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for withdrawal of an appeal, the proper course for the High Court would be to consider all that is required by s. 110 itself. However in view of our decision on the first question we need not pursue the point further.

We, therefore, allow the appeal, set side the order of the High Court and in view of the unconditional application for withdrawal made by Satrughna Sahu, the appellant before the High Court, order that the appeal before the High Court should stand withdrawn. In the circumstances we pass no order as to costs.

Appeal allowed.

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March 27

SMT. SRILEKHA BANERJEE AND OTHERS

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA

(S.K. DAS, A.K. SARKAR and M. HIDAYATULLAH JJ.)

Income Tax—Sale of high denomination notes—Sale proceeds, if liable to tax—Indian Income-tax Act, 1922 (11 of 1922).

The assessee had encashed 51 high denomination notes of Rs. 1,000/- each in January, 1946. The assessee's explanation in his application for encashment of the notes was that he was a colliery proprietor and contractor, that for conducting the business and for payment to labour which came to about Rs.30,000/-to 40,000/- every week he had to keep large sums of money to meet emergency and that the sum of Rs. 50,000/- realised by encashment of the notes was neither profit nor part of profit but was floating capital for the purpose of conducting business. The Income-tax Officer did not accept this explanation and treated this amount as profit from some undisclosed

source and assessed it as assessable income. The assessee contended that the burden lay on the department to establish that the amount in question was income liable to tax and that the department had failed to establish this.

Held that the department was justified in holding that Rs. 51,000/- was assessable income of the assessee from some undisclosed source. It was not correct that the assessee was not required to prove anything and that the burden was entirely upon the department to prove that the amount received from the encashment of high denomination notes was income. The correct position is as follows. If there is an entry in the account books of the assessee which shows the receipt of a sum or conversion of the notes by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money was and to prove that it did not bear the nature of income. The department is not at this stage required to prove anything. If the business, the state of accounts and dealing of the assessee show that he might have, for convenience, kept the whole or part of a particular sum in high denomination notes, the assessee *prima facie* discharges his initial burden. If the assessee does this the department cannot act unreasonably and reject that explanation to hold that it was income. If the explanation is unconvincing, the department can reject it and draw the inference that the amount represents income either from the source already disclosed by the assessee or from some undisclosed source. Before the department rejects such evidence it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The fact that there was receipt of money or conversion of notes is itself *prima facie* evidence against the assessee on which the department can proceed in absence of good explanation. In the present case though cash used to be received from Banks and sent to the various places where works were carried on by the assessee and *vice versa*, no central account of such transfers was disclosed. There was also no account of personal expenses of the assessee and he failed to prove why such large sums were kept at hand in one place when at each of the places where work was carried on, there were Banks with which he had accounts. Further though this large sum was kept on hand, further cheques were drawn to meet current needs and this amount remained untouched.

Kanpur Steel Co. Ltd. v. *C. I. T.* [1957] 32 I. T. R. 56, *Lalchand Bhagat Ambica Ram* v. *Commissioner of Income-tax, Bihar and Orissa,* [1959] 37 I. T. R. 288; *Manindranath Dash* v. *Commissioner of Income-tax, Bihar and Orissa,* [1955]

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27 I. T. R. 522, *A. Govindarajulu Mudaliar* v. *Commissioner of Income-tax, Hydcrabad*, [1958] 34 I. T. R. 807, *Chunilal Ticamchand Coal Co. Ltd.* v. *Commissioner of Income-tax, Bihar and Orissa*, [1955] 27 I. T. R. 602, *Mehta Parikh & Co.* v. *Commissioner of Income-tax, Bombay* [1956] 30 I. T. R. 181 and *Soyachand Baid* v. *Commissioner of Income-tax*, [1958] 34 I. T. R. 650, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 486 of 1962.

Appeal by special leave from the judgment and decree dated September 24, 1959, of the Patna High Court in Miscellaneous Judicial Case No. 318 of 1957.

A. V. Viswanatha Sastri and *P. K. Chatterjee*, for the appellants.

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

1963. March 27. The judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH J.—This is an assessee's appeal by special leave of this Court against an order of the High Court of Patna, answering in favour of the Department the question "whether in the circumstances of the case the amount of Rs. 51,000 being the value of high denomination notes encashed by the assessee, has been validly taxed as profits from some undisclosed business". The original assessee, Rai Bahadur H. P. Banerjee, is dead. His son, who was substituted in his place, also died during the pendency of the proceedings in the High Court. The present appeal has been filed by the widow of the son and other legal representatives.

Banerjee was the owner of several collieries in the Jharia Coal fields in the State of Bihar and

was also a contractor for raising coal. This matter relates to the assessment year 1946-47. For that year, Banerjee was assessed on an income of Rs. 1,28,738. The assessment was then re-opened under s. 34 of the Indian Income-Tax Act, and was enhanced, but subsequently on appeal, it was reduced to a sum a little below the original assessment. The present assessment was made on a second re-opening of the case under s. 34 in the following circumstances.

On January 22, 1946, Banerjee encashed high denomination notes of the value of Rs. 51,000/-. In his application under the Ordinance which demonetized high denomination notes, Banerjee gave the reason for the possession of the notes as follows:—

> "I am engaged in business as colliery proprietor, contractor under Messrs. Kilburn & Co. in the name and style of H.P. Banerjee & Son and also under the State Rly. Bokaro, Swang, Hazaribagh district in the name of Jharia Dhanbad Coal & Mica Mining Co.,..... For conducting the business and payment to labour, I have to pay every week between 30/40 thousand as I did not get payment for work done every week. I had to keep large sum of money to meet emergency..... It is neither profit nor part of profit—it is very floating capital for purpose of conducing business. It is not an excess of profit".

He stated that he had accounts with (1) Imperial Bank of India, (2) Nath Bank Ltd., Jharia, and (3) Central Bank of India Ltd., Bhowanipore Branch, but added that he did not remember exactly from which Bank the notes came into his possession, as his transanctions were frequent. The notice which was issued to him under s. 34 of the Income Tax Act, was not questioned on any of the grounds which are usual in such cases. Banerjee's explanation

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was not accepted. The Income Tax Officer pointed out that although his business was large and the withdrawals from the various banks were large and frequent, he had not maintained a central account showing withdrawals from the banks and remittances made to his various businesses, and that none of the books maintained by the assessee and produced by him, contained a bank account. The Income Tax Officer found a discrepancy of nearly Rs. 50,000 in the statements filed by the assessee. He, accordingly, treated the high denomination notes as profits from some undisclosed source and assessed them as assessable income. Banerjee appealed to the Appellate Assistant Commissioner and further to the Tribunal. Both the authorities upheld the order of the Income Tax Officer. The assessee demanded a case which was refused, but the High Court directed a statement of the case on the question already quoted. The High Court decided the question against the assessee, and hence this appeal.

The connection of the appellants is that since the Department had issued a notice under s. 34 of the Income Tax Act, it was incumbent on the department to establish that the amount in question was income which had escaped assessment. The appellants also contend that even if the assessee was required to prove the source of the high denomination notes, he had sufficiently proved it by showing that he had large amounts on hand, which were held for convenience in high denomination notes. The appellants thus submit that the burden, if any, upon the assessee was discharged in the case, and the evidence being unrebutted, the additional assessment could not be made. The appellant rely upon *Kanpur Steel Co., Ltd.* v. *C. I. T.* (1) where, according to the appellants, the Allahabad High Court explained the nature of burden of proof in the way contended for by the appellants. They

(1) [1957] 32 I. T. R. 56.

claim that the Allahabad case applies to the facts here and point out that the said ruling was considered and approved by this Court in *Lalchand Bhagat Ambica Ram* v. *Commissioner of Income Tax, Bihar and Orissa* (1). Other cases have been cited on behalf of the department.

The cases involving the encashment of high denomination notes are quite numerous. In some of them the explanation tendered by the tax-payer has been accepted and in some it has been rejected. The manner in which evidence brought on behalf of the tax-payer should be viewed, has of course, depended on the facts of each case. In these cases in which the assessee proved that he had on the relevant date a large sum of money sufficient to cover the number of notes encashed, this Court and the High Courts, in the absence of something which showed that the explanation was inherently improbable, accepted the explanation that the assessee held the amount or a part of it in high denomination notes. In other words, in such cases, the assessee was held *prima facie* to have discharged the burden which was upon him. Where the assessee was unable to prove that in his normal business or otherwise, he was possessed of so much cash, it was held that the assessee started under a cloud and must dispel that cloud to the reasonable satisfaction of the assessing authorities, and that if he did not, then, the Department was free to reject his explanation and to hold that the amount represented income from some undisclosed source.

The case which is strongly relied upon by the assessee is *Kanpur Steel Co., Ltd.* v. *C. I. T.*(2). In that case, 32 notes of Rs. 1,000 were encashed. It was claimed that they were part of the cash balance of the company which amounted to Rs. 34,000 odd. The Income Tax Officer examined the entries regarding sales preceding the encashment of the notes and

(1) [1959] 37 I.T.R. 288 (2) [1957] 32 I.T.R. 56.

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found that those sales brought in sums under Rs. 1,000 and could not have resulted in the accumulation of so many high denomination notes. The Tribunal then came to the conclusion that Rs. 7,000 only could have been held in high denomination notes. On a reference, the Allahabad High Court held that the burden lay upon the Department to prove that Rs. 32,000 was suppressed income and there was no burden on the assessee to show whence he got the notes, because until demonetization, there was no idea that possession of high denomination notes would have to be explained. The High Court also found that the explanation was fairly satisfactory, because big notes might have been received even in small transactions and change taken, and that the High Court could not make a conjecture how many notes could or could not have accumulated. It is contended before us that the burden in such cases lies as stated by the Allahabad High Court.

On the other hand, in *Manindranath Das* v. *Commissioner of Income Tax, Bihar & Orissa* (1), the tax-payer had encashed notes of the value of Rs. 28,000, which he contended were his accumulated savings. His explanation was accepted in respect of Rs. 15,000, because 15 notes could be traced to a bank, but was rejected in respect of the balance. The Patna High Court pointed out that if an assessee received an amount in the year of account, it was for him to show that the amount so received did not bear the character of income, and the tax-payer in the case had failed to prove this fact in respect of the remaining notes. The Patna case finds support in *A. Govindaraju Mudaliar* v. *Commissioner of Income Tax, Hyderabad*; (2), where it is laid down by this Court that if an assessee fails to prove satisfactorily the source and nature of an amount received by him during the accounting year, the Income Tax Officer is entitled to draw the inference that the

(1) [1955] 27 I.T.R. 522. (2) [1958] 34 I.T.R .8.70

receipts are of an assessable nature. In that case, the explanation of the assessee in respect of the amounts shown as credits for him in the account books of a firm of which he was a partner, was rejected as untrue. It was held that it was open to the Income Tax Officer and the Appellate Tribunal to hold that the amounts represented the concealed income of the assessee.

From the last two cases, it is plain that if there is receipt of an amount in the accounting year, it is incumbent in the first instance upon the assessee to show that it does not bear the character of income. If he fails to do this, the Income Tax Officer may hold that it represents income of the assessee either from the sources he has disclosed or from some undisclosed source.

In applying this principle to the cases of encashment of high denomination notes, there is some difficulty when the assessee has books of account which are accepted and in which there is a cash balance sufficient to cover the amount of high denomination notes. Each case must depend upon its own peculiar facts. A few illustrative cases may be noticed, because they show some differences in the approach to the problem. In *Chunilal Ticamchand Coal Co., Ltd.*, v. *Commissioner of Income Tax, Bihar and Orissa* (1), high denomination notes of the value of Rs. 68,000 were encashed. Evidence showed that the assessee was in the habit of keeping large sums which he kept intact for emergencies and meeting the current needs from withdrawals from the banks. This explanation was supported by receipts and disbursement in the books of account. The explanation was rejected as to a part because the accounts did not mention the high denomination notes and further because such notes were hardly needed to pay wages to labourers. The Tribunal, however, held that the explanation might be true as to a part

(1) [1955] 27 I. T. R. 602.

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and accepted it in respect of Rs. 35,000, rejecting it in respect of Rs. 33,000. The Patna High Court held that the explanation which was held to be reasonable as to a part must be good for the whole, because there was no material on which it could be held that the balance constituted income from some undisclosed source to distinguish the case about the part rejected from the part accepted.

In *Mehta Parikh & Co.* v. *Commissioner of Income Tax, Bombay,* (1) high denomination notes of the value of Rs.61,000 were encashed. The explanation was that they were part of the cash balance on hand. The accounts disclosed that in order to sustain the explanation, it would have to be presumed that the entire balance on January 1,1946, was held in 18 notes of Rs. 1,000 each and that all receipts up to January 18, 1946, when the notes were encashed, were also in high denomination notes. The affidavits of persons who stated that they had paid amounts in Rs.1,000 notes were not accepted. The Tribunal accepted the explanation as to Rs.31,000 only. This Court held that if the account books were accepted and the deponents were not cross-examined on their affidavits, the rejection of the explanation as to a part proceeded only on surmise and the finding that Rs.30,000 were income from some undisclosed source was based on no evidence. It may be pointed out that Venkatarama Ayyar J., in that case, chose to rest his decision on the second ground only, treating the decision as involving an error of law. But in *Sovachand Baid* v. *Commissioner of Income Tax,* (2) high denomination notes of the value of Rs.2,28,000 were encashed. The assessee stated that he had inherited that amount from his father in 1942, and produced account books from 1926 to 1942. He did not produce earlier account books. The Tribunal found that the books were such as could be written at any time and did not contain full dealings even between 1926 and

(1) [1955] 30 I.T.R. 181. (2) [1958] 34 I.T.R. 650.

1942, and there were no entries showing that any amount as such was received from business. The Tribunal, however, held that Rs.1,28,000 only was income from some undisclosed source. The assessee's appeal in this Court was dismissed, because the rejection of the account books was held to be reasonable in the circumstances of the case. This Court observed that the partial rejection of the explanation by the Tribunal must be treated as a concession rather than a reasoned conclusion.

We now come to *Lalchand Bhagat's* case which is strongly relied upon, particulary, as it has cited the Allahabad case, so it is said, with complete approval. It is therefore, necessary to examine it closely to see if there is such an approval. In that case, 291 high denomination notes of the value of Rs.2,91,000 were encashed. The assessee was maintaining for a long time past two accounts: one was known as "Almirah Account", and other, "*Rokar* Account". On the date the notes were encashed there was a balance of Rs.2,81,397 in the almirah account and Rs.29,284 in the *rokar* account. These two amounts between them were sufficient to cover the encashed notes. The explanation was that for the purposes of the business which was distributed in many branches, a large amount of ready cash was always kept at the head office, so that any emergency might be met. The business of the assessee was admittedly extensive and the almirah account had also existed for several years. Except in the previous year in which the high denomination notes were encashed, even the numbers of the high denomination notes used to be shown in the almirah account. The explanation was rejected on the ground that those were the days of emergency and the assessee, as a grain dealer, could have secretly made money by smuggling grain, and that he had once been prosecuted, though acquitted. It was also said that the area where he did his business was

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notorious for smuggling and also that he had speculated in the year and might easily have made profits, though he had returned a loss from speculation. Emphasis was also laid upon the fact that in the year of account, the numbers of the high denomination notes were written subsequently. The Tribunal accepted the two books of account as genuine and also that there was a balance of Rs.3,10,681 with the assessee. Before the Tribunal it was explained that in the year of account the numbers of the high denomination notes were inserted in the almirah account out of nervousness owing to the demonetization of the notes. The Tribunal accepted the explanation with regard to Rs. 1,50,000 and rejected it with regard to Rs.1,41,000. No reasons were given for distinguishing the good part of the explanation from the bad.

This Court examined the reasons and held that except for the insertion of the numbers of notes in the book, none of the other reasons had any probative value and that they were mere conjectures and surmises. This court pointed out that if the explanation for the interpolations was good for the acceptance of the explanation as to Rs.1,50,000, it must be held to be good also for the balance, because there was nothing to distinguish between the two parts. This Court, therefore, pointed out that the main question about Rs.1,41,000 was whether there was any material to justify a different conclusion in respect of that amount and pointed to the following facts. The assessee had established the need for keeping a large sum on hand and had proved the almirah account as a genuine account. The almirah account contained the numbers of the high denomination notes in the years previous to the year relative to the assessment. In that year, the numbers were inserted subsequently and this was the only substantial point against the assessee. This Court also pointed out that there were statements of banks and accounts

of the branches and of *beoparis*, showing that large amounts were received by the assessee, which made up the amount in the almirah account. Between February 6, 1945 and January 11, 1946, when the notes were encashed, sums above Rs. 1,000 received by the assessee aggregated to as much as rupees five lakhs. As the almirah account was not questioned by the Tribunal at all, and out of that amount, more than half was held to be in the shape of high denomination notes, this Court posed the following question:—

> "Was there any material on record which would legitimately lead the Tribunal to come to the conclusion that the nature of the source from which the appellant derived the remaining 141 high denomination notes of Rs. 1000 remained unexplained".

The Court, therefore, concluded :

> "If the entries in the books of account in regard to the balance in the *Rokar* and the balance in the Almirah were held to be genuine logically enough there was no escape from the conclusion that the appellant had offered reasonable explanation as to the source of the 291 high denomination notes of Rs. 1000 each which it had encashed on January 19, 1946".

The case of assessee was thus accepted *in toto*. This Court did not hold that the assessee need not prove anything. As we have said earlier, the burden of proof must depend on the facts of the case. One such fact may be the existence of a large floating cash balance on hand, and taken with other facts, may be sufficient to show that the high denomination notes constituted the whole or part of that balance. In the Allahabad case, such a balance was proved and was accepted as to a part by the

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Tribunal. The High Court held that the explanation was good for the whole of the amount of the notes. No doubt, this Court, in referring to that case, summarised the reasons, but it pointed out that it was not open to the Tribunal to make a guess as to the number of high denomination notes which could be accepted, and cited the Allahabad case and some others in that connection.

It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum or conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money is and to prove that it does not bear the nature of income. The Department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not of an income nature, the Department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the Department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The Department does not then proceed on no evidence, because the fact that there was receipt of money, is itself evidence against the assessee. There is thus *prima facie* evidence against the assessee which he fails to rebut, and being unrebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words "an undisclosed source" show that the disclosure must come from the assessee and not form the Department. In cases of high denomination notes,

where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee *prima facie* discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the Department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The Department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof. It is within the range of these principles that such cases have to be decided. We do not think that the Allahabad view puts no burden upon the assessee and throws the entire burden on the Department. The case itself does not bear this out. If it does, then, it is not the right view.

In the present case, the assessee claimed that the high denomination notes were a part of the cash balance at the head office. The Income Tax Officer found that at first the cash on hand was said to be Rs. 1,62,022, but on scrutiny, it was found to be wrong. Indeed, the assessee himself corrected it before the Appellate Assistant Commissioner and stated there that the balance was Rs. 1,21,875. Ordinarily, this would have *prima facie* proved that the assessee might have kept a portion of this balance in high denomination notes. But the assessee failed to prove this balance, as books of the assessee did not contain entries in respect of banks. Though cash used to be received from banks and sent to the various places where works were carried on and *vice versa*, no central account of such transfers was disclosed. There was also no account of personal expenses of the assessee and he had failed to prove why such large sums were kept on hand in one place when at each of the places where work was carried

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on, there were banks with which he had accounts. The Appellate Assistant Commissioner also went into the question and found that on the same day when the high denomination notes were encashed, a sum of Rs. 45,000 was drawn by cheque. The next remittance immediately afterwards was of Rs. 16,000 to Bokaro, but Rs. 17,000 were withdrawn a few days before to meet this expense. A withdrawal of Rs. 8,000 was made a day later and Rs. 20,000 were withdrawn ten days later to finance the business. It appears that the money on hand (Rs. 45,000) was not touched at all, but on January 30, 1946, a further sum of Rs. 6,000 was withdrawn and not utilized, which made up the sum of Rs. 51,000 for which the high denomination notes were encashed.

On these facts, the Tribunal came to the conclusion that the high denomination notes represented not the cash balance but some other money which remained unexplained, and the Tribunal treated it as income from some undisclosed source. The High Court held on the above facts and circumstances that there were materials to show that Rs. 51,000 did not form part of the cash balance, and the source of money not having been satisfactorily proved, the Department was justified in holding it to be assessable income of the assessee from some undisclosed source. In this conclusion, the High Court was justified, regard being had to the principles we have explained above.

The argument that as this was a case under s. 34 of the Income Tax Act, it cast a special burden on the Department to show that this income had escaped earlier, need not detain us. No doubt, proceedings under s. 34 can only be commenced under the conditions prescribed in the section, but when the proceedings are validly commenced, there is no difference between an ordinary assessment and an additional assessment under s. 34, and the same rule

as to burden of proof governs the additional assessment.

In our opinion, this appeal has no substance; it fails and is dismissed with costs.

Appeal dismissed.

LAXMIDAS DAHYABHAI KABARWALA

v.

NANABHAI CHUNILAL KABARWALA AND ORS.

(S. K. DAS, A. K. SARKAR and N. RAJAGOPALA AYYANGAR JJ.)

Civil Procedure—Amendment of Pleadings—Suit for decree on settled accounts—Counter-claim made in written statement—Court-fee paid as on plaint—Court if can treat counter-claim as plaint in cross-Suit—Amendment when to be refused or allowed—Plaint in cross-suit when should be treated as having been filed—Liability of surviving partner—Goodwill of a firm—Exercise of discretion by trial court, when can be interfered with—Constitution of India Art. 136—Partnership Act. 1932 (9 of 1932) s. 37—Code of Civil Procedure, 1908 (Act 5 of 1908) O. 6, r. 17, O. 8, r. 6

The appellant filed a suit for the enforcement of an agreement to the effect that a partnership between himself and one Bai Itcha since deceased had been dissolved and that the partners had arrived at a specific amount to be paid by the appellant in full satisfaction of the share of Bai Itcha in the partnership. The respondents who were the heirs of Bai Itcha, not only denied the allegations in the plaint but also made a counter-claim in the written statement for the rendition of account against the appellent and paid court fee on the counter-claim as on a plaint. At a later stage, the respondents made a prayer to treat the counter-claim as a plaint in a cross-suit. The trial court dismissed the suit on the ground that appellant had failed to prove the