

Commissioner of Income Tax, Uttar Pradesh

Vs

Manmohan Das

Civil Appeal No. 512 of 1964

(K. Subha Rao, S. M. Sikri, J. C. Shah JJ)

05.11.1965

JUDGMENT

SHAH, J. –

Under an agreement dated January 2, 1931, Lala Manmohan Das - hereinafter called 'the assessee' - was appointed Treasurer of the Allahabad Bank Ltd. in respect of certain Branches, Sub-Agencies and Pay Offices. The assessee was assessed to income- tax as representing his Hindu undivided family, and the income received by the assessee under the terms of the agreement with the Allahabad Bank, was treated as income of the Hindu undivided family. In the previous year corresponding to the assessment year 1950-51, the assessee, in performing his duties as a Treasurer, suffered a net loss of Rs. 38,027. For the assessment year 1951-52, the profit and loss account of the assessee showed Rs. 73,815 as receipts, against which were debited outgoings amounting to Rs. 39,370 which included Rs. 20,000 being the loss suffered by the assessee as Treasurer of the Patna Branch of the Allahabad Bank arising from misappropriation by an Assistant Cashier. The Income-tax Officer refused to allow the loss suffered in the previous year to be set off against the net profit of Rs. 34,445 and brought that amount of profit to tax as remuneration received by the assessee as Treasurer of the Allahabad Bank. The order of the Income tax Officer was confirmed in appeal by the Appellate Assistant Commissioner. The Income tax Appellate Tribunal held that the remuneration received by the assessee as treasurer of the Allahabad Bank was income arising from pursuit of a profession or vocation within the meaning of s. 10 of the Act and the loss suffered during the preceding year was liable to be set off against the assessee's income from that source in the year under consideration.

At the instance of the Commissioner of Income tax, U.P., the following questions were referred to the High Court of Allahabad under s. 66(1) of the Indian Income-tax Act, 1922 :

"(1) Whether on a true interpretation of the deed of agreement dated 2nd January, 1931, appointing the assessee as Treasurer of the Allahabad Bank Limited, income earned by the assessee from his activities as such treasurer fell to be computed under Section 10 of the Act or Section 7 or Section 12 of the Income-tax Act ?

If the answer to this question is that such income is liable to be computed under Section 10 of the Act,

(2) Whether the assessee could claim a set off of the loss suffered by him in the preceding year 1950-51 against his profits in the year under consideration, i.e., 1951-52 having failed to prefer an appeal against the refusal by the Income-tax Officer

making the assessment for the year 1950-51 to allow the assessee to carry forward the loss under Section 24(2) of the Act ?"

The High Court held that the remuneration received by the assessee from the Allahabad Bank was income liable to be taxed under s. 10 of the Income-tax Act, and that the assessee could claim to set off the loss computed in the assessment year 1950-51 against the profits in the subsequent year. With certificate granted by the High Court, this appeal has been preferred by the Commissioner of Income tax.

The second question presents little difficulty. In making his order of assessment for the year 1950-51, the Income-tax Officer declared that the loss computed in that year could not be carried forward to the next year under s. 24(2) of the Income-tax Act, as it was not a business loss. The Income-tax Officer has under s. 24(3) to notify to the assessee the amount of loss as computed by him, if it is established in the course of assessment of the total income that the assessee has suffered loss of profits,. Section 24(2) confers a statutory right (subject to certain conditions which are not material) upon the assessee who sustains a loss of profits in any year in any business, profession or vocation to carry forward the loss as is not set off under sub-s. (1) to the following year, and to set it off against his profits and gains, if any, from the same business, profession or vocation for that year. Whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and gains of the same business, profession or vocation under s. 24(2) has to be determined by the Income-tax Officer who deals with the assessment of the subsequent year. It is for the Income tax Officer dealing with the assessment in the subsequent year to determine whether the loss of the previous year may be set off against the profits of that year. A decision recorded by the Income tax Officer who computes the loss in the previous year under s. 24(3) that the loss cannot be set off against the income of the subsequent year is not binding on the assessee.

The answer to the first question depends upon the true interpretation of the terms of the agreement between the Allahabad Bank and the assessee. If under the terms of the agreement it is found that the assessee was carrying on a business, profession or vocation, the assessee would be entitled to carry forward the loss suffered therein and set it off against the profit in the subsequent year of the same business, profession or vocation under s. 24(2). If the remuneration was received by the assessee as a servant of the bank, and on that account has to be computed under s. 7 of the Act, the right to set off the loss cannot be claimed under s. 24(2). The fact that the assessee held an office is however not decisive of the question whether remuneration earned by him was as a servant of the Allahabad Bank. Receipt of remuneration for holding an office does not necessarily give rise to a relationship of master and servant between the holder of the office and the person who pays the remuneration.

The agreement is between the Allahabad Bank Ltd. and Lala Manmohan Das - called in the agreement "Treasurer", and the expression Treasurer includes "his heirs and representatives". By cl. 2 it is recited that the treasurer is appointed for the Bank's Branches and Sub-Agencies and Pay Offices mentioned therein and such other offices in other parts of India for which he may be appointed, and that the Treasurer has agreed to provide security to the Bank for the due discharge and performance of his duties and obligations to the Bank. The agreement then proceeds to set out the conditions of the agreement, the following of which are relevant :

(1) "The Treasurer shall serve the Bank as Treasurer for its Branches, Sub-Agencies and Pay Offices . . . until this agreement is determined as hereinafter provided."

(2) "The remuneration of the treasurer shall be a monthly allowance for each of the Branches, Sub-Agencies and Pay Offices . . . , the total of such monthly allowance to be Rs. 2,250 (Rupees two thousand two hundred and fifty) plus Rs. 350 (Rupees three hundred and fifty) for travelling expenses."

(3) "The duties, liabilities and responsibilities of the Treasurer to the Bank shall be such as either by custom or contract usually devolve on a Treasurer in the service of the Bank including the duties, liabilities and responsibilities hereinafter mentioned and the Treasurer shall faithfully discharge his duties and duly perform his obligations to the Bank."

(4) "The Treasurer shall with the approval of the Bank appoint at adequate salaries to be paid by the Bank all the Indian staff . . . as may be considered sufficient by the bank for the business of the Cash Department of the Bank's Branches, Sub-Agencies and Pay Offices.... and shall dismiss any person or persons so appointed whom he shall be reasonably directed by the Bank to dismiss and shall with like approval appoint another or others in the place of person or persons so dismissed. The Treasurer shall be deemed to have appointed the present staff of the Cash Department of the Branches, Sub-Agencies and Pay Offices aforesaid. Provided always that the Bank shall accept any proposal of the Treasurer for transfer, suspension or dismissal of any member of the Cash staff in the Bank."

(5) "The Treasurer shall be responsible to the Bank for the work and conduct of every person . . . to be appointed or employed on his staff and shall make good to the Bank any loss or damage sustained or incurred by the Bank from any embezzlement, theft, fraud, misappropriation, mis-conduct, mistake, omission, negligent act or default of any such person or persons."

(6) "The Treasurer shall keep under his care and supervision or that of his staff the moneys, cash, bullion, securities, cheques, notes, hundies, drafts, orders and other documents or property which may from time to time be entrusted to him at the Branches, Sub-Agencies and Pay Offices . . . and shall whenever so required to do so transmit from one place to another place under such guard as may be provided by the Bank all such money, documents or properties and shall be responsible for the care and proper custody of the same while in transit. That the Bank shall for the efficient working of its Cash Department provide proper iron safes and a strong room in each of the said Branches, Sub-Agencies and Pay Offices and the Treasurer shall be responsible to the Bank for any loss occasioned to the Bank through the negligence, malfeasance or misfeasance of any of his servants or agents by the payment or delivery of any money, document or property aforesaid to a wrong person whether owing to forgery, mistake, fraud or otherwise."

(7) "The Treasurer shall be responsible for the correctness and genuineness of all hundies, cheques, drafts, securities, vouchers, documents, writing and signature in an Indian language or character which the Treasurer or any of his staff may accept and certify as genuine and correct and shall make good to the Bank any loss or damage from any forged instrument or signature on a document as dealt with and shall also be liable for any loss occasioned to the Bank by receipt of any bad or base-money coin or bullion or any forged or fraudulently altered currency note."

(9) "The Treasurer shall not nor shall any substitute or any one of the staff of the Treasurer publish or divulge any of the business affairs or transactions of the Bank or any of its constituents."

(10) "The Treasurer's employment . . . may be determined at any time by either party giving to the other three calendar months written notice to that effect, and in the case of the Treasurer's death, this agreement as regards the Treasurer's liabilities and obligations for the staff and other persons shall remain in force so as to bind his heirs, representatives and estate for any loss then accrued or accruing claim of the Bank hereunder but also for any future claim of the Bank in respect of any subsequent transaction or occurrence unless and until determined by his heirs or representatives giving like notice to the Bank."

The agreement contains certain peculiar covenants : for instance, the expression "Treasurer" includes the heirs and representatives and except where the context may justify a contrary implication, the rights, obligations and liabilities of the Treasurer would apparently be enforceable by or be enforced against the heirs and legal representatives of the assessee. The Treasurer is entitled under the terms of cl. (4) to transfer, suspend and dismiss any member of the staff in the cash department of the Bank and his recommendation in that behalf has to be accepted by the Bank. The Treasurer has if reasonably directed by the Bank, but not otherwise, to dismiss any member of the Indian staff appointed by him, and to appoint another in the place of the person so dismissed. The staff in the Cash department is referred in cls. (5), (6) & (7) as the Treasurer's staff. Under cl. (4) all the staff originally in the employment of the Bank at the date of the agreement and the staff subsequently appointed were to be paid by the Bank, but the Treasurer was to stand responsible for any loss or damage which may be sustained not only for embezzlement, theft, fraud, misappropriation, misconduct, but even for mistake, omission, negligent act or default of any member of the staff. The Treasurer has by the agreement undertaken to keep the moneys, cash, bullion, securities, cheques, notes, hundies, drafts, orders, and other documents or property under his care and supervision through his staff, and is liable to protect the property of the Bank in his custody, and has to make good any loss occasioned to the Bank by the negligence, malfeasance or misfeasance of any of "his servants or agents" even though not belonging to the Cash Department. The Treasurer is responsible for the "correctness and genuineness" of all hundies, cheques, drafts, securities, vouchers, documents, writing and signature in an Indian language and he is responsible for any loss or damage from any forged instrument or signature on a document dealt with by his staff, and also for any loss arising from receipt of any bad or base money, coin or bullion or any forged or fraudulently altered currency note. It may be noticed that the liability imposed under that covenant is for the acts of the staff appointed by him or deemed to have been appointed by him within the meaning of cl. (4), and also for loss arising from the receipt of any bad or base-money coin or bullion or any forged or fraudulently altered currency note by any person employed by the Bank. The agreement also contemplates that the Treasurer may appoint any substitute to carry on the work of the Bank. The Treasurer is under the agreement responsible for the acts of the Indian staff at the Branches, Sub-Agencies and Pay Offices for apart as Calcutta, Lahore, Lucknow, Patna, Amritsar, Banaras and Secunderabad.

On a fair reading of the terms of the agreement it appears that the Treasurer had to provide the staff for the cash section : he had power to suspend, transfer or dismiss any member of the staff or to appoint another person in his place : he had to perform the duties, liabilities and responsibilities which by custom or contract usually devolve upon a Treasurer and the duties specified in the agreement, and he was responsible for all acts of the staff so appointed which result in loss or

damage to the Bank. The Treasurer was also responsible for the protection of the property of the Bank and was also responsible for receipt of any bad or base-money coin or bullion or any forged or fraudulently altered currency note. Personal attendance by the Treasurer and supervision over the staff in the cash section in all the Branches and Pay Offices being in the very nature of things impossible, it was open to the Treasurer to appoint his own agents to supervise the work of the cash section.

An office of Treasurer was undoubtedly created by the agreement. It is recited in cl. (1) that the Treasurer shall serve the Bank and in cl. (3) that the duties, liabilities and responsibilities of the Treasurer shall be such as by custom or contract usually devolve on a Treasurer in the service of the Bank. For performing these duties there is a fixed remuneration which is paid to the Treasurer, besides the travelling expenses. But the use of the expressions "serve the Bank" and "in the service of the Bank" have to be read in the setting of the other covenants. By themselves they are not decisive of the intention of the parties to the agreement. The office of the Treasurer can be determined only by notice on either side of a duration of three months, and even on the death of the assessee, the Treasurer's obligations accrued or accruing during his life-time, and future claims in respect of any transactions, even subsequent to his death, remain enforceable. Express reference to liability of the Treasurer for future claims for subsequent transactions clearly indicates that the agreement does not come to an end by the death of the assessee : it is determined only by notice of three months' duration. Liability for transactions subsequent to the death of the person for the time being acting as Treasurer remaining enforceable, it is reasonable to infer that the right to receive remuneration would enure to the person who would step into the office of the Treasurer.

The office of Treasurer is therefore to be held by the assessee, and after his death by his heirs and legal representatives. It is unnecessary to consider whether the agreement would be determined by any supervening disability of the Treasurer, which may render the contract impossible of performance. But the Treasurer holds the office not as servant of the Bank. The Treasurer has unquestionably under taken very onerous responsibilities. There is however no covenant which authorises the Bank to control the Treasurer in the due performance of duties undertaken by him under the terms of the agreement. Business of the Bank has undoubtedly to be carried on in the manner normally done by the Banks, and the duties, liabilities and responsibilities of the Treasurer are to be such as "either by custom or contract usually devolve on a Treasurer". The Bank pays the Indian staff in the Cash Department, but the control is of the assessee. He has control over the staff appointed by him or deemed to be appointed by him : he has therefore the power to initiate proposals for transfer, suspension or dismissal of any member of the cash staff.

This Court in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra* ([1957] S.C.R., 152, 157.) observed :

"The principles according to which the relationship as between employer and employee or master and servant has got to be determined are well settled. The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done. A distinction is also drawn between a contract for service and a contract of service and that distinction is put in this way : "In the one case the master can order or require what is to be done while in the other case he cannot only order or require what is to be done but how itself it shall be done"."

After referring to a large number of cases, the Court observed at p. 160 :

"The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition.... it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of universal application and that there were many contracts in which the master could not control the manner in which the work was done.

.....

The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer or to use the words of Fletcher Moulton L.J., at page 549 in *Simons v. Health Laundry Company* - [(1910)1 K.B. 543] :-

". . . it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service".

Under the contract the Treasurer had to procure due performance of the duties of the Cash Department by employees under his supervision and that he was to be responsible for all acts done by them and to make good the loss which may result from any embezzlement, theft, fraud, misappropriation, mistake, misconduct, omission, negligent act or default of any such person. In carrying out his duties under the contract apparently he was not to be controlled or supervised by the Bank. The contract was therefore one for service and the Treasurer could not be called a servant of the Bank.

But Mr. Sastri on behalf of the Revenue contended, relying upon *Shivnandan Sharma v. Punjab National Bank Ltd.* ([1955] 1 S.C.R. 1427.), and *Piyare Lal Adishawar Lal v. Commissioner of Income-tax, Delhi* ([1960] 3 S.C.R. 669.), that under the contracts substantially similar to the contract in this case, Treasurers were held merely to be servants of the Banks, business whereof they attended. It is true that in each of these cases this Court in interpreting a contract in which a Treasurer was appointed to supervise the Cash Department of a Bank, held that the Treasurer was a servant of the Bank, and not an independent contractor. But unless the terms of the contracts and the circumstances in which they are made are identical, interpretation of one contract cannot be regarded as a guide for determining the intention of the parties to another contract.

In *Shivnandan Sharma's* case ([1955] 1 S.C.R. 1427.) the position of a Treasurer of a Bank fell to be determined somewhat indirectly. *Shivnandan* - a head cashier in one of the branches of the Punjab National Bank - appointed by the Treasurer, who was in charge of the Cash Department of the Bank under an agreement between the Bank and the Treasurer, was dismissed from the service by the Bank. In a reference made to the Industrial Tribunal of certain industrial disputes including one for reinstatement of *Shivnandan*, it was held by this Court that, under the terms of the agreement between the Treasurer and the Bank, the Treasurer was the servant of the Bank and not an Independent Contractor. In coming to that conclusion the Court was substantially guided by the

covenants which reposed the direction and control over Shivnandan and of the ministerial staff in charge of the Cash Department in the Bank. The covenants of the agreement between the Treasurer and the Bank disclosed that the Treasurer had agreed to serve the Bank and to obey and observe all lawful orders and instructions of the Bank and to carry out such duties and to discharge such responsibilities as usually devolve upon a Treasurer in the employment of the Bank and in consideration thereof to receive remuneration mentioned in the Schedule. The Treasurer and his nominees were bound as expressly stipulated to obey all the orders, rules, and regulations prescribed by the Bank with regard to the discharge of their duties by the cashiers as well as with regard to the amount of balance they were allowed to keep with them. The Bank was also given power in case of gross negligence or misconduct or of any fraud, misappropriation or embezzlement by the Treasurer or any of the nominees in the discharge of their duties to dispense with the services of the Treasurer forthwith. The Treasurer was not to engage any person as his assistant or peon about whose character, conduct or reliability, the manager of the Board of Directors of the Bank may have any objections. Shivnandan was a nominee of the Treasurer, but from the terms of his employment it appeared that he was working directly under the control and supervision of the Punjab National Bank. This Court held that the Treasurer's relation to the Bank was that of a servant to the master, and the ministerial staff of the Cash Department appointed by him were also the employees in the Cash Department. It is difficult to regard the agreement in Shivnandan Sharma's case ([1955] 1 S.C.R. 1427.) as even substantially similar to the agreement in the present case between the Allahabad Bank and the Treasurer, so as to make the interpretation of the agreement a guide or a precedent in the interpretation of the agreement before us.

In Piyare Lal Adishwar Lal's case ([1966] 3 S.C.R. 669.), one Sheel Chandra was appointed Treasurer of the Central Bank for various branches on a monthly salary. Under the agreement between Sheel Chandra and the Bank, Sheel Chandra had to engage and employ all subordinate staff. He had the power to control, dismiss and change the staff at his pleasure, but he could not engage or transfer any member of the staff except with the approval of the Bank and he had to dismiss any such member if so required by the managing director of the Bank or Agent of the office. The Treasurer was responsible for the acts and omissions of his representatives whom he was entitled to appoint at the various branches with the approval of the Bank, and he had agreed to indemnify the Bank against any loss arising from any neglect or omission on their part. But the Treasurer and his staff were under the direct control of the Bank. The agreement which was terminable by three calendar months' notice in writing by either side, could in the event of any breach of any condition of the agreement by the Treasurer be terminated by the Bank forthwith. Having regard to the nature of his work and the control and supervision of the Bank over the Treasurer, it was held that the Treasurer was a servant of the Bank and the emoluments received by the Treasurer were in the nature of salary and assessable under s. 7 of the Income-tax Act and not profits and gains of business under s. 10. Some of the covenants of the contract between the Central Bank and the Treasurer are similar to the agreement under consideration in this appeal, but in Piyare Lal Adishwar Lal's case ([1960] 3 S.C.R. 669.) this Court founded its conclusion upon the existence of control and supervision of the Bank over the Treasurer and upon the power vested in the Bank to summarily dismiss the Treasurer in case of breach of any of the conditions of the agreement.

In the present case there is no covenant which either expressly or impliedly confers upon the Bank such control and supervision over the work done by the Treasurer, and the agreement is not liable to summary determination. His duties, liabilities and responsibilities are to be such as either by custom or contract usually devolve upon the Treasurers and those which are specified in the agreement. It is true that under cl. (d) he has to transmit from one place to another place whenever so required,

under such guard as may be provided by the Bank, all such money, cash, bullion, securities, cheques, notes, hundies, drafts, orders and other documents, but that does not put the Treasurer under the general supervision of the Bank.

On a careful consideration of the covenants, we are of the view that the Treasurer was not a servant of the Allahabad Bank under the terms of the agreement dated January 2, 1931, and the remuneration received by him was not "salaries" within the meaning of s. 7 of the Income tax Act. But that is not sufficient to conclude the matter in favour of the assessee. The benefit of s. 24(2) of the Indian Income tax Act may be availed of by the assessee only if the loss sought to be set off was suffered under the head "Profits and gains . . . in any business, profession or vocation". It is difficult to regard the occupation of the Treasurer under the purely intellectual or manual skill, and the work of the Treasurer under the contract cannot be so regarded. Occupation of a Treasurer is not one of the recognised professions, nor can it be said that it partakes of the character of a business or trade. In performing his duties under the agreement, the assessee exercised his skill and judgment in making proper appointments and made arrangements for supervision the work done by the staff in the Cash Department of the Bank's Branches. The remuneration received by him was for due performance of the duties and also for the guarantee against loss arising to the Bank out of the acts or omissions of the Cash and other staff of the Bank.

Taking into consideration the nature of the duties performed, and the obligations undertaken, together with the right to remuneration subject to compensation for loss arising to the Bank from his own acts and omissions or of the servants introduced by him into the business of the Bank, the assessee may be regarded as following a vocation. The remuneration must therefore be computed under s. 10 of the Income-tax Act and loss of profit suffered in that vocation in any year may be carried forward to the next year and be set off against the profit of the succeeding year.

The appeal therefore fails and is dismissed with costs

Appeal dismissed.

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