

# **BOMBAY HIGH COURT**

Bhimji Naik

Vs

Commissioner of Income-Tax

(Leonard Stone, Kt., C.J. Kania , J.)

12.03.1946

## **JUDGMENT**

### **Leonard Stone, Kt., C.J.**

1. This reference was before this Court on September 29, 1944, when we decided that upon the true construction of Sub-section 4A(I) of the Indian Income-tax Act, which deals with the question of residence of a Hindu undivided family, firm or other association of persons, the control and management therein mentioned must be de facto control and management and not de jure control and management and we sent this matter back to the Tribunal to find the necessary facts (see *Bhimji Naik v. Commissioner of Income-tax Bombay (1944)* 47 Bom. L. H. 187), The assessee firm in this case admittedly carries on its business in South Africa. The suggestion of the Commissioner was and is that Rao Bahadur Naik, who founded the business and returned to live in India, still retains the control and, management of its affairs. Sub-section (b) of Section 4A of the Indian Income-tax Act provides:For the purposes of this Act-

(b) A Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India. Sub-section (c) deals with the case of a company and provides:A company is resident in British India in any year if the control and management of its affairs is situated wholly in British India in that year, or There follows another proviso which is not material.

2. Control and management of the affairs of a business must be effected through the media of human minds, and in dealing with a plurality of persons who either jointly or severally exercise powers of control and management over a particular business, and who may be either generally or from time to time in different places and in communication by letter, telephone or telegram, it may be difficult to ascertain where the control and management is situated. Especially is this so, when, as in this case, the section refers to the control and management being situated wholly without British India. In one sense an American business man, who pays a short visit to this country and while here by cablegram gives some instructions to his firm in America, could be

said to make his firm resident in British India for Income-tax purposes. But in my opinion the canons of construction do not demand the conclusion of any such extreme result. I think that a liberal meaning is to be given to the words "wholly situated" and that it must be ascertained in every case where in fact the control and management of the business is situated, apart from the temporary journeyings of the active partners or the residence of the dormant ones. Some assistance is to be gained by comparing the language of Sub-section (b) with that of Sub-section (c), which deals with companies, and which I have already quoted. A company has a registered office and its directors hold their board meetings and its members their annual general meetings at a particular place. These are indicators which must assist in any consideration of the situation of the control and management of a company, and free it from some of the difficulties which arise in the case of a firm, however in the case of a firm, the problem ought, in my opinion, to be approached from the same angle.

3. If this is correct, the further facts found by the Tribunal' present little difficulty to our holding that this firm was managed and controlled outside British India. There are on record three affidavits, one of which is deposed to by Hap Bahadur Naik himself, he having died during the pendency, of these proceedings, and in that affidavit he says: :-The said business and its affairs are solely and wholly controlled and managed by the partners residing in South Rhodesia. I have not at any time either controlled and managed or attempted to control and manage the affairs of the said business. I say that the; control and management of the affairs of the said business are situated wholly without British India.

4. Then there is another affidavit by two of the three South, African partners and they say:We have never received any instructions from Sardar Rao Bahadur Bhimbhai R. Naik as to the purchases or sales or any matters of the firm and we have never referred to Sardar Bhimbhai R. Naik as to the management and conduct of any of the business affairs of the firm.

5. Lastly there is an affidavit by Mr. Manilal Rayaram who is: the senior partner of a firm with whom the assessee firm do business and he says that he has purchased their goods for the last twenty years:My firm has never and does not refer to Sardar Rao Bahadur Bbimbhai R. Naik about any matters of Messrs. Bhimji R. Naik in general and for the execution of the orders and for the payments received from Messrs. Bhimji R. Naik in particular. He also never interfered in any matters of the firm. The total purchases of Messrs. Bhimji R. Naik for the year ended March 31, 1939, done through my firm amount to about Rs. 29,900.

6. These affidavits remain unchallenged and no request was made or direction given to cross-examine the deponents upon them. Mr. Setalvad; on behalf of the Commissioner has pointed out that by the effect of Section 10(3), of the Indian Evidence Act when any fact is especially within the knowledge of any person, the burden of proving .that fact is upon him. Unchallenged by any

cross-examination, I think the affidavits to which I have referred do discharge the initial burden of proof.

7. The difficulty, however, arises because at the end of their further statement of the case the Tribunal has said this:

Taking into account all the evidence produced before us we are of the opinion that Rao Bahadur B. R. Naik did as a matter of fact exercise some control over the management of the affairs of the firm in the relevant accounting period. The control and management of the firm was therefore not situated wholly outside British India. We are of the opinion that the assessee firm is a firm resident in British India.

8. In my opinion not only is that conclusion contrary to the evidence,; but there is no actual evidence at all to support it. Whether or not a man exercises control over a particular business may be a mixed question of law and fact; for, example, suppose that the dormant partner has given: a mandate to the bank to honour the cheques drawn by the active partners, it could be argued that every time a cheque is drawn, the powers of the dormant partner are being invoked. Whether that is so or not must be a question of law. The evidence of the facts with regard to the actions of the partners in this case is, it seems to me, all one way and that is against the exercise of control by B. R. Naik. The mere fact that he had the power of control, whilst it is a relevant consideration, is no evidence by itself of any act of control; of management and it is the acts and not the powers with which we are concerned; In my opinion, therefore, the question referred to us should be answered in the negative. It follows that the Commissioner must pay the costs. Commissioner to pay the costs of this hearing and of the previous hearing on which the remand, was made. ...

**Kania, J.**

9. I agree.

10. When the matter was first argued before us, it appeared that the Tribunal had come to its conclusion against the assessee on the construction of the deed of partnership. The rights of the partners, as defined by the deed of partnership, could give no answer to the question, whether the control and management were wholly outside British India. We therefore remanded the matter under Section 66(4) of the Indian Income-tax Act for a further finding of facts.

11. The question whether the control and management are wholly outside British India is to be answered on the facts ascertained by the Tribunal. Before the matter was remanded, the Tribunal had before it three affidavits. The effect of those affidavits has been set out in the judgment of the learned Chief Justice. The contents of those affidavits were not challenged. It appears to be

common ground also that after 1912 Rao Bahadur Naik never went to South Africa. If so, the only way in which the control or management could in fact be exercised by him would be either by letters, telegrams or telephones. The affidavits filed by the two partners living in Africa and Rao Bahadur Naik .negative the suggestion of any such directions being sent after the partnership was formed. The correspondence file was produced before the Examiner, Income-tax Office. It appears that after the preliminary inquiry and assessment order was made, no importance was attached to this file. Rao Bahadur Naik died pending these proceedings and five years have elapsed since then. The non-production of the file by the legal representatives of Rao Bahadur Naik when the matter was reconsidered on remand, under the circumstances, can be easily understood and no adverse inference could be drawn from that fact. The matter, however, does not leave room for much doubt. A summary of the correspondence made by the Examiner of the Income-tax Department was produced before the Tribunal and it contained the following statement:After going through some of the letters it is seen that the assessee (Rao Bahadur Naik) has left the management and control of the business at Salisbury in the hands of the partners at Salisbury. He Only keeps himself in touch just to caution the partners at Salisbury, while the partners at Salisbury inform the assessee about the general condition of trade prevailing in Salisbury .

12. The first part of this statement clearly indicates that the control and management were wholly at Salisbury. The latter part only deals with advices received from one end by the other. They would be natural in the case of a partner who has a share in profits and losses. They, however, do not lead to any conclusion about the control and management of the business.

13. When the case was remanded, the Tribunal in different paragraphs considered the facts relevant to the question to be answered. The first was a letter from the Bank in South Africa. That indicated that since 1912 Rao Bahadur Naik had not operated on the banking account at all. The Tribunal sought to use this as leading to the inference that the management still remained in Rao Bahadur Naik, because between 1912 and 1937 he was the sole owner. I do not see any justification for that conclusion. Rao Bahadur Naik being the owner up to 1937 all acts done on his behalf, in law, must be presumed to be under his authority. In law he had the sole control and management. His agents could act only under his directions. That position was entirely changed when the partnership was entered into. It is therefore improper to draw .an inference about the state of affairs after the partnership agreement was made, on the footing of the facts as they existed before. No inquiry was made as to how the account was operated upon after 1937. No explanation was asked and in my opinion there is no justification for holding that the same state of affairs, in respect of the right to operate on the account, continued as before.

14. In the second paragraph of the further statement" of the case a summary of the correspondence leading to the conclusion, which I have quoted above, is made. In the third

paragraph the Tribunal dealt with the question of sales and purchases. They held that in fact no business was carried on by the firm in British India and the sales and purchases were made wholly on instructions received from Africa and Rao Bahadur Naik had nothing to do with the same.

15. In, paragraph 4 they considered the affidavits filed before. In that paragraph they also considered the effect of the note of the Examiner, in relation to Rao Bahadur Naik's letters advising the South African partners to act with caution. Those words are treated as words of instructions. In my opinion, that is not the correct interpretation of the note made by the Examiner.

16. As regards the affidavits of the two partners in South Africa, the Tribunal put a meaning on the words different from what they plainly bear. The Tribunal thought that when the partners used the words "control and management", they probably meant "sales and purchases". The affidavits show that the partners, apart from sales and purchases, have separately stated that they received no instructions for anything else from Mr. Naik.

17. Paragraphs 5 and 6 and 7 deal with the affidavits and do not contain any further finding.

18. Paragraph 8 deals with the clauses of the partnership agreement in the first instance. The next statement is as follows; In our opinion, it is very likely that Rao Bahadur B. R. Naik left definite instructions in detail with the Managers.

19. In my opinion, that inference is drawn without any materials or evidence before the Tribunal. They have not recorded any fact from which such inference could be justified. The next sentence is this:

He was continuously informed that his instructions were being carried out.

20. Again, for this there is no evidence whatsoever in the further statement of facts submitted by the Tribunal. There is no question of continuous information and there is no evidence of any instructions being carried out.

21. The last statement in that paragraph is in respect of the power-of-attorney. In my opinion there is no justification for holding that a power-of-attorney was granted by Rao Bahadur Naik to the partners in South Africa after they entered into the partnership agreement. There is no evidence that because they were described as managers to outsiders any power-of-attorney was required. It is well known that Munims carry on unlimited business even though they hold no power-of-attorney. As regards the bank, there is no evidence that a power-of-attorney was required. There is no evidence in whose name the account stands, and under what circumstances the bank allows the partners in Africa to operate on the banking account. I therefore think that no

inference in respect of the control and management of the business could be based on the footing of any power-of-attorney in the present case.

22. Apart from these, no other facts are recorded in the further statement of the case submitted by the Tribunal. The analysis of the statement of case made above, in my opinion, clearly shows that the conclusion of the Tribunal that Rao Bahadur Naik as a matter of fact exercised some control over the management of the affairs of the firm in the relevant accounting period is based on no evidence, and therefore I agree that the answer to the question submitted for our opinion should be in the negative.

