A M/S J.K. INTERNATIONAL

v.

STATE, GOVT. OF NCT OF DELHI AND ORS.

FEBRUARY 23, 2001

B [K.T. THOMAS, R.P. SETHI AND B.N. AGRAWAL, JJ.]

Code of Criminal Procedure, 1973 : Sections 173, 301, 302 and 435.

Criminal proceedings—Prosecution of—Complainant—Impleadment of—
C *Complainant alleged breach of trust and cheating against accused—Charge sheet filed—Accused filed petition in High Court for quashing of criminal proceedings—But High Court refused to implead the complainant as a party—Correctness of—Held: The genesis in almost all criminal cases is the grievance of the complainant that he is wronged by the accused—Hence, an aggrieved private person cannot be altogether eclipsed from criminal proceedings—*
D *Magistrate is duty-bound to hear such person—High Court directed to dispose of the petition for quashing the criminal proceedings after affording reasonable opportunity to the complainant.*

The appellant filed a complaint before the police alleging the re-
E **spondents 2 and 3 committed offences of criminal breach of trust and cheating. A charge sheet was filed against the said respondents, and they filed a writ petition before the High Court for quashing of the charge sheet. The appellant filed a petition before the High Court for impleading the appellant as a party in that writ petition. The High Court dismissed the appellant's petition on the ground that the right of the complainant to be**
F **heard ceased once, cognizance was taken and he could not thereafter continue to participate in the proceedings as if he were the aggrieved party who must have his say in the proceedings. Hence this appeal.**

Allowing the appeal, the Court

G **HELD : 1. An aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing**
H **offences against them. [95-G]**

Thakur Ram v. *State of Bihar*, AIR (1966) SC 911, held inapplicable. A

2. There is no obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased. But in order to provide him with an opportunity to be heard at the time of consideration of the final report of the police (except when the final report is to the effect that no offence had been made out in the case) the informant who lodged the FIR B **is entitled to a notice from the Magistrate. In other instances, the injured or any relative of the accused can appear before the Magistrate at the time of consideration of the police report if such person otherwise comes to know that the Magistrate is going to consider the report. If such person appears before the Magistrate it is the duty of the Magistrate to** C **hear him. [96-D-E]**

Bhagwant Singh v. *Commissioner of Police*, [1985] 2 SCC 537, relied on.

3. The petition filed by the respondents for quashing the criminal proceedings can now be disposed of by the High Court after affording a reasonable D opportunity to the appellant also to be heard in the matter.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 222 of 2001.

From the Judgment and Order dated 26.9.2000 of the Delhi High Court E in Crl. M. No. 3715/2000 in Crl. M. (Main) No. 2672 of 2000.

Ashok H. Desai, S.S. Gandhi, Anoop Bagai, Arun K. Sinha and Rakesh Singh for the Appellant.

Jaspal Singh, C. Mukhopadhya, Manish Kumar and V. Krishna Murthy F for the Respondent No. 3.

Rakesh K. Sharma for the Respondent No. 2.

The Judgment of the Court was delivered by

THOMAS, J. Leave granted. G

The grievance of the appellant is simple and apparently innocuous that he too may be heard by the court. But the High Court rolled down the shutters before him saying he has no right to be heard and the court has no power to permit him to be heard. As his grievance was compounded by such denial he has filed this appeal by special leave. H

A A person accused of certain offences moved the High Court of Delhi for quashing the criminal proceedings pending against him in a Magistrate's court. Appellant informed the High Court that the criminal proceedings were initiated at his behest and hence he too may be heard before the criminal proceedings are to be quashed. A learned Single Judge of the High Court of Delhi, while B foreclosing the appellant from doing so, observed that the Court is "of the considered opinion that the right of the complainant to be heard ceases once cognizance is taken and he cannot thereafter continue to participate in the proceedings as if he were the aggrieved party who must have his say in proceedings."

C The background is the following. Appellant filed a complaint before the police alleging that respondents 2 & 3 committed offences of criminal breach of trust and cheating. As he felt that no action was taken by the police on the complaint he filed a writ petition before the High Court for a direction to register FIR. However, before the writ petition was disposed of, the police informed the court that the FIR was already registered on the complaint filed D by the appellant. Respondents then moved the High Court in a writ petition for quashing the FIR, and the appellant was also allowed to be impleaded in that writ petition. For some reasons the said writ petition was not followed up by the respondents and it was subsequently withdrawn.

E The police, after investigation, filed a charge sheet against respondents for offences under Section 420, 406 and 120B of the IPC and the court issued process to the respondents requiring them to appear before the Court on 31.5.2000. At that stage respondents filed the present petition before the High Court praying for quashing the criminal proceedings pending before the Magistrate court pursuant to the aforesaid charge-sheet filed by the police. In F the writ petition the appellant was not made a party and therefore a petition was filed in the High Court for impleading the appellant as a party. The main plank of the appellant before the High Court was the decision of this court in *Bhagwant Singh* v. *Commissioner of Police*, [1985] 2 SCC 537. The learned Single Judge of the High Court of Delhi felt that the observations made by this G Court in an earlier decision (*Thakur Ram* v. *State of Bihar*, AIR (1966) SC 911) are more appropriate to the fact situation and basing on those observations learned single judge rejected the petition filed by the appellant before the High Court.

The observations of this court in *Thakur Ram* which persuaded the H learned single judge to shut the door before the appellant are the following:

"In a case which has proceeded on a police report a private party has really no *locus standi*. No doubt the terms of Section 435 (old Cr.P.C.) are very wide and he can even take up the matter *suo motu*. The criminal law is not, however, to be used as an instrument of wrecking private vengeance by an aggrieved party against the person who, according to that party, has caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book....."

That was a case in which the Public Prosecutor filed an application before a Magistrate in a pending trial for amending the charge by incorporating two more offences which are exclusively triable by the court of sessions and prayed for the case to be committed by the Magistrate to the sessions court. The Magistrate dismissed the application, but prosecution did not challenge the order passed by the Magistrate. However, the informant in that case filed a revision before the Sessions Court under Section 435 of the Code of Criminal Procedure 1898 (old Code). The Sessions Judge directed the Magistrate to commit the case to the court of sessions. The said order of the Sessions Court was challenged by the accused before the High Court, but that challenge was unsuccessful. Then the accused moved this court by special leave. In the above background a three-judge Bench of this court considered the scope of Sections 435 and 437 of the old Code. In the said context this Court made the observation which has been quoted by the learned single judge as extracted above. When the Public prosecutor is in management of the prosecution of a case a private person trying to interject in the case to re-channelise the course of the prosecution has been disapproved by this Court.

But the situation here is different, as the accused approached the High Court for quashing the criminal proceedings initiated by the appellant. It may not be that the complainant should have been made a party by the accused himself in the petition for quashing the criminal proceedings, as the accused has no such obligation when the case was charge-sheeted by the police. It is predominantly the concern of the State to continue the prosecution. But when the complainant wishes to be heard when the criminal proceedings are sought to be quashed, it would be a negation of justice to him if he is foreclosed from being heard even after he makes a request to the

court in that behalf. What is the advantage of the court in telling him that he would not be heard at all even at the risk of the criminal proceedings initiated by him being quashed. It is no solace to him to be told that if the criminal proceedings are quashed he may have the right to challenge it before the higher forums.

The scheme envisaged in the Code of Criminal procedure (for short "the Code") indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301(2) of the Code which reads thus:

> "If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

The said provision falls within the Chapter titled "General Provisions as to Inquiries and Trials." When such a role is permitted to be played by a private person, though it is a limited role, even in the Sessions Courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal Court merely because the case was charge sheeted by the police. It has to be stated further, that the Court is given power to permit even such private person to submit his written arguments in the Court including the sessions court. If he submits any such written arguments the Court has a duty to consider such arguments before taking a decision.

In view of such a scheme as delineated above how can it be said that the aggrieved private person must keep himself outside the corridors of the Court when the case involving his grievance regarding the offence alleged to have

been committed by the persons arrayed as accused is tried or considered by the Court. In this context it is appropriate to mention that when the trial is before a Magistrate Court the scope of any other private person intending to participate in the conduct of the prosecution is still wider. This can be noticed from Section 302 of the Code which reads thus:

> "(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
>
> Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
>
> (2) Any person conducting the prosecution may do so personally or by a pleader."

The private person who is permitted to conduct prosecution in the Magistrate's court can engage a counsel to do the needful in the Court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the Court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them.

We may now proceed to point out the usefulness of the observations made by the three-judge Bench in *Bhagwant Singh* v. *Commissioner of Police*

(supra). Bhagwati J. (as he then was) who spoke for the Bench pointed out that the informant having taken the initiative in lodging the First Information Report with a view to initiate investigation by the police for the purpose of ascertaining whether any offence has been committed (if so by whom) is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer-in- charge of the police station on such FIR should be communicated to him. The Bench said this with reference to Section 173(2)(i) of the Code.

This Court further said in the decision that if the Magistrate finds that there is no sufficient ground for proceeding further the informant would certainly be prejudiced because the FIR was lodged by him. After adverting to different clauses of Section 173 of the Code learned judges laid down the legal proposition in paragraph 5 of the said judgment. The law so laid down is that though there is no obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased in order to provide him an opportunity to be heard at the time of consideration of the final report of the police (except when the final report is to the effect that no offence had been made out in the case) the informant who lodged the FIR is entitled to a notice from the Magistrate. In other instances, the injured or any relative of the accused can appear before the Magistrate at the time of consideration of the police report if such person otherwise comes to know that the Magistrate is going to consider the report. If such person appears before the Magistrate it is the duty of the Magistrate to hear him. It is profitable to extract the relevant portion of that ratio:

> "The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative or relatives of the deceased, but not giving of such notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report."

In the above view of the matter learned single judge has done wrong to the appellant when he closed the door of the High Court before him by saying that the High Court is going to consider whether the criminal proceedings initiated at his behest should be quashed completely and that the complainant would not be heard at all even if he wants to be heard.

We, therefore, allow this appeal and set aside the impugned order. The petition filed by the respondents for quashing the criminal proceedings can now be disposed of by the High Court after affording a reasonable opportunity to this appellant also to be heard in the matter.

The appeal is accordingly disposed of.

V.S.S. Appeal allowed.

A COMMISSIONER OF INCOME TAX, COCHIN

v.

MRS. GRACE COLLIS AND ORS.

FEBRUARY 23, 2001

B [S.P. BHARUCHA, N. SANTOSH HEGDE AND Y.K. SABHARWAL, JJ.]

Income Tax Act, 1961—Sections 2(47), 45, 47 and 49(2)—Scheme of Amalgamation under the Companies Act—Shares in amalgamated company given in lieu of shares in amalgamating company in the ratio of 1:14—Sale
C *of shares of amalgamated company by assessee—Transfer—Capital Gains Tax—Liability of—Held, extinguishment of shares of amalgamating company on amalgamation come within the purview of the definition of 'transfer'—Exigible to capital gains tax—Companies Act, 1956—Sections 391(2) and 394.*

D **Respondent-assessees were shareholders of 'A' company. Under a Scheme of Arrangement under Section 391(2) and 394 of the Companies Act, 1956, 'A' company (amalgamating company) was amalgamated with 'C' company (amalgamated company) in consideration of issuing 14 equity shares of Rs. 100 each, fully paid up, in the amalgamated company for each**
E **share held by the shareholders in the amalgamating company. The assessees sold 45,318 shares of the amalgamated company for Rs. 48,72,523 i.e. at Rs. 107.50 each in the previous year relating to assessment year 1976-77. The assessees did not furnish to I.T.O., the cost of acquisition of the shares of the amalgamating company. The I.T.O. computed the cost of acquisition by multiplying the number of shares sold of the amalgamated company with**
F **their face value and dividing the result by 14. The I.T.O. levied capital gains tax under the provisions of the Income Tax Act, 1961. The order of the I.T.O. was confirmed by CIT (Appeals) and the Tribunal. On reference at the instance of the assessees, the High Court held in favour of the assessees. Hence these appeals by the Revenue.**

G **The assessees contended that the shares in the amalgamating company ceased to exist on amalgamation; that there was no transfer of their shares in the amalgamating company to any one; that the expression 'extinguishment of any rights therein' in Section 2(47) of the Act is not applicable as there was extinguishment of the asset itself; that the shares of the amal-**
H **gamated company were obtained on account of holding shares in the amal-**

gamating company; and that capital gains tax could not be levied as there was no provision under the Income Tax Act to determine the cost of the shares received from the amalgamated company. A

Allowing the appeals, the Court

HELD : 1.1. The definition of 'transfer' in Section 2(47) of the Income Tax Act, 1961 clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. There is no limitation of the expression "extinguishment of any rights therein" to such extinguishment on account of transfers. The expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. Therefore, the expression includes extinguishment of rights in a capital asset independent of and otherwise than on account of transfer. [106-B-C] B C

1.2. The rights of the assessees in the capital asset, being their shares in the amalgamating company, stood extinguished upon the amalgamation of the amalgamating company with the amalgamated company. There was, therefore, a transfer of the shares in the amalgamating company within the meaning of Section 2(47). It was, therefore, a transaction to which Section 47(vii) applied and, consequently, the cost to the assessees of the acquisition of the shares of the amalgamated company had to be determined in accordance with the provision of Section 49(2) of the Act. [106-D-E] D E

Commissioner of Income-tax, Bombay v. *Rasiklal Maneklal (HUF),* 177 ITR 198 and *Vania Silk Mills Pvt. Ltd.* v. *CIT,* 191 ITR 647, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4437-45 of 1997. F

From the Judgment and Order dated 3.6.96 of the Kerala High Court in I.T.R. Nos. 269-277 of 1985.

M.L. Verma, P.S. Narsimha and Ms. Sushma Suri for the Appellant.

Joseph Vellapally, S. Rajappa, V. Balaji and P.N. Ramalingam for the Respondents. G

The Judgment of the Court was delivered by

BHARUCHA, J. These are the appeals by the Revenue against the decision of a Division Bench of the High Court of Kerala on a reference H

A application at the instance of the assessees under Section 256(1) of the Income Tax Act, 1961. The High Court was called upon to answer the following three questions :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that on the amalgamation
B of Ambassador Steamship Pvt. Ltd. with Collis Line Pvt. Ltd., there was a transfer by the assessee of their shares in Ambassador Steamships Pvt. Ltd.?

2. In case the answer to question No. 1 above is in the
C affirmative, whether the Tribunal was right in holding that the transfer was made in consideration of the allotment for to the assessees of shares in Collis Line Pvt. Ltd.?

3. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that Section 49(2) of the
D I.T. Act, 1961 applied to the sale of the shares of the assessees in Collis Line Pvt. Ltd., which were obtained by the assessees on the amalgamation of Ambassador Steamship Pvt. Ltd. with Collis Line Pvt. Ltd. ?"

The High Court answered the first question in the negative and in
E favour of the assessees, namely, that there was no transfer. In view of this answer, it held that the second question did not arise. It answered the third question in the negative and in favour of the assessees. Even so, it held that the taxing authorities could consider taxing the assessees on the basis of the transaction whereunder the share of Rs.100/- was sold for Rs.107.50. The
F assessees were shareholders of Ambassador Steamship Pvt. Ltd.

The High Court of Kerala sanctioned a Scheme of Arrangement under Section 391(2) and 394 of the Companies Act whereby Ambassador Steamship Pvt. Ltd. ("the amalgamating company") was amalgamated with Collis Line Pvt. Ltd.("the amalgamated company"). The Scheme contemplated the
G transfer by way of amalgamation of all assets and liabilities of the amalgamating company to the amalgamated company in consideration of the amalgamated company issuing to the members of the amalgamating company 14 equity shares of Rs.100/- each, credited as fully paid up, in the amalgamated company for each share held in the amalgamating company. Upon amalgama-
H tion, the amalgamating company would cease to function and the amalgamated

company would take over all its business, assets and liabilities and carry on its business. The sanctioned Scheme stated: "As the residue of the consideration for the said transfer, the Transferee Company shall issue to the members of the Transferor Company 14 equity shares of Rs.100/- each in the Transferee Company credited as fully paid up in respect of each share held by him or her in the Transferor Company....." A B

The assessees sold the 45318 shares of the amalgamated company of the face value of Rs.100/- each which they had acquired under the Scheme to one B.K. Chatterji and his associates on 29th February, 1976 for the aggregate sum of Rs.48,72,523/-. This meant that they had sold each share for Rs.107.50.

For the Assessment Year 1976-77, the previous year whereof ended on 31st March, 1976, the Income Tax Officer levied capital gains tax upon the assessees in respect of the sale to Chatterji and others. The Income Tax Officer applied the provisions of Section 49(2) read with Section 47(vii) for the purposes of computing the capital gain. Thereunder the cost of the shares of the amalgamating company is the cost of the shares of the amalgamated company that the assessee surrendered in exchange under a scheme of arrangement. The assessees had not furnished to the Income Tax Officer information as to the cost at which they had acquired the shares of the amalgamating company. Accordingly, the Income Tax Officer noted that under the Scheme the assessees had received 14 shares of the face value of Rs.100/- each in the amalgamated company for one share of the face value of Rs.100/- in the amalgamating company. He multiplied the number of shares of the amalgamated company that the assessees had sold by their face value of Rs.100/- and divided the result by 14 to arrive at their cost. The price at which the assessees had sold the shares less their cost as aforesaid was the capital gain that the Income Tax Officer subjected to tax. The Income Tax Officer rejected the contention of the assessees that Sections 49(2) and 47(vii) were not attracted as the assessees had not become the owners of the shares of the amalgamated company in consideration of the transfer of their shares in the amalgamating company. C D E F

The order of the Income Tax Officer was confirmed by the C.I.T.(Appeals). The matter went up before the Tribunal and the Tribunal upheld the appellate order. From out of the order of the Tribunal, the questions aforestated were referred to the High Court and answered as set out above. G

For the purposes of appreciating the controversy in this appeal, it is H

A necessary to set out the relevant provisions of the Act as they obtained at the relevant time.

Section 2(47) defines "transfer", in relation to a capital asset, to include the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law. Section
B 45 states that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. Section 47 states which transactions are not to be regarded as transfers. Nothing contained in Section 45 applies, by reason
C thereof, to:

> "(vii) any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating company if-
>
> D (a) the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company, and
>
> (b) the amalgamated company is an Indian company."

Section 49 sets out how cost is to be computed with reference to various
E modes of acquisition. It says, in sub-section(2): "Where the capital asset being a share or shares in an amalgamated company which is an Indian company became the property of the assessee in consideration of a transfer referred to in clause (vii) of Section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the amalgamating company."
F

In *Commissioner of Income-tax, Bombay* v. *Rasiklal Maneklal (HUF)*, 177 I.T.R. 198, this Court was concerned with a case of acquisition of shares consequent upon a scheme of amalgamation virtually identical to the Scheme before us. At that time capital gains were chargeable to tax by reason of
G Section 12B of the Income Tax Act, 1922, which stated thus :

> "*12B. Capital gains.*- (1) The tax shall be payable by an assessee under the head 'Capital gains' in respect of any profit or gains arising from the sale, exchange, relinquishment or transfer of a capital asset effected after the 31st day of March, 1956, and such profits and gains
H shall be deemed to be income of the previous year in which the sale,

exchange, relinquishment or transfer took place." A

The question this Court was called upon to consider read thus: "Whether, on the facts and in the circumstances of the case, the sum of Rs.49,350 could be assessed in the hands of the assessee as capital gains as having accrued to the assessee by exchange or relinquishment as provided for under section 12B of the Act ?" This Court held that no exchange was involved in the B transaction. An exchange involved the transfer of property by one person to another and, reciprocally, the transfer of property by that other to the first person. There had to be a mutual transfer of ownership of one thing for the ownership of another. In the case before the Court the assessee could not be said to have transferrd any property to anyone. When he was allotted shares C of the amalgamated company, he was entitled to such allotment because of his holding 90 shares of the amalgamating company. The holding of 90 shares in the amalgamating company was merely a qualifying condition entitling the assessee to the allotment of 45 shares in the amalgamated company. The dissolution of the amalgamating company deprived the holding of the 90 shares of that company of all value. D

Learned counsel for the assessees submitted that no capital gains tax could be levied upon the assessees in respect of the sale by them of their shares in the amalgamated company because there was no provision in the Act with regard to the manner of determination of the cost of these shares. E This was for the reason that Section 49(2) prescribed the mode of determining the cost where the shares in an amalgamated company had become the property of the assessee in consideration of a transfer, as referred to in Section 47(vii); that is to say, a transfer by a shareholder in a scheme of amalgamation of shares held by him in the amalgamating company if the transfer was made in consideration of the allotment to him of shares in the amalgamated com- F pany. The decision in *Rasiklal* had held that there was no transfer of any property to any one by the assessee in circumstances identical to those before us.

This, however, is not the end of the matter for Section 2(47) defines G "transfer" to include "the extinguishment of any rights" in a capital asset.

In this regard, our attention was drawn by learned counsel for the assessees to the decision of a Bench of two learned Judges of this Court in *Vania Silk Mills Pvt. Ltd.* v. *C.I.T.*, 191 I.T.R. 647. This was a case in which the appellant company carried on the business of manufacture and H

A sale of art-silk cloth. It purchased during the year 1957 machinery and gave it on hire to Jasmine Mills at an annual rent. Jasmine Mills, as bailee of the machinery, insured it against fire along with its own machinery. The insurance policy contained a reinstatement clause requiring the insurer to pay the cost of the machinery as on the date of the fire in case of destruction
B or loss. A fire did break out in the premises of Jasmine Mills causing extensive damage, *inter alia*, to the machinery which became useless as a result. On settlement of the insurance claim, Jasmine Mills received an amount from the insurance company. From out of it it paid Rs. 6,32,533 to the appellant on the account of the destruction of the machinery. The Income-tax Officer brought to tax the sum of Rs. 3,50,792, being the dif-
C ference between the insurance amount received by the appellant for the machinery and the original cost thereof, as a capital gain. The Appellate Tribunal held that the insurance amount was not received by the appellant on the transfer of a capital asset but on account of the damage to its machinery and that Section 45 of the Act was not attracted. On a reference, the High
D Court reversed the decision of the Tribunal. This Court held in appeal therefrom that when an asset was destroyed, there was no question of transferring it to others. The destruction or loss brought about the destruction of the right of the owner of the asset in it, but it was not on account of a transfer but on account of the disappearance of the asset. The extinguishment of the right in an asset on account of the extinguishment of the asset was not a transfer
E of the right but its destruction. The destruction of the right on account of the destruction of the asset could not be equated with the extinguishment of the right on accounts of its transfer. Section 45 of the Act was, therefore, not attracted. The fact that while paying for the total loss or damage to the property the insurance company took over such property or whatever was
F left of it did not change the nature of the insurance claim, which was an indemnity or compensation for the loss. The payment of the insurance claim was not in consideration of the property taken over by the insurance company, for one was not consideration for the other. This Court then, having so very rightly held that Section 45 was not attracted, went on to consider the definition of 'transfer' and it said:

G

> "It is true that the definition of "transfer" in section 2(47) of the Act is an "inclusive" definition and therefore, extends to events and transactions which may not otherwise be "transfer" according to its ordinary, popular and natural sense. It is this aspect of the definition
H which has weighed with the High Court and, therefore, the High

Court has argued that, if the words "extinguishment of any rights therein" are substituted for the word "transfer" in section 45, the claim or compensation received from the insurance company would attract the said section. The High Court has, however, missed the fact that the definition also mentions such transactions as sale, exchange, etc., to which the word "transfer" would properly apply in its popular and natural import. Since those associated words and expressions imply the existence of the asset and of the transferee, according to the rule of noscitur a sociis, the expression "extinguishment of any right therein" would take colour from the said associated words and expressions and will have to be restricted to the sense analogous to them. If the Legislature intended to extend the definition to any extinguishment of right, it would not have included the obvious instances of transfer, viz., sale, exchange, etc. Hence, the expression "extinguishment of any rights therein" will have to be confined to the extinguishment of rights on account of transfer and cannot be extended to mean any extinguishment of right independent of or otherwise than on account of transfer."

Learned counsel for the assessees relied upon this decision to contend, again, that there had been no transfer by the assessees of their shares in the amalgamating company and that, therefore, the case would still not fall within the meaning of the expression "extinguishment of any rights therein" in Section 2(47). By reason of the decision, the expression "extinguishment of any rights therein" had to be confined to the extinguishment of rights on account of a transfer and could not be extended to refer to the extinguishment of rights independent of or otherwise than on account of transfer.

Learned counsel for the Revenue submitted that having held that the payment in settlement of the insurance claim was not in consideration of the transfer to the insurer of the damaged machinery and that, therefore, there was no transfer within the meaning of Section 45, it was unnecessary for this Court in *Vania's* case to go on to consider the definition in Section 2(47) and the meaning to be attached to the expression "extinguishment of any rights therein". In his submission, the decision in *Vania's* case was to this extent obiter dicta. The definition in Section 2(47) of 'transfer' included sale and exchange. In each of those cases there was an extinguishment of the right of the seller or exchanger in the capital asset. To restrict the extinguishment of rights to extinguishment on account of transfer was, in learned counsel's

A submission, to render the expression "extinguishment of any rights therein" otiose and to nullify the effect of their use in the definition.

We have given careful thought to the definition of 'transfer' in Section 2(47) and to the decision of this Court in *Vania's* case. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset B distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression "extinguishment of any rights therein" to such extinguishment on account of transfers or to the view that the expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent C of or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer.

This being so, the rights of the assessees in the capital asset, being their D shares in the amalgamating company, stood extinguished upon the amalgamation of the amalgamating company with the amalgamated company. There was, therefore, a transfer of the shares in the amalgamating company within the meaning of Section 2(47). It was, therefore, a transaction to which Section 47(vii) applied and, consequently, the cost to the assessees of the acquisition E of the shares of the amalgamated company had to be determined in accordance with the provision of Section 49(2), that is to say, the cost was deemed to be the cost of the acquisition by the assessees of their shares in the amalgamating company.

Upon this reading of the law, our answers to the questions are:

F

(1) In the affirmative and in favour of the assessee.

(2) Does not arise.

(3) In the affirmative and in favour of the Revenue.

G We have already set out how the Income Tax Officer computed the capital gain and see no reason to take another view, having regard to the fact that the assessees could have disclosed, without prejudice to their contentions, the cost at which they had acquired their shares in the amalgamated company. We are at a loss to understand the reasoning of the High Court in giving to H the Revenue the liberty to consider taxing the assessees on the basis that it was

"a transaction by itself whereunder a share of Rs.100.00 each was sold as a share of Rs.107.50". A

We are obliged to learned counsel for their assistance. The appeals are allowed.

The judgment and order under appeal is set aside. The questions are answered as already indicated. B

There shall be no order as to costs.

B.S. Appeals allowed.