

CALCUTTA HIGH COURT

Hoosen Kasam Dada

Vs

Commissioner of Income-Tax

(Costello, J.)

25.01.1937

JUDGMENT

Costello, J.

1. 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 under Section 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 under Section 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 assessee 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 under Section 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 under Section 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 under Section 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 several 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, and 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 immoveable 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 assesseees 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 the 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 summarized 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 assesseees 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 assesseees 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 matter 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 paragaph 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 Mulla's 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 can be partner in a firm, for Section 4 of the Indian Partnership Act defines "partnership" as the relation between persons 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 assessee 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 persons 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 he 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 provision 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 of the deed that what was intended was that the fund should be used in purchasing immoveable 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 Tirtha 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 may 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 Mahomedan Law the moment the wakf is created all rights 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 and 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 ALI's 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 is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining 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 it 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 no 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 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 assesseees. 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 times 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 framed 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 short 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 register 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 to look into the matter and if any authority is needed for that, one may refer to the case of *In Re Bisseswar Lal Brijlal*,¹ 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 quite right 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 Reference under Section 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 deed 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 refuse 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, quite 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 to 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 not to 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.

Cases Referred.

1(LL.R. 57 Cal. 1336 at page 1338)