MESSRS. HOOSEN KASAM DADA Vs COMMISSIONER OF Income Tax, BENGAL.

Court: Calcutta High Court

Date of Decision: Jan. 25, 1937

Acts Referred: Income Tax Act, 1922 â€" Section 2(14), 26A

Citation: (1937) 5 ITR 182

Hon'ble Judges: Panckridge, J; Costello, J

Bench: Full Bench

Judgement

COSTELLO, J. - This matter arises out of an assessment which was made by the income tax authorities in respect of the year 1933-34 on the

assessee Hossen Kasam Dada as an unregistered firm on the basis of the total income of Rs. 2,87,846 as against an annual income of Rs.

1,60,854 returned by the assessee. While the assessment proceedings were pending the assessee put in an application said to have been made u/s

2(14) of the Indian income tax Act, 1922, which application is dated the November 23, 1933 in which the assessee asked for the registration of

his firm in accordance with certain particulars which were contained in an instrument of partnership dated October 22, 1933. It appears, however,

that the assessee was at the time doubtful as to the validity of that particular partnership-deed and, accordingly, a fresh instrument of partnership

was entered into which is dated the March 25, 1934, and then on the May 10, 1934, a fresh application was filed which is also said to have been

made u/s 2(14) of the Act read with Section 26-A of the Act. That application was for registration of the firm in the accordance of with the terms

of the new partnership deed, that is to say, the deed of the March 25, 1934. The case of the assessee at the time of the application was that the

constitution of the firm at all material times was governed by this instrument of the March 25, 1934. That instrument of partnership purports to

constitute a partnership as between twenty different parties and of these parties Nos. 17, 18, 19 and 20 are minors and are represented by Hossen

Kasam Dada who is, in fact, their father. According to clause 4 of the instrument of the March 25, 1934, the partnership was to be deemed to

come into existence, or at any rate, into force, as from the July 10, 1933, on which date new account books for the businesses were to be opened

and the partnership was to remain in the first instance for one year terminating on or about the July 9, 1934, but could be extended by mutual

consent of all the parties. The application for registration was dealt with by the income tax Officer for Calcutta, District No. IV(1). He gave his

decision on the June 30, 1934, whereby he refused the application. From that decision the assessees appealed, as they were entitled to do, under

the provisions of Section 30(1) of the Act of 1922. When the matter came before the Assistant Commissioner of income tax, Calcutta, he stated

that the matter in issue which he had to decide was the objection of the appellant which lay in respect of the income tax Officers refusal to register

the firm. The Assistant Commissioner gave his decision and made his order on the January 22, 1935, to the following effect :-

The orders passed by the income tax Officer on the application for registration are hereby confirmed u/s 31(3)(c)."" Thereupon the assessee took

steps to have the matter reviewed by the Commissioner of income tax in order that the matter might come before this Court upon a reference u/s

66 of the Act of 1922, and an application was made under Cl. 2 of Sec. 66 on the April 16, 1935. By that application the assessee requested the

Commissioner of Income Tax to put forward certain questions of law for the consideration of this Court. The questions of law formulated by the

assessee were these :

(a) Whether the income tax Officer has the power to refuse an application for registration made in the prescribed manner with the deed of

partnership.

(b) Whether in dealing with an application u/s 26-A for registration of a firm, the income tax Officer has the power to enquire into the origin of the

money brought by a partner for investment in the firm, or to enter into such questions as whether a partner has lawful title to the fund invested by

him in the partnership, or whether the investment so made by him was unauthorised or in breach of trust.

(c) Whether in dealing with such an application the income tax Officer has the power to question the validity of the acts of a manager of a

Mohamedan Wakf or of a trustee, in the matter of investment of the Wakf or trust funds.

(d) Whether on a proper construction of the two documents creating the Wokfs in the present case, it can be held that the action of the present

Manager in investing the funds in business partnership was unauthorized.

(e) What is the legal effect of an unauthorized investment by a mutwalli or Manager of a Mohammedan Wakf of Wakf funds in partnership

business ? Is the investment wholly invalid ? can it be challenged collaterally by any person other than the beneficiaries ?

(f) Whether on a proper construction of the instrument of partnership, the partners Nos. 7 and 9 can correctly be regarded as inanimate objects,

viz., the Wakf or the funds in question or as non-personal beings like the Almighty, or whether the said partners Nos. 7 and 9 are really

represented by their respective managers.

(g) Whether in law there can be partnership in which one or more partners are the Managers of the Mohammedan Wakfs ?

(h) Whether the delivery of possession in the present case to the sevaral donees evidenced and accompanied by necessary entries in the account

books together with the subsequent conduct of the donor and the donee is not sufficient in law to complete and validate the gift ?

(i) Is physical delivery of possession absolutely necessary for the validity of a gift under the Mohammedan law even where the donee is either the

wife or an infant son of the donor living under his guardianship.

(j) Whether under correct interpretation of the deed of gift of January 16, 1930 the donees became actual owners of the properties gifted to them

? And whether there is anything in the subsequent conduct of the donor and the donees to confirm or modify the ownership of the properties then

gifted ? Was the direction as to investment in the business not mandatory, an had the major sons and each minor son on his attaining majority the

right to take away to remove his money ?

(k) Whether assuming but not admitting that the gift was not valid with respect to some of the donees, the income tax Officer could legally refuse

registration when he found the assessee to be a firm and made the assessment as such ?

Upon that application the learned Commissioner of income tax decided (as he put it) : that

The real question that arises in this case may be formulated as below :-

Question :- Whether on a correct construction of the alleged deed of gift dated the January 16, 1930 (and marked F) there was any valid transfer

by gift of money under the Mahommedan Law to the donees named therein ?

So that the learned Commissioner of income tax seemed to think that the whole matter in dispute between the income tax authorities and the

assessee touching the question of registration depended on whether or not there had been a valid transfer by gift of certain sums of money from

Hossen Kasam Dada to his wife and sons. The Commissioner in paragraph 6 of the Statement of the Case in which he puts the matter for the

consideration of this Court sums up the previous proceedings, that is to say, the proceedings before the income tax Officer in this way.

The income tax Officer refused to register the firm on the ground that the wakf or mutwali H. K. Dada as manager of the wakf could not in that

capacity and in the circumstances of this case be a partner in the firm and on the further ground that the wife of the senior partner and his nine sons

were not legally partners on a true construction of the deed of partnership read with the deed of January 16, 1930, by which the senior partner

purported to make certain gifts to his wife and sons. He held that the mutwali or the wakf was not a genuine partner for two reasons firstly,

because the wakf was not responsible for any loss which might be incurred by the firm, and secondly, because the mutwali had not complied with

the terms of the wakf deeds directing that the funds of the wakf should be invested in Immovable properties in Government securities and should

not be invested in business or any commercial activities of a risky nature, while the Assistant Commissioner supported this view on the further

argument that under the Mahommedan Law when a wakf has been legally constituted the owner of the property is the Supreme Being and the

Supreme Being cannot be partner in a firm"".

The assessees were not content in having the matter put before the Court in such a precise form as that in which the income tax Officer thought fit

to state it. They were of opinion that there were other matters as set forth in the original questions of law which ought to have received

consideration by this Court. Accordingly, they moved for a Rule calling on the Commissioner of Income Tax to show cause why he should not

refer to this Court the whole of the questions of law which I have already read and which are set forth at page 24 of the paper book. This matter

was heard by the Honble the Chief Justice and the Honble Mr. Justice panckridge and they directed that a Rule should issue calling upon t he

Commissioner of Income Tax to show cause why he should not state the case for the opinion of this Court on the questions Nos. (b) to (j) which

are set forth in paragraph 9 of the petition presented to the Court at the trial. The Commissioner of Income Tax has now appeared before us to

show cause why he should not state the case for the opinion of this Court and what we have to decide in the first instance, after hearing the

argument put forward by Mr. Gupta on behalf of the assessee and the reply made thereto by Dr. Pal on behalf of the Commissioner of income tax,

is whether the Commissioner of income tax should still be required to state a case on the particular questions of law as formulated by the assessee.

That matter is really one which is antecedent to the question of the determination of the one question which the Commissioner of income tax did

think fit to put forward for the opinion of this Court. I have already read the paragraph in which the learned Commissioner has summarised what

took place before the income tax Officer and the Assistant Commissioner but I think it desirable that I should refer a little more in detail to what

passed in the earlier proceedings.

I deal first of all, with the order made by the income tax Officer on the June 30, 1934. At page 26 of the paper-book appears this passage :

As regards partners Nos. 7 and 9 they are the managers of two wakf funds and appear to have been admitted as partners on account of

contribution of capital of the funds. As it was not clear from the partnership deed whether the managers of these two funds could lawfully become

partners, the assessees were asked to submit copies of wakf deeds in question. They have accordingly submitted copies of the wakf deeds in

Guzrati together with translations in English. They are the deed, dated February 28, 1930 for Hossain Kassem Grant and Dharmay Wakf Fund

and the deed, dated January 27, 1929 for wakf-ul-aulad or Kassemi Fund and a supplementary deed, dated March 8, 1931 to the Kassemi Fund.

The assessees have also filed a note along with their letter, dated June 6, 1934 in which they have made their submissions in connection with the

construction of the above documents, for deciding the points at issue.

As I was not satisfied from the above documents as well as the above note, that the partners Nos. 7, 9 and 11 to 20 can be admitted as valid

partners, a hearing was given to allow them further opportunity to make any further submission."" Then at page 27 appears this passage :

It has been submitted by the learned Advocates that the restrictions imposed upon the Trustees decided on not appear to have been intended to

bind the founder himself. I am, however, unable to accept his view. Mere absence of the restrictions cannot mean that the founder did not intend to

bind himself with them. Moreover he has clearly forbidden the Trustees to invest the fund in business or to enter into partnership with others or to

decided on any business in the name of the fund. In view of this I think there should be clear direction to the contrary, so far as the founder himself

if concerned, in order to empower himself to do what he has forbidden the Trustees to do. In this particular case we find nothing of the sort. The

only direction given, so far as the founder himself is concerned, is that he will try to invest in immovable properties. From this it cannot be inferred

that the directions empower him to enter into partnership."" It seems quite clear, therefore, from the decision given by the income tax Officer that the

he was of opinion that the parties Nos. 7 and 9, as they were the managers of the two wakf firms, could not lawfully be partners in order to

constitute partnership and it was mainly on that ground that he refused registration of the firm. When the matte r came before the Assistant

Commissioner he seems to have based his decision more on the ground which had been touched upon by the Commissioner and not on the ground

of delivery of possession of the capital which is said to have been given to the partners who were described as Nos. 11 and 20 - they being the

sons of the principle partner Hossen Kasem Dada. The Assistant Commissioner puts the matter in this way at page 37 of the paper-book :

In Mahomedan law (vide paragreph 125A, Mullahs Principle of Mahomdedan law), it is essential to the validity of a gift that the donor should

divest himself completely of all ownership and dominion over the subject of a gift. Paragraph 125-B of the same work says that tone of the

essentials of a gift is delivery of possession of the subject of the gift by the donor to the donee.

Then on the following page he says :

Having found that partners 11-20 are not bona fide partners, it is really unnecessary for me to consider the question as to whether the two Wakf

Funds which are stated to be partners are in effect such, for the application for registration must fail on the finding already arrived at. I will however

deal with the point, as the grounds on which I hold that the trust cannot be partners, are very much more fundamental, than the reasons for which

income tax Officer has refused to admit the funds as partners. Both the funds in question are Wakfs. Under Mahomedan law (vide paragraph 163-

B of Mullahs Principles of Mahomedan Law) the moment a Wakf is created all rights of the property pass out of the Wakf and vest in the

Almighty. The mutwalli is merely a manager or Superintendent, having no vested right in the property of the Wakf. From this it follows that the

capital of the Wakf vests in the Almighty. Such being the case, I do not appreciate how a Wakf cant be partner in a firm, for Section 4 of the

Indian Partnership Act defines ""partnership"" as the relation between person who have agreed to share the profits of a business carried on by all or

any of them acting for all.

A non-personal being, such as the Almighty is, is obviously not in a position to enter into relationship with material persons for the sharing of

profits of a business and therefore any partnership which purports to exist with a Wakf as a partner, can be no partnership in law.

With that statement of law I entirely agree. It has been conceded by Mr. Gupta on behalf of the assessees that these two mutwallis of the two

Wakfs who are stated to be partners Nos. 7 and 9 cannot really be partners. But says Mr. Gupta that in spite of that they ought to be treated as

though they were persons having some kind of share in the profits of the concern. Therefore, although in law they are not, strictly speaking,

partners, they were sufficiently in the position of partners as to justify the income tax Officer in granting registration of the firm as applied for by

them.

Mr. Gupta has also conceded that the minors, that is to say the per sons who are said to be parties Nos. 17,18,19 and 20 cannot, properly

speaking, be partners by reason of the provisions of Section 30 of the Indian Partnership Act. But again, says Mr. Gupta, although, strictly

speaking, these persons could not be partners in this concern nevertheless the provision of Section 30 entail that they should be treated as if they

were infant partners and according to what has been laid down in the income tax Manual was no bar to the registration of the firm after excluding

these quasi partners and that this was once the practice of the income tax Department. Dr. Pal, on the other hand, says that if this was the practice

at one time, it has long ceased to be the practice and the income tax authorities do not allow registration of an instrument of this kind unless all the

persons of the firm are partners in law. I am quite satisfied that it was not possible for the managers of the two Wakfs to be partners in any sense.

They are numbers 7 and 9 and they are described thus. ""Hossain Kassem Dada, manager or trustee of the Grant and Dharmay Wakf Fund"" and

Hossain Kassem Dada the manager or trustee of the Wakf-ul-Aulad or Kassemi Fund."" It is to be observed that what purports to be two

partners is, in fact, only one person said to have been functioning in two different characters. Moreover be is the same person who is the founder

of the firm and the father of the infants who are said to be interested in this firm. It seems to me that as regards the mutwallis of the Wakf there are,

as the income tax Assistant Commissioner thought, two fundamental difficulties in the way of their being considered as partners. On the one side,

there is a pro vision in the instrument of the Wakf, which would appear to prevent the investing of the Wakf fund in a commercial business or in any

kind of undertaking of a like nature. It seems obvious from the perusal sal of the deed that what was intended was that the fund should be used in

purchasing Immovable properties and not in any other way except that the mutwalli was empowered temporarily to invest the money in

Government securities to other securities of like nature. That is looking at the matter from one aspect. From another aspect I agree with the

Commissioner of income tax as to the nature of a Wakf fund. We were referred to the judgment of Mr. AMEER ALI given by him in the Privy

Council in the case of Vidya Varuthi Tirth a v. Balusamy Ayyer, 4/8 I.A. 302 at page 312 where his Lordship says : ""The Mohammadan Law

relating to trusts differs fundamentally from the English Law. It owes its origin to a Rule laid down by the Prophet of Islam; and means, the tying up

of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human being"". When once it is declared that a

particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of Jewan Das

Shahu v. Shah Kuburddin (2 Moo.I.A. 390) that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and

the ownership is transferred to the Almighty. The donor ma name any meritorious subject as the recipient of the benefit. The manager of the Wakf

is the Mutwalli, the governor, superintendent or curator."" Then at page 315 the learned Judge says ""Under the Mahommedan Law the moment the

wakf is created all tights of property pass out of the wakif, and vest in God Almighty. The curator, whether called Mutwalli or Sajjadanishim or by

any other name, is merely a manager. He is certainly not a trustee as understood in the English system. That judgment was referred to an approved

of by LORD SUMNER in the case of Abdur Rahim v. Marayan Das Aurora (50 I.A. 84 at page 90) where after quoting the passage from Mr.

AMEER ALIs judgment to which I have just referred, His Lordship said : ""The principle of the respondents contention, accordingly, appears to

their Lordships to be fallacious. The property in respect of which a wakf if created by the settlor, is not merely charged with such several trusts as

he may declare, while ramaining his property and in his hands. It is in very deed God acre, and this is the basis of the settled rule that such property

as is held in wakf is inalienable, except for the purposes of the wakf"". In the light of the above statement in seems perfectly clear that it was not

possible for the wakf property in the present case to be used for the purposes of a partnership. Therefore, in on sense could it be said that Hossain

Kassem as a mutwalli of the two wakfs was a partner with himself and other person in partnership. I entirely fail to to see how it could be argued

that a man can be at one and the same time a partner in his individual capacity and a partner, in a representative capacity. Taking that point alone, it

follows, in my opinion, that there was no partnership in law of the description set forth in the application made by the assessees. Sub-section (1) of

Section 26-A of the income tax Act, 1922, which is now the material section provides that ""Application may be made to the income tax Officer on

behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of

this Act and of any other enactment for the time being in force relating to income tax or super-tax."" Sub-section (2) reads as follows : The

application shall be made by such person or persons and at such tines and shall contain such particulars and shall be in such form and be verified in

such manner, as may be prescribed; and it shall be dealt with by the income tax Officer in such manner as may be prescribed."" Now the form of

the application should be as prescribed in the schedule to rule (3) of the income tax Rules farmed in the Act itself. The way in which the application

is to be dealt with is prescribed in rule 4(1) of the Indian income tax Rules which says thus : ""On the production of the original instrument of

partnership or on the acceptance by the income tax Officer a certified copy thereof, the income tax Officer shall enter in writing at the foot of the

instrument or copy, as the case may be, the following certificate, namely, This instrument of partnership (or this certified copy of an instrument of

partnership) has this day been registered with me, the income tax Officer, under clause (14) of Section 2 of the Indian income tax Act, 1922. This

certificate of registration has ""effect from the - day of April up to 31st March, 19"". It seems to me that the income tax Officer is only empowered

to register a partnership or rather the partnership which has been put forward or nothing else.

Mr. Gupta says that even if the two wakfs have to be eliminated or even if the infant partners or quasi partners have to be eliminated, nevertheless

there remain other partners and they constitute a partnership which can and should be registered. The sho rt answer to that is that if you take away

two or more or even one of the persons constituting the constituents of the partnership then what is left is not the partnership which the assessee

seeks to tegister but another partnership altogether, if indeed there is in existence any partnership at all. It is quite clear that it was open to the

income tax Officer of look into the matter and if any authority is needed for that, one may refer to the case of In Re Bisseswar Lal Brijlal, (I.L.R.

Cal. 1336 at page 1338) where the late Chief Justice of this Court sitting with Mr. Justice BUCKLAND said ""It is said that the rules contain no

provision for an investigation into the reality of such document, that is to say, relating to the partnership. Neither they do. On the other hand under

the Act and under the rules the right to present such a document at all is only given to a firm constituted under an instrument of partnership,

specifying the individual shares of the partners, and if a firm is not a firm constituted under an instrument of partnership the income tax officer, in my

judgment, is not obliged to receive the application at all or to register the document which the parties were putting forward"". We have no doubt

that both the income tax Officer and the Assistant Commissioner were quit e tight in coming to the conclusion that there was, in the circumstances

of this case, no such partnership as that which was put forward by the assessee on the basis of the instrument of partnership deed dated April 25,

1934. The Income Tax officer was therefore quite right in refusing registration. Upon that view of the matter, in my opinion, it is unnecessary to

trouble the income tax Commissioner to put forward a statement of case on the basis of the long catalogue of ""question of law"" formulated by the

assessee appearing at page 24 of the paper book.

The Rule is, therefore, discharged with costs -seven gold mohurs.

PANCKRIDGE, J. :- I agree.

Reference No. 1 of 1936.

PANCKRIDGE, J. - The circumstances in which this References u/s 66(2) of the Indian income tax Act, 1922, has been made have been set out

in the judgment delivered by my Lord in dealing with the Rule which has just been disposed of. The substantive question raised by the case stated

by the Commissioner of income tax is whether on a correct construction of the seed of gift dated the January 16,1920 there was under

Mohamedan Law a valid transfer by gift of money to the donees named therein. One of the reasons for which the income tax Officer considered

that he was bound to refus e registration of the firm of Hossen Kasem Dada was that he considered that the gift to the minor sons of Hossen

Kasem Dada by their father were not effective. What was purported to be done was that after the sums had been validly transferred by gift to the

minors they were contributed by the minors to the partnership capital. The income tax Officer took the view that as the sums of money were never

vested in the minors, they could not be considered to have made any contribution to the partnership, and under the terms of the partnership deed

had, therefore, never become partners, quire apart from any difficulty that might be occasioned by the fact that they had not attained majority. This

is one of the reasons for which the income tax officer refused to register the deed. Inasmuch as we have just decided that the income tax Officer

was justified in refusing to register the deed because among the partners shown was Hossen Kasem Dada in his capacity as Manager of the two

wakfs, it appears that it would be wasting the time of the Court it ask us to consider whether, apart from this reason, the income tax Officer was

also justified in refusing to register the deed for the reasons which from the subject-matter of the case stated by the Commissioner of Income Tax.

In these circumstances, we decided on not propose to deal with the Reference, and we decline to answer the question on the ground that no

answer is necessary for the guidance of the income tax Department. These will be no order as to costs.

COSTELLO, J. - I agree.

Order accordingly.