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the said presumption. We must, therefore, hold that the High Court was right in taking the view that, on the facts and circumstances proved in this case, the transaction in question is an adventure in the nature of trade.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

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November 24.

PUNJAB DISTILLING INDUSTRIES LTD.

v.

THE COMMISSIONER OF INCOME-TAX, SIMLA

(VENKATARAMA AIYAR, GAJENDRAGADKAR and A. K. SARKAR, JJ.)

Income-tax—Distiller taking deposit refundable on return of bottles—Balance of deposits after refund, if trading receipt—Indian Income-tax Act (XI of 1922), s. 10.

The appellant, a distiller of country liquor, carried on the business of selling liquor to licensed wholesalers. Due to shortage of bottles during the war a scheme was evolved, whereunder the distiller could charge a wholesaler a price for the bottles in which liquor was supplied at rates fixed by the Government, which he was bound to repay to the wholesaler on his returning the bottles. In addition to this the appellant took a further sum from the wholesalers described as 'security deposit' for the return of the bottles. Like the price of the bottles these moneys were also repaid as and when the bottles were returned with this difference that the entire sum was refunded only when 90% of the bottles covered by it had been returned. The appellant was assessed to income-tax on the balance of the amounts of these additional sums left after the refunds made thereout.

Held, that the amounts paid to the appellant and described as 'security deposit' were trading receipts and therefore income of the appellant assessable to tax. These amounts were paid as an integral part of the commercial transaction of the sale of liquor in bottles and represented an extra price charged for the bottles. They were not security deposits as there was nothing to secure, there being no right to the return of the bottles.

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K. M. S. Lakshmanier & Sons v. *Commissioner of Income-tax and Excess Profits Tax, Madras*, [1953] S.C.R. 1057, followed.

Davies v. *The Shell Company of China Ltd.*, (1951) Tax Cas. 133; and *Morley* v. *Tattersall*, (1938) 22 Tax Cas. 51, distinguished.

Imperial Tobacco Co. v. *Kelly*, (1943) 25 Tax Cas. 292, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 119 of 1955.

Appeal from the judgment and order dated June 16, 1953, of the Punjab High Court in Civil Reference No. 1 of 1953.

A. V. Viswanatha Sastri and *Naunit Lal*, for the appellant.

H. N. Sanyal, Additional Solicitor-General of India, R. Gopalakrishnan, R. H. Dhebar and *D. Gupta*, for the respondent.

1958. November 24. The Judgment of the Court was delivered by

Sarkar J.

SARKAR, J.—The appellant is a company carrying on business as a distiller of country liquor. It was incorporated in May 1945 and was in fact a previously existing company called the Amritsar Distillery Co. Ltd. reconstructed under the provisions of the Company's Act. The appellant carried on the same business as its predecessor, namely, sale of the produce of its distillery to licensed wholesalers. The wholesalers in their turn sold the liquor to licensed retailers from whom the actual consumers made their purchases. The entire trade was largely controlled by Government regulations.

After the war started the demand for country liquor increased but difficulty was felt in finding bottles in which the liquor was to be sold. In order to relieve the scarcity of bottles the Government devised in 1940 a scheme called the buy-back scheme. The scheme in substance was that a distiller on a sale of liquor became entitled to charge a wholesaler a price for the bottles in which the liquor was supplied at rates fixed by the Government which he was bound to repay to the wholesaler on the latter returning the bottles. The

same arrangement, but with prices calculated at different rates was made for the liquor sold in bottles by a wholesaler to a retailer and by a retailer to the consumers. Apparently it was conceived that the price fixed under the scheme would be found to be higher than the price which the bottles would fetch in the open market and the arrangement for the refund of the price would therefore encourage the return of the bottles from the consumers through the intermediaries ultimately to the distiller. The price refundable was later increased perhaps because the previous price did not fully achieve the desired result of the bottles finding their way back to the distillers.

Sometime in 1944, the Amritsar Distillery Co. Ltd. which then was in existence, insisted on the wholesalers paying to it in addition to the price of the bottles fixed under the buy-back scheme, certain amounts described as security deposits and calculated at varying rates per bottle according to sizes for the bottles in which the liquor was supplied to them promising to pay back for each bottle returned at the rate applicable to it and further promising to pay back the entire amount paid on a transaction when 90 per cent. of the bottles covered by it had been returned. The company while it was in existence realised these additional sums and so did the appellant after it took over the business. The object of demanding and taking these additional sums was obviously to provide additional inducement for the return of the bottles to the distiller so that its trade in selling the produce of its distillery might not be hampered for want of bottles. No time-limit had been fixed within which the bottles had to be returned in order to entitle a wholesaler to the refund, nor does it appear that a refund had ever been refused. The price of the bottles received by the appellant under the buy-back scheme was entered by it in its general trading account while the additional sum received for them was entered in the general ledger under the heading "Empty Bottles Return Security Deposit Account". It is not disputed that for the accounting periods with which this case is concerned, the additional amounts had been taken

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without Government's sanction and entirely as a condition imposed by the appellant itself for the sale of its liquor.

The appellant was assessed to income-tax on the balance of the amounts of these additional sums left after the refunds made thereout. It had also been assessed to business profits tax and excess profits tax on the same balance. Its appeals against the orders of assessment to these taxes to the Appellate Assistant Commissioner and thereafter to the Tribunal failed. It then obtained an order referring a certain question arising out of the assessments for decision by the High Court of Punjab. The question originally suggested was reframed and in its final form reads thus:

> Whether on the facts and circumstances of the case the collections by the assessee company described in its accounts as "empty bottle return security deposits" were income assessable under section 10 of the Income-tax Act?

The High Court answered the question in the affirmative. The present appeal is against that decision which related to all the three varieties of taxes for which the appellant had been made liable.

We are concerned in this appeal only with the additional sums demanded and received by the appellant and described as security deposit and not with the price of bottles which also it took under government sanction. The question is whether these amounts called security deposits were trading receipts. Now, as already stated, the appellant's trade consisted in selling in bottles liquor produced in its distillery to wholesalers. The sale was made on these terms: In each transaction of sale the appellant took from the wholesaler the price of the liquor, a certain sum fixed by the government, as price of the bottles in which the liquor was supplied and a further sum described as security deposit for the return of the bottles. The moneys taken as price of the bottles were returned as and when the bottles were returned. The moneys described as security deposit were also returned as and when the bottles were returned with only this difference that in this case the entire sum taken in one

transaction was refunded when 90 per cent. of the bottles covered by it had been returned, though the remaining 10 per cent. had not been returned. Such being the nature of the appellant's trade and the manner in which it was conducted, these additional sums appear to us to be its trading receipts.

Mr. Vishwanatha Sastri appearing on behalf of the appellant first contended that on these facts the amounts could not be regarded as price and that therefore they were not trading receipts. He said that the price of the bottles was separately fixed and the amount taken as deposit was different from and exclusive of, it. This contention is founded on the use of the word price in the buy-back scheme in connection with the rates which the distiller was entitled to charge a wholesaler for the bottles. It seems to us that this contention lays undue emphasis on that word. We think that the High Court took substantially a correct view of the matter when it said that in realising these amounts "the company was really charging an extra price for the bottles". It is clear to us that the trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the appellant would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold. Nor does it make any difference that the price of the bottles was entered in the general trading account while the so called deposit was entered in a separate ledger termed "empty bottles return deposit account", for, what was a consideration for the sale cannot cease to be so by being written up in the books in a particular manner. Again the fact that the money paid as price of the bottles was repaid as and when the bottles were returned while the other moneys were repaid in full when 90 per cent. of the bottles were returned does not affect the question for none of these sums ceased to be parts of the consideration because it had been agreed that they would be

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refunded in different manners. It is not contended that the fact that the additional sums might have to be refunded showed that they were not part of the price. It could not be so contended because what was expressly said to be the price of bottles and admitted to be price was also refundable. If so, then a slightly different method providing for their refund cannot by itself prevent these additional sums from being price.

Now, if these additional sums were not part of the price, what were they? Mr. Sastri said that they were deposits securing the return of the bottles. According to him if they were such security deposits, they were not trading receipts. Again we are unable to agree. There could be no security given for the return of the bottles unless there was a right to their return for if there was no such right, there would be nothing to secure. Now we find no trace of such a right in the statement of the case. The wholesalers were clearly under no obligation to return the bottles. The only thing that Mr. Sastri could point out for establishing such an obligation was the use of the words "security deposit". We are unable to hold that these words alone are sufficient to create an obligation in the wholesalers to return the bottles which they had bought. If it had been intended to impose an obligation on the wholesalers to return the bottles, these would not have been sold to them at all and a bargain would have been expressly made for the return of the bottles and the security deposit would then have been sensible and secured their return. The fact that there was no time limit fixed for the return of the bottles to obtain the refund also indicates that there was no obligation to return the bottles. The substance of the bargain clearly was that the appellant having sold the bottles agreed to take them back and repay all the amounts paid in respect of them.

For this part of the case Mr. Sastri relied on *Davies* v. *The Shell Company of China Ltd.* (1), but we do not think that case assists at all. What had happened there was that the Shell Company had appointed a large number of agents in China to sell its products

(1) (1951) 32 Tax Cas. 133.

and had taken from each agent a deposit to secure itself against the risk of default by the agent duly to account for the sale proceeds. The deposits were made in Chinese dollars and later converted into sterling. When the Company closed its business in China it reconverted the deposits into Chinese dollars and refunded to the agents the deposits made by them. Owing to a favourable exchange for the conversion of sterling into dollars, the Company made a profit and it was sought to assess this profit to income-tax. It was held that the profit could not be taxed, for the deposits out of which it was made were really not trading receipts at all. Jenkins, L. J., observed at p. 157:

"Mr. Grant described the agents' deposits as part of the Company's trading structure, not trade receipts but anterior to the stage of trade receipts, and I think that is a fair description of them. It seems to me that it would be an abuse of language to describe one of these agents, after he had made a deposit, as a trade creditor of the Company; he is a creditor of the Company in respect of the deposit, not on account of any goods supplied or services rendered by him in the course of its trade, but simply by virtue of the fact that he has been appointed an agent of the Company with a view to him trading on its behalf, and as a condition of his appointment has deposited with or, in other words, lent to the company the amount of his stipulated deposit."

He also said at p. 156:

"If the agent's deposit had in truth been a payment in advance to be applied by the Company in discharging the sums from time to time due from the agent in respect of petroleum products transferred to the agent and sold by him the case might well be different and might well fall within the *ratio decidendi* of *Landes Bros.* v. *Simpson* (1) and *Imperial Tobacco Co.* v. *Kelly* (2). But that is not the character of the deposits here in question. The intention manifested by the terms of the agreement is that the deposit should be

(1) (1934) 19 Tax Cas. 62.
(2) (1943) 25 Tax Cas. 292.

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retained by the Company, carrying interest for the benefit of the depositor throughout the terms of the agency. It is to be available during the period of the agency for making good the agent's defaults in the event of any default by him; but otherwise it remains, as I see it, simply as a loan owing by the Company to the agent and repayable on the termination of the agency".

It would therefore appear that the deposits in that case were held not to be trading receipts because they had not been made as part of a trading transaction. It was held that they had been received anterior to the commencement of the trading transactions and really formed the trading structure of the Company. The character of the amounts with which we are concerned is entirely different. They were parts of the trading transactions themselves and very essential parts: the appellant would not sell liquor unless these amounts were paid and the trade of the appellant was to make profit out of these sales. The fact that in certain circumstances these amounts had to be repaid did not alter their nature as trading receipts. We have already said that it is not disputed that what was expressly termed as price of bottles was a trading receipt though these had to be repaid in almost similar circumstances. We may point out that it had not been said in *Shell Company* case(1) that the deposits were not trading receipts for the reason that they might have to be refunded; the reason for the decision was otherwise as we have earlier pointed out, namely, that they were no part of the trading transactions. We therefore think that the deposits dealt with in the *Shell Company* case were entirely of a different nature and that case does not help. Mr. Sanyal was prepared to argue that even if the amounts were securities deposited for the return of the bottles, they would still be trading receipts, for they were part of the trading transactions and the return of the bottles was necessary to enable the appellant to carry on its trade, namely, to sell liquor in them. As we have held that the amounts had not been paid as security for the return of the bottles, we do not

(1) (1951) 32 Tax Cas. 133.

consider it necessary to pronounce upon this contention.

We might also refer to the observations made in *Imperial Tobacco Co.* v. *Kelly*(1) mentioned in the *Shell Company* case (2) and set out below. There the Company in the course of its trading activity used to purchase tobacco in America and for that purpose had to acquire American dollars. It so happened that after it had acquired a certain amount of dollars for making the purchases, it was prevented from buying tobacco in America by Government orders passed due to outbreak of war. While the dollars lay with the Company, they appreciated in value and later the Treasury acquired the dollars and paid the Company for them in sterling at the then current rate of exchange, as a result of which payment the Company made a profit. It was held that the profit was a trading receipt of the Company. Lord Greene said at p. 300:

"The purchase of the dollars was the first step in carrying out an intended commercial transaction, namely, the purchase of tobacco leaf. The dollars were bought in contemplation of that and nothing else". He also observed that the dollars "were an essential part of a contemplated commercial operation". It seems to us that the amounts with which this case is concerned, were paid and were refundable as an integral part of a commercial transaction, namely, the sale of liquor in bottles by the appellant to a wholesaler.

The case nearest to the present one is, in our view, that decided by this Court in *K. M. S. Lakshmanier & Sons* v. *Commissioner of Income-tax and Excess Profits Tax, Madras* (3). There the appellants, who were the assessees, were merchants carrying on business as the sole selling agents for yarn manufactured by the Madura Mills Co. Ltd. They sold the yarn to their constituents and in the relevant accounting period the sales were made under three successive arrangements each of which covered a part of it. Under each arrangement, the assessees were paid a certain initial

(1) (1943) 25 Tax Cas. 292. (2) (1951) 32 Tax Cas. 133.
(3) [1953] S.C.R. 1057.

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sum by their customers. The question was as to the nature of these initial payments. Under the first arrangement "the appellants had two accounts for each constituent, namely, 'a contract deposit account' and 'a current yarn account', crediting the moneys received from the customers in the former account and transferring them to the yarn account in adjustment of the price of the bales supplied then and there, that is, as and when deliveries were made under a contract either in instalment or in full". It was held that the amounts received from the customers under this arrangement were taxable as they were merely advance payments of the price and could not therefore be regarded as borrowed money. This was clearly so because under this arrangement cash was deposited by a purchaser in respect of a contract of purchase at the time it was made and was to be applied when the goods had been delivered by the appellant under that contract towards the price payable in respect of them, such price not being payable in any other manner.

The arrangement for the second part of the accounting period was that the payment made by a constituent at the time of the making of a contract was taken as "Contracts advance fixed deposit" and it was refunded when the goods under the contract had been supplied and the price in respect thereof paid in full irrespective of the earlier payment. With respect to the payment initially made under this arrangement Patanjali Sastri, C. J., said at p. 1067:

"...we are of opinion that, having regard to the terms of the arrangement then in force, they partake more of the nature of trading receipts than of security deposits. It will be seen that the amounts received were treated as advance payments in relation to each "contract number" and though the agreement provided for the payment of the price in full by the customer and for the deposit being returned to him on the completion of delivery under the contract, the transaction is one providing in substance and effect for the adjustment of the mutual obligations on the completion of the contract. We hold accordingly that

the sums received during this period cannot be regarded as borrowed money....."

It seems to us that the amounts involved in the present case were exactly of the nature of the deposits made in the second period in *Lakshmanier & Sons'* case (1). There, as here, as soon as a transaction of sale was made the seller received certain moneys in respect of it. It is true that in *Lakshmanier & Sons'* case the transaction was a contract to sell goods in future whereas in the present case the transaction was a sale completed by delivery of the goods and receipt of the consideration. But that cannot change the nature of the payment. In *Lakshmanier & Sons'* case, the payment initially made was refundable after the price had been paid; in the present case the contract is to refund the amount on the return of the bottles already sold. In each case therefore the payment was made as part of a trading transaction and in each case it was refundable on certain events happening. In each case again the payment was described as a deposit. As in that case, so in the present case, the payment cannot be taken to have been made by way of a security deposit. We must therefore on the authority of *Laskhmanier & Sons'* case, hold the amounts in the present case to have been trading receipts.

It was Mr. Sastri's effort to bring the case within the arrangement that prevailed in the third part of the accounting period in *Laskhmanier & Sons'* case, the initial payments made during which were held to be loans. But we think that he has not succeeded in this. The payments during the third period were made under the following arrangements: "Instead of calling for amounts from you towards 'Security Deposit' due to bales for which we are entering into forward contracts with you and returning the same to you from the said deposit then and there, as we are doing now, and in order to make it feasible, we have decided to demand from you a certain sum towards Security Deposit and keep the same with us so long as our business connections under forward contracts will continue with you." Under this arrangement a certain

(1) [1953] S.C.R. 1057.

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sum was kept in deposit once and for all and thereafter Lakshmanier & Sons commenced to enter into the trading transactions, namely, forward contracts for sale of yarn with the constituents who deposited the money. The sum so deposited was to be refunded with interest at three per cent. per annum at the end of the business connection between the parties, if necessary, after retaining thereout any amount due on the contracts made with the constituent which, the latter was at the termination of the business found not to have paid. Patanjali Sastri, C. J., observed at p. 1063 in regard to the deposits made under this arrangement:

"The amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract—either in instalments or otherwise. Such price was to be paid by the customer in full against delivery in respect of each contract without any adjustment out of the deposit, which was to be held by the appellants as security for the due performance of his contracts by the customer so long as his dealings with the appellants by way of forward contract continued, the appellants paying interest at 3 per cent. in the meanwhile, and having, as appears from the course of dealings between the parties, the use of the money for their own business. It was only at the end of the "business connection" with the appellants that an adjustment was to be made towards any possible liability arising out of the customer's default. Apart from such a contingency arising, the appellants undertook to repay an equivalent amount at the termination of the dealings. The transaction had thus all the essential elements of a contract of loan, and we accordingly hold that the deposits received under the final arrangement constitute borrowed money".

Having observed that the description of the payment made by the customer as a deposit made no difference for a deposit included as a loan, the learned Chief Justice further said at p. 1064:

"The fact that one of the conditions is that it is to be adjusted against a claim arising out of a possible

default of the depositor cannot alter the character of the transaction. Nor can the fact that the purpose for which the deposit is made is to provide a security for the due performance of a collateral contract invest the deposit with a different character. It remains a loan of which the repayment in full is conditioned by the due fulfilment of the obligations under the collateral contract ".

In coming to the view that he did with regard to the arrangement prevailing in the third period, the learned Chief Justice referred with approval to the case of *Davies* v. *Shell Company of China* (1) which we have earlier mentioned.

Now it seems to us that the reasons on which the learned Chief Justice based his conclusion that the deposits during the third period were loans do not apply to the present case. In the present case, unlike in *Lakshmanier & Sons*' case, the amount paid has a relation to the price of the goods sold; it is part of that price as we have earlier said. It was a condition of each transaction of sale by the appellant. It was refundable to the wholesaler as soon as he returned the bottles in which the liquor had been supplied to him in the transaction in respect of which the deposit had been made. The deposit in the present case was really not a security at all; it did not secure to the appellant anything. Unlike *Lakshmanier & Sons*' case, in the present case a deposit was made every time a transaction took place and it was refundable under the terms of that transaction independently of other deposits under other transactions. In *Lakshmanier & Sons*' case, the deposit was in the nature of the assessee's trading structure and anterior to the trading operations, as were the deposits considered in *Shell Company* case (1). In the case in hand the deposit was part of each trading transaction. It was refundable under the terms of the contract relating to a trading transaction under which it had been made; it was not made under an independent contract nor was its refund conditioned by a collateral contract, as happened in *Lakshmanier & Sons*' case.

(1) (1951) 32 Tax Cas. 133.

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We therefore think that the present case is governed by the arrangement covering the second period and not the third period mentioned in *Lakshmanier & Sons* case (1), and come to the conclusion that the amounts with which we are concerned were trading receipts.

Mr. Sastri also referred us to *Morley* v. *Tattersall* (2) and contended that the amounts with which we are concerned, were of the same kind as those considered in that case and were not income. It seems to us that there is no similarity between the two cases at all. Tattersall was a firm who sold horses of its constituents on their behalf and received the price which it was liable to pay them. It so happened that in the course of years various customers did not come and demand the amounts due to them. Initially Tattersall showed these amounts in its accounts as liabilities which they really were. Later it thought that it would never have to pay back these amounts and thereupon transferred them to the credit of its partners. The Revenue sought to tax the amounts so transferred as Tattersall's income. The question was whether the amounts upon transfer became Tattersall's income. It was never contended that the amounts when received as price of the constituent's horses sold were Tattersall's income and the only contention was that they became income upon being transferred to the credit of the partners. It was held that the amounts had not by being entered on the credit side, become income of the firm. Sir Wilfrid Greene said at p. 65 :

"Mr. Hill's argument was to the effect that, although they were not trading receipts at the moment of receipt, they had at that moment the potentiality of becoming trading receipts. That proposition involves a view of Income Tax Law in which I can discover no merit except that of novelty."

Then again he said :

"It seems to me that the quality and nature of a receipt for Income Tax purposes is fixed once and for all when it is received. What the partners did in

(1) [1953] S.C.R. 1057. (2) (1938) 22 Tax Cas. 51.

this case, as I have said, was to decide among themselves that what they had previously regarded as a liability of the firm they would not, for practical reasons, regard as a liability; but that does not mean that at that moment they received something, nor does it mean that at that moment they imprinted upon some existing asset a quality different from what it had possessed before. There was no existing asset at all at that time."

All that this case decided was that moneys which were not when received, income—and as to this there was no question—could never later become income. With such a case we are not concerned. The case turned on the fact that the moneys received by Tattersall were never its moneys; they had been received on behalf of others and that receipt only created a liability towards them. Now it seems to us quite impossible to say that the amounts with which we are concerned were not the appellant's moneys in the sense that the constituent's moneys in the hands of Tattersall were not its. The amounts in this case were not received on account of any one but the appellant. No doubt these moneys might have to be refunded if certain things happened which however might never happen, but that did not make them the moneys of those who might become entitled to the refund.

Mr. Sastri referred us to the observations of Sir Wilfrid Greene, M. R., in *Morley* v. *Tattersall* (1) at p. 65 to the effect that, "The money which was received was money which had not got any profit making quality about it; it was money which, in a business sense, was a client's money and nobody else's" and contended that the amounts involved in the present case were of the same nature. We are unable to agree. If we are right in our view that the amounts were trading receipts, it follows that they must have a profit making quality about them. Their payment was insisted upon as a condition upon which alone the liquor would be supplied with an agreement that they would be repaid on the return of the bottles. They

(1) (1938) 22 Tax Cas. 51.

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were part of the transactions of sale of liquor which produced the profit and therefore they had a profit making quality. Again, a wholesaler was quite free to return the bottles or not as he liked and if he did not return them, the appellant had no liability to refund. It would then keep the moneys as its own and they would then certainly be profit. The moneys when paid were the moneys of the appellant and were thereafter in no sense the moneys of the persons who paid them.

Having given the matter our anxious consideration which the difficulties involved in it require, we think that the correct view to take is that the amounts paid to the appellant and described as "Empty Bottles Return Security Deposit" were trading receipts and therefore income of the appellant assessable to tax. We agree with the High Court that the question framed for decision in this case, should be answered in the affirmative.

In the result the appeal fails and is dismissed. The appellant will pay the costs in this Court.

Appeal dismissed.

1958

December 1.

SHRI KISHORI LAL

v.

MST. CHALTIBAI

(JAFER IMAM, S. K. DAS and J. L. KAPUR, JJ.)

Hindu Law—Adoption, proof of—Evidence not proving adoption—Estoppel—Both parties knowing true facts, if doctrine applicable—Admissions and conduct of parties, if can prove adoption.

The respondent filed a suit for declaration and possession of certain properties left by her deceased husband L. The appellant contested the suit on the grounds that L had adopted him as his son six months before his death. In addition to the oral evidence of adoption the appellant alleged that he performed the obsequies of L as such adopted son, that on the thirteenth day after the death of L he was taken by the respondent in her lap, that he entered into possession of the estate of L, that the