,05,641 could be set off against the income, profits and gains (if any) of the unregistered firm of five persons and not of the partners. In the same manner the loss, if not absorbed, could be carried forward to be set off against further income, profits and gains of the same unregistered firm of five persons. The High Court was thus in error in holding that those losses could be set off against the income of the assessee firm. It makes no difference that the Department has not assessed the unregistered firm or taken action under s. 23 (5) (b). What the High Court has ordered just cannot be done as it is against the provisions of s. 24.

Whether the partners in their individual assessments would be able to take advantage of s. 16 (1) (b) and the decision of the Privy Council in *Arunachalam Chettiar* v. *Income-tax Commissioner* [1] (a point almost conceded before us), is not a matter on which we need pronounce our opinion. That question does not arise for our consideration. The answer of

(1) (1936) L. R. 63 I. A. 238.

the High Court to the second question is set aside and the question is answered in the negative. In view of the equal success parties will bear their own costs here and in the High Court.

SARKAR, J.—The respondent, a firm registered under the Income-tax Act, 1922, claimed in its assessment to that tax for the year 1946-47, a set off for a sum of Rs. 1,05,641/- as its share of the loss of another partnership said to exist between it and one Damji Laxmidas and which, for convenience, I will call the bigger partnership. The Income-tax Officer refused to allow the set off on the ground that the existence of the bigger partnership had not been established.

The respondent firm's appeals, first to the Appellate Commissioner and then to the Appellate Tribunal from the order of the Income-tax Officer failed. Thereafter pursuant to an order obtained by the respondent firm from the High Court of Bombay, two questions were referred by the Tribunal to that Court for decision. Both these questions were answered by the High Court against the Department and the Commissioner of Income-tax has thereupon filed the present appeal.

The first of these questions is, "Whether there was any legal admissible evidence to justify the Tribunal's finding that the transaction in question was not the transaction of the assessee". Now it has been held by this Court in *Dulichand Lakshminarayan* v. *The Commissioner of Income-tax, Nagpur* (1) that "a firm as such is not entitled to enter into partnership with another firm or individuals". The respondent firm, therefore, as a firm could not in law have entered into any partnership with Damji. It would hence be to no purpose to enquire whether there was evidence to justify the finding that such a partnership existed or in other words, to enquire whether the evidence showed that an agreement of partnership

(1) [1956] S. C. R. 154, 163.

1962

The Commissioner Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Sarkar, J.

which in law could not be made had in fact been made. That which the law does not recognise does not for a court of law exist. I think therefore that the first question does not really arise and no answer to it need be given.

The second question which was referred to the High Court was, "If not, whether the assessee can claim the set off of such loss, although it is the loss of an unregistered partnership." As framed, this question is posed only if the first question is answered in the negative. As in my view the first question does not arise at all, I will consider this question independently of the first. The High Court's answer to this question was that the respondent firm can claim the set off and this answer was based on the assumption that a partnership between a firm and an individual is permissible, an assumption which must be held to be unwarranted in view of the decision in *Dulichand's case.*(1) It must be held that no partnership in which the respondent firm as such is a partner, exists. If the partnership does not exist, the respondent firm cannot have suffered any loss as a partner in it and there is therefore no loss for which it can claim a set off.

The sections of the Act dealing with set off would not justify a set off in such circumstances. Thus under s. 10 an assessee is entitled to set off the loss incurred by him in one business against the profits made by him in another business : see *Anglo French Textile Co. Ltd.* v. *Commissioner of Income-tax* (2). It is hardly necessary to point out that in the case of a single business its profits can only be ascertained after its losses have been taken into account. If this also is to be called a set off, I suppose it may also be justified under s. 10. It is clear that the set off contemplated by this section is of a loss suffered by the assessee himself. That is not the position in the present case. The assessee, the respondent firm, has no interest in the bigger partnership

(1) [1956] S. C. R. 154, 163. (2) [1953] S. C. R. 448,453.

and, therefore, no concern with its losses. Sub-section (1) of s. 24 also provides for set off by an assessee of a loss suffered by him under one head of income against the profits earned by him under another head. This section would not assist the respondent firm or the same reason as in the case of s. 10 and also because it applies when two heads of income are being considered while in the present case we have only one head of income, namely, business. The second proviso to sub-sec. (1) of s. 24 provides for certain rights of set off in the case of assessment of unregistered and registered firms. That part of this proviso which deals with an unregistered firm cannot obviously apply to the present case which is one of the assessment of registered firm. The other part of the proviso dealing with a registered firm would not assist the respondent firm either though it is a registered firm, because the right of set off that it gives is only to the partners of a registered firm and not to the registered firm itself and in the present case we are not concerned with a claim of set off by any partners of the respondent firm. No other section of the Act dealing with set off has been brought to our notice.

The second question should therefore be answered in the negative. Strickly speaking, this question also does not arise. As the bigger partnership does not exist, no question of its being registered or otherwise can arise.

Learned counsel for the respondent firm however contended that the bigger partnership was really between Damji and the partners of the respondent firm. I will assume that to have been so. It may be that in such a case the individual partners of the respondent firm in their respective assessments may claim a set off of their shares of the loss of the bigger partnership but with such assessments of individual partners this case is not concerned. The question here is whether the respondent firm can claim a set

1962

The Commissioner f Income-tax, Bombay City II, Bombay
v.
M/s. Jadavji Narsidas & Co.

Sarkar, J.

off in its own assessment. I venture to say that it does not follow that because the partners of the respondent firm may in their individual assessments be able to claim the set off, the respondent firm itself can do so; they are different assessees each with a separate and independent right of set off. One cannot claim a set off basing such claim on the other's right to it.

But it was said that in the present case the real assessees were the partners of the respondent. I am entirely unable to accept that contention. Section 23(5) of the Act contemplates a registered firm as an assessee though it did not have to pay any tax itself as the law stood prior to April 1, 1956. The whole proceedings in the present case have been conducted on the basis that the respondent firm was the assessee. The questions raised in this case were framed on that basis and we are not called upon by them to say whether the partners of the respondent firm had any right of set off. The assessees in the present case were not the partners of the respondent firm. If they were, we would have found the respective incomes of the individual partners from other sources being considered but this was not what had happened. It seems to me to be impossible to contend in the present case that the assessees were the partners of the respondent firm.

I would allow the appeal with costs here and below.

BY COURT : In view of the opinion of the majority the answer of the High Court to the first question is upheld and the answer to the second question is set aside. The parties will bear their own costs here and in the High Court.