

DIRECTOR OF INCOME TAX
v.
M/S. BHARAT DIAMOND BOURSE

DECEMBER 16, 2002

[RUMA PAL AND B.N. SRIKRISHNA, JJ.]

Income Tax Act, 1961; Sections 2(15), 11, 13 & 260(A):

Charitable Institution—Benefits of exemption under Section 11—Entitlement to—Held, since the dominant purpose of establishment of the assessee-Institution being charitable, assessee entitled to benefits under Section 11 of the Act.

Charitable Institutions—Lending of money to its founder without security—Benefits of exemption under Section 11—Effect on—Held, since assessee lent certain income to prohibited category of person without adequate security and interest, benefit of exemption under Section 11 was lost in view of provisions under Section 13(1)(c)(ii) of the Act.

Constitution of India, 1950; Article 136—Appeal—Finding of facts recorded by Subordinate Courts—Interference—Generally finding of facts by Courts below not disturbed unless it is perverse—Under the facts and circumstances of the case, correct finding of facts recorded by revenue authorities were reversed by the Tribunal and affirmed by the High Court on perverse reasoning—Hence set aside.

Words & Phrases:

'Founder', 'Foundation'—Meaning of in the context of Section 13(3)(a) and 13(3)(c) of Income Tax Act, 1961.

Respondent-assessee, a company limited by guarantee was incorporated under Companies Act. It was an institution established wholly for charitable purposes and a non-profit Organisation and as such registered under the provisions of the Income Tax Act. Assessee claimed benefits of exemption under Section 11 of the Act for the assessment years 1989-90 and 1990-91. Assessing Officer denied the exemption on the ground that objects of assessee institution were not charitable purposes

A and assessee had breached the condition under Section 13 as well. Appellate authority confirmed the order of Assessing Officer. However, Tribunal allowed the appeals and High Court affirmed it. Hence these appeals.

B It was contended for the Revenue that since activities of assessee fell outside the definition of charitable purpose it was not entitled to the benefit of Section 11 of the Act; and that since assessee lent its income to the founder of Institution without appropriate security, assessee lost the benefit of exemption under Section 11 of the Act.

C On behalf of respondent-assessee, it was submitted that the judgment/order of the Tribunal which was affirmed by High Court, ought not to be disturbed by the Supreme Court in appeal under Article 136 of the Constitution of India; and that since 'B' was merely signatory to the Memorandum of Association of the Company, he could not be considered as founder of the Institution.

D Allowing the appeal, the Court

E HELD: 1.1. The setting up of the Diamond bourse had a great impact on the diamond export trade. The export turn over of diamonds gradually increased during the relevant period and consequently the country had benefited by increased earning of foreign exchange. On the basis of these facts, the Revenue Authority granted registration to the appellant as an institution established for charitable purposes within the meaning of Section 2(15) of the Act. These earnings must be treated as ancillary to the dominant purpose for which the Diamond Bourse were established.

F [104-C-E]

G 1.2. Applying the dominant purpose test to the objects of the respondent-assessee there is no escape from the conclusion that it is validly recognized as an institution established for charitable purpose. The predominant objectives are charitable purpose. Thus the Tribunal as well as the High Court rightly held that the assessee was rightly registered under Section 11 by treating it as an institution established for charitable purpose within the meaning of Section 2(15) of the Act. [106-B; F]

H on. *Additional Commissioner of Income Tax, Gujarat, Ahmedabad v. Surat Art Silk Cloth Manufacturers' Association, Surat*, [1980] 2 SCC 31, relied

CIT v. Andhra Chamber of Commerce, (1965) 55 ITR 722, relied on. A

Commissioner of Inland Revenue v. Yorkshire Agricultural Society, (1928) 1 KB 611 and *Institution of Civil Engineers v. Commissioner of Civil Revenue* [1932] 1 KB 149], referred to.

2.1. In the previous year relevant to the assessment year 1989-90, B the assessee had advanced certain amount to one 'B' without entering into a written agreement with him. The said 'B' was one of the signatories to the Memorandum of Association of the Assessing Company and also the Honorary Secretary of the Institution. For this reason, the assessing officer was of the view that he was a person belonging to the prohibited category C within the meaning of Section 13(3)(a) and 13(3)(cc) and since income or property of the institution had been lent to such a person for any time during the previous years relevant to Assessment Years 1989-90 and 1990-91, without adequate security and adequate interest, the legal fiction in sub-section (2) of Section 13 would come into play and the income or property of the institution shall, for the purpose of Clause (d) of sub-section D (1) of Section 13, be deemed to have been applied for the benefit of the prohibited category of persons under sub-section (3). Consequently, the benefit of exemption under Section 11 was lost by reason of Section 13(1)(c)(ii). [106-H; 107-B]

2.2. The Assessing Officer was of the view that certain amount of E money received by 'B' had been utilized by him for investment in his name in the property, though there might have been a tacit understanding that the assessee would be given business premises on the lease. On examination of documents, it is noticed that 'B' was not the builder, nor did he own F any suitable premises at that point of time. As a matter of fact, he was intending to buy premises for his own purposes. The terms of the lease are not found on record. Admittedly, the terms were not even recorded in an agreement. It strains one's credulousness that seasoned businessmen G parted with a large sum of money to 'B' without any agreement under which the amount was being paid and without setting the terms of the lease. As on the date on which the money was paid to 'B', it was neither intended as deposit for lease of premises, nor was it intended as deposit H to be paid to the builder. There is no evidence that any premises were procured or agreed to be procured in the name of the Bourse from any builder. If at all there was any substance in the story that 'B' was merely negotiating on behalf of the assessee for procurement of suitable premises,

A the lease for the premises, the ownership of the premises or the lease rights would be in favour of the respondent assessee with the builder as lessor or seller. The assessing officer was, therefore, justified in concluding that the amount, when it was paid to 'B', was clearly intended for his buying the premises in the building which in turn, may have been made available by way of a sub-lease to the respondent. If this be so, then the payment to **B** 'B' could hardly be a deposit. The stand of the respondent is completely belied by 'B's' statement made pursuant to the summons under Section 131 of the Act. [108-C-D; 110-H; 111-A]

C 2.3. After the assessment order was made, the assessee must have realised that the amount paid to 'B' was treated as an amount lent without adequate security or interest. Hence there was an attempt to place on record documents to make it appear that the amount had been paid as deposit. The material on record clearly suggests that the amount paid to 'B' did not carry the stamp of a deposit but was merely intended to enable **D** him to purchase a property in his own name. To that extent the conclusion of the assessing officer that it was a colourable transaction appears to be justified. [111-C-D]

E 2.4. The Tribunal accepted the facile explanation given by the assessee, perhaps manufactured post facto the assessment order, without critical appraisal. The entire agreement between 'B' and the assessee was supposed to be an oral agreement, which was supposed to have been terminated orally with 'B' being orally called upon to return the money with interest of 12% which he refused to pay. This story does not ring true and could not have been accepted by any reasonable person, instructed in law. [111-H; 112-A]

F 2.5. The Tribunal's conclusions on the issue of lending of money to 'B' are perverse and need to be interfered with. The conclusion arrived at by the assessing officer and the appellate authority is affirmed to the effect that certain amount of money was lent to 'B' for substantial periods during the previous years pertaining to the relevant assessment years, **G** without interest and without adequate security. [112-D]

H 3.1. The meaning of expression "Founder" highlighted by the assessee is with reference only to an institution of eleemosynary. Eleemosynary is a charitable object intended to provide for relief from distress to humans based on Christian values. In the case of the assessee, it is not recognized as a 'charity' as its predominant object is an "object of general public

value". The test to ascertain the founder of an institution for eleemosynary need not be valid to ascertain the founder of an institution of other kinds. The expression "founder of the institution" used in Section 13(1)(a) means that the person concerned should be the originator of the institution, or at least one of the persons responsible for the coming into existence of the institution. Contribution of money is not an inexorable test of a person being a "founder" though, it might happen often that person who originates an institution may often also fund it. In the case of the assessee, it is found that 'B' along with several others, founded the company as all of them were subscribers of its Memorandum of Association. It is by their acts that the company got incorporated under the provisions of the Companies Act and was thus born. May be that 'B' did not contribute any money, apart from the guarantee given as the company is one limited by guarantee. That hardly makes any difference to the situation and 'B' would very much answer the description "founder of an institution" used in Section 13(3)(a) of the Act. That there may be others also is irrelevant and immaterial for the purpose of this appeal. In fact, a reading of Section 13(3) and the contrast between clauses (a) and (b) brings home the distinction made by the Act between the founder of the institution and the person who has made substantial contribution to the institution.

[113-F, G; 114-D-G]

Black's Dictionary of Law, 4th Edition; Corpus Juris Secundum, Volume XXXVII, page 37; Concise Oxford Dictionary, New Seventh Edition, Page 388 and The Collins Cobuild English Dictionary, New Edition, Page 670, referred to.

4. 'B' was a founder of the assessee institution and during the previous years relevant to the assessment years 1989-90 and 1990-91, a substantial amount of money was lent to 'B' without adequate security or interest. Consequently, the assessee would lose the benefit under Section 11 of the Act by falling within the mischief of Section 13(3)(a) read with Section 13(1)(c)(ii) of the Income Tax Act, 1961. [114-H; 115-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8211 of 2001.

WITH

Civil Appeal No. 8212 of 2001.

A From the Judgment and Order dated 21.3.2000 of the Bombay High Court in ITA No. 255 of 2000.

R.P. Bhat, Prateek Jalan and B.V. Balram Das, for the Appellant.

Sohrab E. Dastur, B.V. Jhaveri and R.B. Hathikhanwala, for the

B Respondent.

The Judgment of the Court was delivered by

C **SRIKRISHNA, J.** These appeals arise out of the judgments of the High Court of Bombay dismissing the appeals filed by the Revenue under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') Civil Appeal No. 8211/2001 pertains to assessment year 1989-90 while Civil Appeal No. 8212/2001 pertains to the assessment year 1990-91. Since the issues, fact and law are common, both the appeals are disposed of by this common judgment.

D The respondent-assessee is incorporated as a Company limited by guarantee under the Companies Act, 1956 and is a non-profit service organization. For the assessment years 1989-90 and 1990-91 returns were filed by the assessee along with audited Income and Expenditure Accounts and Balance Sheets for the relevant previous years. The assessee claimed the benefit of Section 11 of the Act on the ground that it was an institution established wholly for 'charitable purposes' within the meaning of Section 2(15) of the Act and had been registered as such under Section 13 of the Act. The Assessing Officer (hereinafter referred to as the 'AO') denied the benefit of Section 11 on two grounds. First, he held that the respondent-assessee was a Diamond Bourse and as such its objects were not 'charitable purpose'

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F within the meaning of Section 2(15) of the Act. Secondly, he took the view that, even if so, the assessee had breached the conditions under Section 13 and as such was liable to be denied the benefit of Section 11. The assessee carried the matter in appeals to the Commissioner of Income Tax (appeals) who confirmed the orders of the A.O. Further appeals were carried to the Income Tax Appellate Tribunal. The Tribunal came to the conclusion that the objects for which the respondent-assessee was established were 'charitable purpose' within the meaning of Section 2(15) of the Act and that there was no breach of the provisions of Section 13. In this view of the matter, the tribunal allowed the appeals of the assessee for both assessment years and reversed the orders of the two authorities below. Being aggrieved thereby,

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H the Department carried appeals to the High Court under Section 260(A) and

these appeals have been dismissed. A

Shri R.P. Bhat, learned senior counsel for the revenue, urges two grounds in support of the appeal:

- (1) The assessee was not entitled to benefit of Section 11 of the Act. B
- (2) Even if the assessee was to be treated as an institution entitled to the benefit of Section 11 of the Act the assessee lost that exemption by lending Rs. 70 lakhs during the previous year relevant to the assessment year 1989-90 and 1990-91 to Bharat Shah, the founder of the institution. The exemption was lost by reason of Section 13(2)(a) read with Section 13(3)(a) of the Act. C

Section 11(1)(a) of the Act provides that income derived from property under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India, shall not be included in the total income of the previous year of the person receiving the income. D

Section 12 provides that any voluntary contributions received by an institution established for charitable purposes shall, for the purposes of Section 11, be deemed to be income derived from property held under trust wholly for charitable or religious purposes and the provisions of Sections 11 and 13 shall apply accordingly. E

Section 12A provides for registration of the trust or institution in the appropriate form.

Section 12AA deals with the procedure for such registration.

Section 13 enumerates the contingences under which the exemption available under Section 11 is lost. F

Section 13(1)(c)(ii) is relevant and reads as under:-

“Section 13(1)—Nothing contained in Section 11 or Section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof- G

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(c) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof-

(i) if such trust or institution has been created or established after H

A the commencement of this Act and under the terms of the trust or the rules governing the institution, any part of such income enures, or

(ii) if any part of such income or any property of the trust or the institution (whenever created or established) is during the previous year used or applied.

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directly or indirectly for the benefit of any person referred to in sub-section (3).

Section 13(2) provides as under.....:-

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“(a) if any part of the income or property of the trust or institution is, or continues to be, lent to any person referred to in sub-section (3) for any period during the previous year without either adequate security or adequate interest or both;

(b)-(h) xxxxxx”

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The relevant provision of Section 13(3) is:-

“The persons referred to in clause (c) of sub-section (1) and sub-section (1) and sub-section (2) are the following namely:-

(a) the author of the trust or the founder of the institution.

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(b)

(c)

(cc) any trustee of the trust or manager (by whatever name called) of the institution;

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(d)

(e)

(f)

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Section 2(15) of the Act defines “Charitable purpose” as including relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

In order to decide the first question, the circumstances under which the appellant-assessee came into existence are required to be noticed. The diamond exporters in India had formed a Diamond Exporters Association for facilitating export of diamonds. There was need for setting up a diamond bourse in

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Bombay with customs clearance facilities which would facilitate the export of diamonds and make the trade more competitive in the international market. In 1984 the Central Government accepted the proposal made by the said association to set up a diamond bourse in Bombay. The Minerals and Metals Trading Corporation of India Ltd. (a Central Government Undertaking) agreed to co-ordinate the administrative steps and the bourse was to be named as suggested by the Ministry of Commerce as 'Bharat Diamond Bourse'. A decision to set up the same was taken up by the Government of India in the Ministries of Finance and Commerce with the object of encouraging and increasing the export of polished diamonds from India.

The city of Bombay had been traditionally the headquarters of diamond trade and exports, though the main business center was located in a congested locality. The International Airport in Bombay is situated in Sahar, Andheri, in North Bombay. The bond distance between the center of activity of the diamond trade and the international airport made it highly inconvenient and cumbersome for operations of the diamonds export trade from the point of view of transportation, security and customs clearance. It was, therefore, decided with the concurrence of the Central Government to have a custom clearance facility opened at Diamond Plaza near Opera House as a customs area for the purpose of storage and clearance of diamonds. There was also the question of security since diamonds and gems imported and exported in small packets in large quantities had to be transported over long distances.

The Registrar of Companies was moved for a certificate of incorporation of the assessee company which was done on 18th August, 1984. On 22nd November, 1984 the Collector of Customs, Bombay issued a notice under Section 8 of the Customs Act approving the MMTC situated at Diamond Plaza Building near Opera House as a 'Customs Area' for the purpose of storage and clearance of diamonds, gem etc. On the same day, another notification was issued under Section 45(1) of the Customs Act approving MMTC as the Custodian of the imported cargo of such goods until their clearance in accordance with the provisions of the Customs Act. It was also notified that MMTC would be the custodian with regard to the export cargo until they are trans-shipped and handed over to the airlines at Sahar International Airport Bombay. When MMTC was appointed as the custodian, it had incurred expenditure on behalf of Bharat Diamond Bourse to the extent of about Rs. 81 lakhs for setting up of the Bourse. On 31 August, 1984 the Managing Committee of the assessee resolved to treat the expenses incurred by MMTC as a loan which was to be returned with interest @ 6% per annum.

A MMTC had taken certain premises on leases in the Diamond Plaza which was sub-leased to the assessee on the same terms and conditions except for the deposit. The principle object of establishment of the bourse was to facilitate the diamond trade so that maximum revenue could be earned by way of foreign exchange and also to make the diamond trade more competitive at the international level.

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On 15th December, 1987 an agreement was arrived at between MMTC and the assessee under which it was agreed that, from 1st April, 1988, service charges would be collected by the assessee and not by MMTC, and from that date the bourse would meet its own obligations towards its staff, their expenses etc. and so on. Under the said agreement the operations of the Bourse were taken over from the MMTC.

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The setting up of the Diamond Bourse had a great impact on the diamond export trade. The total value of parcels cleared through the bourse increased from Rs. 2231 crores in 1985-86 to Rs. 11261 crores in the year 1991-92.

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These figures indicate that the export turn over of diamonds gradually increased during the relevant period and consequently the country had benefited by increased earning of foreign exchange.

On the basis of these facts, the Revenue Authority granted registration to the appellant as an institution established for charitable purposes within the meaning of Section 2(15) of the Act. Though the assessee does earn certain income by reason of hiring of locker facilities as incidental to the main custom clearance facilities made available to members as well as non-members, and debits the expenses incurred in respect of customs department, transport charges, security charge and rent for the premises these earnings must be treated as ancillary to the dominant purpose for which the Diamond Bourse were established.

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The revenue authorities have concurrently held that, taking an overall view, the dominant objects of the assessee are charitable as the dominant object is one of general public utility and, therefore, the assessee is entitled to be registered as an institution established for charitable purpose within the meaning of Section 2(15) of the Act.

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The learned senior counsel for the revenue, however, relied on the judgements of this Court in the Case of *Delhi Stock Exchange v. CIT*, (225 ITR, page 235) and the judgment of the Patna High Court in the case of *Bihar State Forest Development Corporation v. CIT* (224 ITR, page 757) to

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contend that the activities of the assessee bourse fall outside the definition of 'charitable purpose', even though the bourse might have been registered as an institution established for charitable purpose within the meaning of Section 2(15) of the Act. A

The decision of the Constitutional Bench of this Court in *Additional Commissioner of Income Tax, Gujarat Ahmedabad v. Surat Art Silk Cloth Manufacturers' Association, Surat*, [1980] 2 SCC 31 really clinches the issue. The assessee in *Surat Art Silk* case was an association established to promote commerce and trade in Art Silk Yarn, Raw Silk, Cotton Yarn Art Silk Cloth, Silk Cloth and Cotton Cloth. Its objects, as evidenced from the Memorandum of Association, included, *inter alia*, carrying on business in Art Silk Yarn, Raw Silk, Cotton Yarn, Art Silk Cloth, Silk Cloth, and Cotton Cloth belonging to and on behalf of its members as well as buying and selling and dealing in all kinds of cloth and yarn belonging to and on behalf of its members. The Constitutional Bench of this Court held that, if there are several objects of the institution, some of which are charitable and some non-charitable, and the trustees or the managers in their discretion may apply the income of the institution of those objects, the trust or institution would not be liable to be regarded as charitable and no part of its income would be exempted from tax. Where the main or primary objects are distributive, each and every one of the object must be charitable in order that the trust be held as a valid charity. But, if the primary or dominant purpose of the institution is charitable and another which, by itself, may not be charitable, but is merely ancillary or incidental to the primary or dominant object, it would not prevent the institution from validly being recognized as a charity. The test to be applied is, whether the object which is said to be non-charitable is the main or primary object of the trust or institution or it is ancillary or incidental to the dominant object which is charitable. Reiterating its earlier view in *CIT v. Andhra Chamber of Commerce*, (1965) 55 ITR 722 the Supreme Court said in *Surat Art Silk* case (supra) that if the primary purpose is advancement of objects for general public utility, the institution would remain charitable, even if an incidental non-charitable object for achieving that purpose was contemplated. In the case of *Andhra Chamber of Commerce* (supra) it was held that a Chamber of Commerce did not cease to be charitable merely because the members of the chamber were incidentally benefited in carrying out its main charitable purpose. This Court approvingly followed the ratio in the case of *Commissioner of Inland Revenue v. Yorkshire Agricultural Society*, (1928) 1 KB 611 and *Institution of Civil Engineers v. Commissioner of Civil Revenue*, (1932) 1 KB 149 for reaching the conclusion that merely because some facilities incidentally H

A arose to the members of a society or institution in the course of carrying out its main charitable purpose, that by itself would not prevent the institution from being a charity.

B All subsequent judgments have noticed and followed the judgment of the Constitutional Bench in *Surat Art Silk* (supra) and the dominant purpose test evolved therein and applied them to the facts before them. Applying this dominant purpose test to the objects of the respondent-assessee it appears to us that there is no escape from the conclusion that it is validly recognized as an institution established for charitable purpose. The assessee's pre-dominant objects are:

C “(i) To establish common facilities required to promote exports of diamonds from India and to provide for this purpose trading halls and other utilities at a central place for Indian Exporters and Overseas buyer to carry on trade and commerce in diamonds with speed and in secure conditions.

D (ii) To establish and promote effective liaison between diamond trade and industry in India and abroad with a view to promoting their sales from India in International market.

E (iii) To promote, advance protect and develop trade, commerce and industry in India relating to exports and imports of diamonds and

E (iv) To develop India as Modern and sophisticated diamond market by establishing and maintaining an international trading centre in India for all those engaged as manufacturers, traders, exporters and importers, brokers/commission agents of diamonds.”

F These being the pre-dominant objectives, we agree with the view taken by the Tribunal as well as the High Court that the assessee was rightly registered under Section 11 by treating it as an institution established for charitable purpose within the meaning of Section 2(15) of the Act.

G The next question which needs our attention is, whether the tribunal was right in its conclusion that the assessee did not lose the benefit of the exemption under Section 11.

The assessing officer took the view that the assessee lost its benefit under Section 11 under the following circumstances:

H In the previous years relevant to the assessment year 1989-90, the

assessee had advanced an amount of Rs. 70 lakhs to one Bharat Shah without interest and security and even without entering into a written agreement with the said Bharat Shah. The said Bharat Shah was one of the signatories to the Memorandum of Association of the Assessing Company and also the Honorary Secretary of the Institution. For this reason, the assessing officer was of the view that Bharat Shah was a person belonging to the prohibited category within the meaning of Section 13(3)(a) and 13(3)(cc) and since income or property of the institution had been lent to such a person for any time during the previous years relevant to Assessment Years 1989-90 and 1990-91, without adequate security and adequate interest, the legal fiction in sub-section (2) of Section 13 would come into play and the income or property of the institution shall, for the purpose of Clause (d) of sub-section (1) of Section 13, be deemed to have been applied for the benefit of the prohibited category of persons under sub-section (3). Consequently, the benefit of exemption under Section 11 was lost by reason of Section 13(1)(c)(ii).

Two issues, therefore, arise for our consideration:

- (A). Was the sum of Rs. 70 lacs lent to Bharat S. Shah without adequate interest of security and;
- (B) Whether Bharat S. Shah can be said to be the founder of the institution within the meaning of sub-section (a) or manager within the meaning of sub-Section (cc) of Section 13(3) of the Act.

Issue (A)

The explanation of the assessee for making payment to Bharat S. Shah is quite involved. According to the assessee, the amount of Rs. 70 lakhs paid to Bharat Shah was not lent to him but was given as a deposit for procurement of appropriate premises for the assessee. That there was neither security, nor interest, is admitted. The assessee's explanation is that the premises in which the assessee was housed was inadequate and, therefore, it was on the look out for more suitable premises. A suitable premises was under construction in the vicinity and Bharat Shah, one of the members of the assessee Bourse, who was knowledgeable in such matters, was authorised to negotiate for buying such premises from the builder. Interestingly, the assessee has nowhere disclosed the name of the builder, nor the terms under which the premises were to be acquired/leased. The reason for the money not being handed over directly to the builder is explained by the assessee by saying that it preferred to trust Bharat S. Shah as his credibility and solvency were beyond doubt.

A For this reason, the assessee preferred to keep the money deposited with the said Bharat Shah with the object of procurement of suitable premises as and when the building became ready.

B The assessing officer issued summons under Section 131 of the Income Tax Act to Bharat Shah and, in response to the summons, he made a statement in writing by letter dated 7.2.1992. According to Bharat Shah, he had received Rs. 70 lacs as part payment from the assessee during the year ending March 31, 1989 towards deposit of lease money in respect of renting one full floor in the premises at Diamond Village, Gamdevi to Bharat Diamond Bourse to house the customs, custodian and other facilities of the assessee. According to Bharat Shah, he, his family members and business associates had entered into agreement to purchase the entire 11th floor in the building known as "Diamond Village" at Gamdevi, Bombay towards which they had already paid Rs. 1.24 crores to the builder and that they had decided to give the said floor on rent to the assessee on terms and conditions "to be mutually decided" on completion of the floor. The Assessing Officer was of the view that the money received by Bharat Shah had been utilized by him for investment in his name in the property, though there might have been a tacit understanding that the assessee would be given business premises on the 11th floor on lease. Therefore, upon appraisal of the entire transaction, the A.O. concluded that the funds of the assessee trust had been made over to Bharat Shah for ulterior motives, though disguised as a genuine transaction of deposit for a lease. Hence, the A.O. was of the view that the transaction amounted to lending money of the institution to Bharat Shah without adequate security or interest. This finding of the Assessing Officer, which was affirmed by the appellate authority, has been reversed by the tribunal.

F Mr. Dastur, learned senior counsel for the assessee strenuously urged that the tribunal is the last fact finding body, that the finding of fact recorded by the tribunal, which has been affirmed by the High Court, ought not to be disturbed by the Court under Art. 136. As a principle, this Court does not disturb findings of fact unless the findings of fact are perverse. It appears to us this is one of those exceptional cases where the correct conclusion recorded by the assessing officer, and affirmed by the appellate authority, has been reversed by the tribunal on account of perverse reasoning, as we shall presently see. It is difficult to believe that the Assessee, a limited company, could take a corporate decision of handing over a large sum to the extent of Rs. 70 lakhs to anyone without proper documentation Mr. Dastur placed before us some such document in an effort to persuade us that everything was above board.

We shall scan them.

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By a resolution dated 11.2.1988 the managing committee of the assessee Bourse resolved to constitute a Committee of select alternate accommodation of around 12000 sq. ft. and to decide all connected matters. The actual resolution reads:

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“Resolved further that at the unanimous decision of the Committee the Bharat Diamond Bourse will pay a deposit upto Rs. 30 lacs to the *owners/builders after taking all action considered necessary to protect the interest of the Bourse.*” (emphasis ours)

On 27th April, 1988, a letter was addressed to Bharat S. Shah by the Vice President of the Bourse in which it was expressed that the managing committee of the Bourse was desirous or renting one full floor in the Diamond Village at 55, Gamdevi to house the Customs, Custodian and other facilities of the Bourse and that it was agreeable to pay Rs. 20 per sq. ft. of super built up area and to pay a deposit of rent for 5 years interest free, all the outgoings including Municipal Tax would be on the account of the Bourse and, if there was a Central Air-conditioning, the Bourse would pay contribution separately for cost and maintenance thereof. After having said this a request made to Bharat S. Shah “will you please now negotiate on behalf of the owners of the premises and draw up the necessary documents in our favour. In order to facilitate your working, the Bourse will provide you adequate amount as per clause above. When the documentation is ready, money may be handed over to them with a receipt”.

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On 28th November, 1988, the following note confirming the arrangement was made:

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“The Managing Committee of the Bourse in its meeting held on 11th February, 1988 had decided to take on lease alternate accommodation of about 12000 sq. ft. in the vicinity of Opera House for housing all the infrastructural facilities preferably on one floor. The Managing Committee has also decided to pay deposit to the owner/builders of the new premises after taking all action considered necessary to protect the interest of the Bourse. As per the above decision we have so far paid an amount of Rs. 50 lacs to Shri Bharat S. Shah. The Total deposit would be around Rs. 120 lacs.

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At present we have around Rs. 20 lacs in the current account with

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A the Bank. As these funds are not immediately required for payment of any other expenditure, it is proposed to pay an amount of Rs. 20 lakhs to Shri Bharat S. Shah as an advance for the new premises. If this advance is paid, the total advance will stand at Rs. 70 lacs."

B On 6th December, 1988, Bharat Shah was paid a sum of Rs. 20 lacs which was acknowledged by him "towards deposit of lease money in respect of second floor premises of the building 'Diamond Village' which on completion has to be rented to Bharat Diamond Bourse."

C On December 19, 1989 a letter was addressed to Bharat Shah confirming that the assessee had paid an amount of Rs. 70 lakhs towards deposit of lease of second floor premise of the building Diamond Village.

D On the strength of these documents, it was urged that an amount of Rs. 70 lacs paid to Bharat Shah was only by way of deposit for procurement of suitable premises to house the activities of the Bourse. As we have already notice, Bharat Shah was not the builder, nor did he own any suitable premises at that point of time. As a matter of fact, he was intending to buy premises for his own purposes. The receipt given by him on 6.12.1988 merely stated that he had received an amount of Rs. 20 lacs "towards deposit of lease money" in respect of second floor premises of the Building "Diamond Village".

E On 6th December, 1988 there was no premises owned by him in Diamond Village. The terms of the lease are nowhere to be found on record. Admittedly, the terms were not even recorded in an agreement. It strains one's credulousness that seasoned businessmen parted with a large sum of Rs. 70 lakhs to Bharat Shah without any agreement under which the amount was being paid and without settling the terms of the lease. This in itself should

F have been sufficient for the Assessing Officer to take a different view as to the real nature of the transaction.

G As on the date on which the money was paid to Bharat Shah, it was neither intended as deposit for lease of premises, nor was it intended as deposit to be paid to the builder. There is no evidence that any premises were procured or agreed to be procured in the name of the Bourse from any builder. The builder's name is not known till today. If at all there was any substance in the story that Bharat Shah was merely negotiating on behalf of the assessee for procurement of suitable premises, the lease for the premises the ownership of the premises or the lease rights would be in favour of the respondent assessee with the builder as lessor or seller. The assessing officer

H was, therefore, justified in concluding that the amount of Rs. 70 lacs, when

it was paid to Bharat Shah, was clearly intended for his buying the premises in Diamond Plaza building which in turn, may have been made available by way of a sub-lease to the respondent. If this be so, then the payment to Bharat Shah could hardly be a deposit. The stand of the respondent is completely belied by Bharat Shah's statement made pursuant to the summons under Section 131 of the Act. A

The learned counsel for the assessee has made available to us a note prepared with regard to the transaction, which according to him was also made available to the Tribunal. It appears to us that the tribunal has, hook, line and sinker, accepted all that is stated therein without critical examination. B

What transpired thereafter is also of interest. After the assessment order was made on 2.3.1992, the assessee must have realised that the amount paid to Bharat Shah was treated as an amount lent without adequate security or interest. Hence, there was an attempt to place on record documents to make it appear that the amount had been paid as deposit. The material on record, in our view, clearly suggests that the amount paid to Bharat Shah did not carry the stamp of a deposit but was merely intended to enable him to purchase a property in his own name. though there might have been a tacit understanding that he would make it available as and when purchased, by way of a lease, the terms of which were indefinite. To that extent, therefore, the conclusion of the assessing officer that it was a colourable transaction appears to be justified. C D E

The appellate authority also noticed that Bharat Shah was not the builder of the building and had utilized the amount of Rs. 70 lac for his personal purpose of buying property. He also pointed out rightly that if, at all, the assessee was interested in taking a lease in second floor in Diamond Village, the amount could have been advanced to the builder of the building. In the instant case, the amount was given to Bharat Shah, but he later on refused to return the amount, resulting in a dispute between the parties culminating in an arbitration award under which Bharat Shah paid back the amount with 9% interest, without even challenging the award. The appellate authority was of the view that, whatever be the arrangement the assessee had made available the sum of Rs. 70 lacs and permitted Bharat Shah to utilize it for a substantial period and, therefore, there was breach of Section 13(1). F G

In our view, the reasoning of the tribunal for reversing the concurrent findings of the assessing officer and the appellate authority, is entirely perverse. The tribunal seems to have accepted the facile explanation given by the H

- A** assessee, perhaps manufactured post facto the assessment order, without critical appraisal. We are surprised that the entire agreement between Bharat Shah and the assessee was supposed to be an oral agreement, which was supposed to have been terminated orally with Bharat Shah being orally called upon to return the money with interest of 12% which he is said to have refused. In our view, this story does not ring true and could not have been accepted by any reasonable person, instructed in law. It is wholly unnatural, because one does not expect hard-nosed businessmen to part with an amount of 70 lacs without even recording an agreement under which it is paid, nor without agreeing upon the precise terms of the lease. The story rings false from beginning to end, and yet, the tribunal accepted it by saying, "As regards the *bona fides* of the transaction, in our opinion, there is nothing to suspect the same." The tribunal says, "there is a transparency about the entire transaction which nullifies any attempt to make out the transaction as something-unusual and out of the ordinary." That diamonds are not transparent, that they dazzle with a brilliance that blinds the eye, seems to have escaped the notice of the Tribunal. It undiscerningly accepted the glib explanation of the assessee, though teeming with improbabilities and strenuous on credulity.

- We, therefore, are of the view that the tribunal's conclusions on this issue are perverse and need to be interfered with. We affirm the conclusion arrived at by the assessing officer and the appellate authority to the effect that Rs. 70 lakhs were lent to Bharat S. Shah for substantial periods during the previous years pertaining to the relevant assessment years, without interest and without adequate security.

ISSUE 'B'

- F** The next question to be addressed is: Even assuming Rs. 70 lakhs was lent to Bharat Shah, is he a person who falls within the meaning of Section 13(3)(a) or 13(3)(c) of the Act?

- G** Section 13(3)(a) speaks of the 'author of the trust' or the "founder of the institution". The respondent is not a trust registered under the law applicable to be trusts. That it is an institution cannot be gainsaid. It is a corporate body registered under the provisions of the Companies Act 1956 as a company limited by guarantee. Bharat Shah was one of the subscribers to its Memorandum of Association and was also the secretary of the Managing Committee of the Company.

- H** The Articles of Association of the assessee do not envisage any special

powers in the secretary so as to make him a “manager” of the Company within the meaning of Section 2(24) of the Companies Act. A

Learned counsel for the assessee urges that merely because the Bharat Shah was a signatory of; the Memorandum of Association by which the company was incorporated, it cannot be contended that he is a “founder” of the institution. According to the learned counsel, a founder must be someone who has substantially contributed financially or by physical efforts to set up an institution or must be a leading person who plays an important role in the functioning of the institution; he must be an originator of the institution. Sub-section (3)(A) of Section 13 speaks of the ‘author of the trust’ and ‘founder of the institution.’ The words used therein take colour from each other, in the submission of the learned counsel. B C

Counsel relied on the meaning of the word “Founder” and “Foundation” in Black’s Dictionary of Law, as found in 4th Edition:

“Founder”—“a person who endows an eleemosynary corporation or institution, or supplies the funds for its establishment.” D

“Foundation”—“the founding or building of a college or hospital. The incorporation or endowment of a college or hospital is the foundation; and he who endows it with land or other property is the founder.” E

He also relied on the meaning of the expression in “Corpus Juris Secundum” Volume XXXVII, page 37, which is:

“Founder’s shares in English company law, shares issued to the founders of, or vendors to, a public company as a part of the consideration for the business, or concession, etc. taken over, and not forming a part of, the ordinary capital,” F

The meaning of expression “Founder” highlighted by the learned counsel is with reference only to an institution of eleemosynary. Eleemosynary is a charitable object intended to provides for relief from distress to humans based on Christian values. In the case of the assessee, it is not recognized as a ‘charity’ because of the element of eleemosynary; it is recognized as a ‘charity because of the extended meaning ascribed to the concept of charity under the Act as its predominant object is an “object of general public value”. The test to ascertain the founder of an institution for eleemosynary need not be valid to ascertain the founder of an institution of other kinds. G H

- A In our view, the term “founder of the Institution” used in Section 13(1) means no more nor less than what it says. The expression “founder” means what is understood in ordinary parlance—the originator or the person responsible for the establishment of the institution. The Concise Oxford Dictionary, New Seventh Edition, Page 388, defines the expression “founder” as *“one who founds an institution”* and the verb “found” to mean *“lay base of; be original builder begin building of, set up, establish, originate, initiate, construct, base.”* The Collins Cobuild English Dictionary, New Edition, Page 670 gives meaning of the term “Founder” as *“The founder of the institution, organization, or building is the person who got it started or caused it to be built often by providing necessary money”* and the verb “found” means *“when an institution, company, or organization is founded by someone or by a group of people, they get it started, often by providing the necessary money,”*
- B
- C

We are hence of the view that the expression “founder of the institution” used in Section 13(1)(a) means that the person concerned should be the originator of the institution, or at least one of the persons responsible for the coming into existence of the institution. In our judgment, contribution of money is not an inexorable test of a person being a “founder” though, it might happen often that person who originates an institution may often also fund it.

- D
- E In the case of the assessee, we are of the view that Bharat Shah, along with several others, founded the company as all of them were subscribers of its Memorandum of Association. It is by their acts that the company got incorporated under the provisions of the Companies Act and was thus born. May be that Bharat Shah did not contribute any money, apart from the guarantee given as the company is one limited by guarantee. That hardly makes any difference to the situation and Bharat Shah would very much answer the description “founder of an institution” used in Section 13(3)(a) of the Act. That there may be others also is irrelevant and immaterial for the purpose of this appeal. In fact, a reading of Section 13(3) and the contrast between clauses (a) and (b) brings home the distinction made by the Act between the founder of the institution and the person who has made substantial contribution to the institution. We are, therefore, unable to accept the contention of the learned counsel for the assessee that Bharat Shah was not a founder of the institution.
- F
- G

- H In the result, we disagree with the view taken by the High Court and the Tribunal and affirm the view taken by the Assessing Officer and the Appellate Commissioner of Income Tax (Appeals). We hold that Bharat Shah

was a founder of the assessee institution; that during the previous years relevant to the assessment years 1989-90 and 1990-91 a substantial amount of money to the extent of Rs. 70 lakhs was lent to Bharat Shah without adequate security or interest. Consequently, the assessee would lose the benefit under Section 11 of the Act by falling within the mischief of Section 13(3)(a) read with 13(1)(c)(ii) of the Income Tax Act, 1961.

In the result, we set aside the impugned judgments of the High Court under appeal as also the orders of the Income Tax Appellate Tribunal for the concerned assessment years and affirm the view taken by the Assessing Officer and Commissioner of Income Tax (Appeals).

The appeals are allowed to the aforesaid extent, but without any order as to costs.

S.K.S.

Appeals allowed.