Commissioner of Wealth Tax, Bhopal

Vs

Abdul Hussain Mulla Muhammad Ali, (Dead) By Lrs

Civil Appeals Nos. 740, 741, 742 and 743 of 1975

(CJI R. S. Pathak, M. N. Venkatachaliah JJ)

09.05.1988

JUDGMENT

VENKATACHALIAH, J. –

1. These appeals, by special leave, by the Commissioner of Wealth Tax, Bhopal, arise out of the opinion rendered by the High Court of Madhya Pradesh, Bhopal, in four consolidated wealth tax references under Section 27(1) of the Wealth Tax Act, 1957. They raise a short but interesting question touching the incidents of what is described as the 'Quaraza-e-Hasana' said to be a transaction known in and peculiar to the personal law of the Muslims.

2. The matters arise out of the proceedings concerning the assessment to wealth tax of the respondent, Abdul Hussain Mulla Mohammed Ali ('the assessee') for the four assessment years 1957-58 to 1960-61.

3. In the original returns for the assessment year 1957-58 relevant to the valuation date March 31, 1957, the assessee filed a return of net wealth of Rs. 8,57,910 which included a sum of Rs. 4,00,000 representing the principle value of the loan advanced by the assessee to a certain Faizullabhai Mandlawala, Sidhpur. Both the assessee and the said Faizullabhai Mandlawala were partners of a firm carrying on business under the name and style 'Rising Sun Flour & Oil Mills at Ujjain. The borrower had employed this sum was part of his capital in the firm. In the revised return, filed by him, the assessee, however, sought to have the value of that loan excluded from his wealth, on the claim that this loan was what was known to Muslim law as 'Quaraza-e-Hasana' - a debt of good faith and goodwill carrying with it no legal obligation on the part of the debtor to repay and correspondingly, no right on the part of the assessee to expect, much less enforce a repayment. The claim for the non-inclusion of this asset in the wealth of the assessee was sought to be supported by the declaration dated March 26, 1965 furnished by the debtor that the sum was received by him 'without any obligation and without any rate of interest and without any consideration'. Reliance was also placed on some extracts of the Quran said to relate to this transaction.

4. Both the Wealth Tax Officer and the Appellate Assistant Commissioner in the appeal found it difficult to accept this claim and, accordingly, brought this sum of Rs. 4,00,000 to tax on the respective valuation dates.

5. However, the Income Tax Appellate Tribunal, Indore Bench, accepting the assessee's appeals held that the loan partook of the character of 'Quaraza-e-Hasana' with its special incidents as known to Muslim law; that the transaction was one of good faith and goodwill and lacked the concomitants of a legally enforceable claim for repayment and that, therefore, the amount was not a debt due to the

assessee.

6. The High Court before which the Tribunal, at the instance of the revenue, stated a case and referred two questions of law for opinion upheld the view that had commended itself to the Tribunal and answered the questions against the revenue. The two questions so referred were :

> (1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of Rs. 4 lakhs cannot be included in the total assets of the assessee ?
>
> (2) Whether on the facts and in the circumstances of the case the Tribunal was justified in accepting that the amount of Rs. 4 lakhs was in the nature of the 'Quaraza-e-Hasana' particularly when Rs. 1,21,500 out of Rs. 4 lakhs has been paid ?

7. Shri B. B. Ahuja, learned counsel for the revenue, contended that the Tribunal as well as the High Court fell into a serious error in their acceptance of the hypothetical incidents of a supposedly peculiar institution of the personal law of the Muslims, respecting which nothing tangible by way of evidence as to the existence of such rule or tenet of Muslim law was forthcoming. Learned counsel invited our particular attention to the following observations of the Tribunal :

> The learned counsel for the assessee, Mr Chitale, has also stated before us that he has not come across any judicial decision defining or describing the exact characteristics of the expression 'Quaraza-e-Hasana', nor has he come across any discussion on this matter in any of the treatises on Mohammedan law. We are, therefore, satisfied that on the facts and circumstances of this case, the amount of Rs. 4 lakhs cannot be treated as a debt due to the assessee and the same cannot be included in the total asset of the assessee.

Learned counsel submitted that the inference drawn does not only not flow from the premise by would clearly be antithetical. If the concept of 'Quaraza-e-Hasana' and the peculiar incidents attributed to it are not established, the plea that there is a debt but yet there is no obligation to repay becomes mutually contradictory. In regard to the subsidiary or supporting reasons for the acceptance by the Tribunal to the hold that there was no debt which could be said to be due and owing to the assessee, the learned counsel invited our attention to the following reasoning of the Tribunal :

> ... Faizullabhai in a declaration dated March 26, 1965 has stated that this amount was received by him without any obligation and without any rate of interest and without any consideration. Therefore, the question that arises for consideration is whether under these peculiar circumstances it can be said that this sum of Rs. 4 lakhs which was given by the assessee to Faizullabhai prior to 1950 for which there is no document and for which there is no obligation to repay can be treated as a debt due to the assessee.

8. Learned Counsel submitted that neither the circumcision that the loan was advanced prior to 1950 nor the self-serving declaration by the borrower; nor even that no repayment had been made during the accounting yearsror earlier would, by themselves, detract from the existence and incidents of a debt which was, otherwise, admitted. Learned counsel pointed out that, admittedly, on July 24, 1961, a sum of Rs. 1,21,821 had been repaid by the borrower to the assessee.

9. Learned counsel said that both the Tribunal and the High Court, while rightly noticing that the

special incidents of what was called 'Quaraza-e-Hasana', had not been established, however, by excluding the sum from the wealth, gave the benefit of this doubt as to the very existence of this institution of 'Quaraza-e-Hasana' to the assessee.

10. Referring to the reliance by the High Court on the incidents 'Hibaba-shart-ul-evza' learned counsel submitted that the reasoning of the High Court based on this form of a mussalman gift destructive of the assessee's case inasmuch as the kind of gift envisaged by 'Hiba-ba-shart-ul-evaz' expressly stipulated contemporaneous liability for a return.

11. Shri Ramachandran, learned counsel for the assessee, sought to support the conclusion of the High Court also on another independent ground that, at all events, by entering into this transaction the parties did not intend to create a legal obligation between them and that, therefore, the debt remained a debt of honour. We will presently refer to the possibilities of this contention in the facts of this case.

12. No authoritative texts nor any principle or precedent recognised in Muslim law was cited before the High Court to show that a transaction of this nature and incidents is known to and recognised by the personal law of the Muslims. As no material was placed before the High Court, or before us, to establish the content and incidents of this idea of what is referred to as 'Quaraza-e-Hasana' it is not possible to say, one way or the other, whether courts can recognise and act upon such a rule of Muslim law much less afford relief to the proponent of that rule.

13. Indeed, literature on the Principles of Islamic Banking "Unlawful Gain and Legitimate Profit in Islamic Law" (Nibil A. Saleh, Cambridge University Press, 1986) does not appear - though we do not want to be understood to have pronounced on the subject finally to support the particular incidents of the non-existence of the element of repayability attributed to this kind of loans. Learned author says that Sharia distinguishes between two types of loans : one the 'Ariya' the 'loan for use' which transfers the usufruct of the property temporarily and gratuitously while ownership of the loaned object remains with the lender; and the second, the 'qard'. In regard to this second type of loan, the 'qard' the author says (at pp. 35 and 36) :

> The second type of loan recognised by Sharia is the qard, which 'involves' the loan of fungible commodities, that is, goods which may be estimated and replaced according to weight, measure or number. In this case, the borrower undertakes to return the equivalent or likes of that he has received but without any premium on the property, which would, of course, be construed as interest. The most likely object of a qard loan would be currency or other standard means of exchange.

On the question whether the lender of 'qard' is entitled to derive any advantage from it, the learned author refers to the views of the different schools namely, Hanafia, Hanbalis, Malikis, Shafiis and Ibadis (see pp. 41 to 43). Again, the learned author refers to 'qard hasan' as interest free loan. Explaining its incidents the author says (at p. 89) :

> Qard hasan means an interest free loan, which is the only loan permitted by Sharia principles. We have seen previously that not only can interest not be charged on the lent capital, but no advantage whatsoever should be derived by the lender from the loan. Of course, each school of law has its own interpretation of what constitutes 'advantage' and that we have already seen in detail....

One may wonder how lending could be a business proposition once interest is abolished...

The learned author also proceeds to enumerate the circumstances in which the Islamic Financial Institutions are advised to make use of 'qard hasan'.

14. From what is gatherable from the author's observations - of course, if the concept of 'qard hasan' is the same as that of 'Qaraza-e-Hasana' - neither the obligation on the part of the debtor of the loan to repay nor the right of the creditor to repayment are excluded. The only incident appears to be that it is 'interest free'.

15. However, we do not to want to be understood to have pronounced on this question finally as neither side has produced nor relied upon any literature of Islamic law on the point. The extracts of the Quran relied upon merely calls some loan a beatific loan which blesses the giver. The incidents of the transactions are not found in the passages.

16. Nor does the reliance by the High Court on the well recognised institution in Muslim law, of 'Hiba-ba-shart-ul-evaz' advance the case of the assessee any further. In Principles of Mohammadan Law (Mulla, 16th end., p. 165) this kind of gift is explained :

> Where a gift is made with a stipulation (shart) for a return, it is called hiba-ba-shart-ul-iwaz..... The main distinction between Hiba-bil-iwaz as defined by older jurists and Hiba-ba-shart-ul-iwaz is that in the former iwaz proceeds voluntarily from the donee of the gift while in the latter it is expressly stipulated for between the parties.

17. Referring to what distinguishes Hiba-bil-ewaz from Hiba-ba-shart-ul-ewaz, the learned author, Syed Ameer Ali, in 'Mohammadan Law' (4th edn., Vol. I, p. 158) excepting from Fatawai Alamgiri, says :

> Ewaz or consideration was of two kinds : one which was subsequent to the contract (of gift) the other which was conditioned in it.

In the other kind, the consideration was expressly stipulated in the contract, and when once it was received the transaction acquired the legal character of a sale. The modern hiba-ba-shart-ul-ewaz has unquestionably sprung from the above.

18. Then, in the last analysis what follows as a logical consequences is that the debt, though a 'passive debt' would require to be treated as due and payable to the assessee. It was not the assessee's case that the debt was a bad and irrecoverable debt. The declaration of the debtor itself establishes its existence.

19. But, then, Shri Ramachandran, anticipating the inherent infirmity of the claim based on 'Quaraza-e-Hasana' sought to treat us to a resourceful argument that the conclusion of the High Court is, at all events, supportable on an independent ground that an agreement will not, by itself, yield legal obligations unless it is one which can reasonably be regarded as having been made between the parties in contemplation of legal consequences and that in the present case the the parties had excluded the contemplation of legal consequence flowing from the transactions. This proposition is stated in 'Chitty on Contracts' (25th edn., Vol. I, para 123) thus :

> An agreement, even though it is supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations. Of course, in

> the case of ordinary commercial transactions it is not normally necessary to prove that the parties in fact intended to create legal relations.

Learned counsel cited certain cases to illustrate the point. In Rose and Frank Co. v. J. R. Crompton and Bros. Ltd. [(1923) 2 KB 261] Scrutton, L. J., said : (p 288)

Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow.

At page, 293, Atkin, L. J., said :

> To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.

The novelty of the clause in the contract relied upon in that case did not miss the learned Judge's notice. He observed : (p. 293)

I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour of self-interest, or perhaps both.

This contention of Shri Ramachandran was not, in this form, urged before the High Court. It was not the case of the parties that, apart altogether from the rule of Muslim law relied upon, they had agreed otherwise also that no legal obligation should arise.

20. The contention has, no doubt, its possibilities. But where, as here, the tax implications of large financial obligations are sought to be put an end to, the burden is heavy on the assessee to establish that what would otherwise be the incidents of the transaction were excluded from contemplation by the parties. Here, one partner has lent a large sum to the other to be utilised as capital in the partnership venture. The transaction is in the context of a commercial venture. The presumption is that legal obligations are intended. The onus is one the parties asserting the absence of legal obligations and the test is not subjective to the parties; but is an objective one. Chitty says (para 124, supra) :

> The onus of proving that there was no such intention is on the party who asserts that no legal effect is intended, and the onus is a heavy one. Where such evidence is adduced, the courts normally apply an objective test.

The observations of Atkin, L. J. in the case cited by counsel are also worth recalling : (p. 293)

Such a intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in Balfour v. Balfour [(1919) 2 KB 571].

21. In Edwards v. Skyways [(1964) 1 WLR 349 at 355 : (1964) 1 All ER 494] Megaw, J. said : (All ER p. 500)

In the present case, the subject matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds - an intention to agree. There was, admittedly, consideration for the defendant company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.

22. Again, in Bahamas Oil Refining Co. v. Kristiansands Tankrederie A/S [(1978) 1 Lloyds Law Reports 211] it was said :

> .... In deciding whether or not there was any animus contrahendi in relation to certain transaction, or whether or not sufficient notice of a certain term was given, the law applies an objective and not a subjective test...
>
> .... In the absence of such evidence, how can the court assume, even if it might be relevant in law, that the master did not intend to enter into a contract...

23. The arguments of learned counsel proceeds on the general proposition that in addition to the existence of an agreement and the presence of consideration there is also a third contractual element in the form of intention of the parties to create legal relations. This proposition, though accepted in English law, has not passed unchallenged. In Cheshire and Fifoot's Law of Contract, 10th edn., it is said : (p. 97)

the criticism of it made by Professor Williston demands attention, not only as emanating from a distinguished American jurist, but as illuminating the whole subject now under discussion. In his opinion, the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract..

24. Be that as it may, the point, however, to note and emphasis is that this intention not to create legal obligation is not inferable from the application of any objective test. The enforceability of debt was pleaded not as a part of what is permissible in law of contracts, but specifically as some inexorable incident of particular tenet peculiar to and characteristic of the personal law of the Muslims. That not having been established, no appeal, in our opinion, could be made to the principle of permissibility of exclusion of legal obligations in the law of contracts. We are afraid both the Tribunal and the High Court accepted, somewhat liberally perhaps, what was at best an argument of hypothetical probabilities. The admitted existence of a debt an argument of hypothetical probabilities. The admitted existence of a debt implies an obligation to repay. No legal bar of the remedy is pleaded. What was set up, and unsubstantiated, was the non-existence of the remedy itself.

25. Accordingly, the appeals are allowed and, in reversal of the view taken by the High Court, the questions referred for opinion, are answered in the negative and in favour of the revenue, with the attendant implication that the loan would become includible in the wealth of the assessee for the relevant assessment years. In the circumstances of the case, we make no order as to costs.

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