

# **BOMBAY HIGH COURT**

Abdullahai Abdul Kader

Vs.

I.-T. Commr

Income-tax Ref. No. 30 of 1949

(Chagla, C.J. and Tendolkar, J.)

25.03.1952

## **JUDGMENT**

### **Chagla, C.J.**

1. This reference was before us on 22-3-1950. On that day we directed the Tribunal to submit a supplementary statement of the case. That supplementary statement has now been submitted by the Tribunal; and on this supplementary statement various questions arise which have got to be considered.

2. The first question which has been argued by Sir Jamshedji on behalf of the assessee is, that with regard to the assessment years 1943-44, 1944-45 and 1945-46 his client cannot be assessed as an agent under Section 43 in view of the death of the non-resident. Now, the facts which are necessary to be considered with regard to this contention are that the assessee was appointed a statutory agent under Section 43 for the year 1942-43 on 12-3-1945. The non-resident died on 26-3-1946, and the orders appointing the assessee statutory agent with regard to assessment years 1943-44, 1944-45 and 1945-46 were passed on 27-6-1946. Sir Jamshedji's contention is that inasmuch as the non-resident was dead, no order can be passed after his death, appointing the assessee as statutory agent. It is perfectly true that when one has to deal with a contractual agency, death of the principal brings the agency to an end. But under Section 43 we are dealing, not with a contractual agency, but with a statutory agency, and a statutory agent can be appointed under Section 43 provided the conditions laid down in that section are satisfied; and the conditions necessary are that any person employed by or on behalf of the person residing out of the taxable territories or having any business connection with such person or through whom such person is in the receipt of any income, profits or gains can be appointed a statutory agent. Now the employment contemplated, the business connection contemplated, and the receipt of income contemplated by this section are all within the accounting year. We are concerned here with business connection; therefore, if there was a business connection in the year of account, a

statutory agent can be appointed under Section 43, notwithstanding the fact that at the date of the appointment of the statutory agent the non-resident was not alive. The material and relevant period to consider is, not the date of the appointment of the statutory agent, but the period covering the year of account. Now, admittedly during the accounting period the non-resident was alive; and we are concerned with the business connection which he had within the taxable territories. Therefore, the Department was within its rights in appointing the assessee the statutory agent on 27-6-1946, notwithstanding the fact that the non-resident died on 26-3-1946.

3. The next question urged by Sir Jamshedji is a much more important and interesting question; and the question that falls to be considered is, what is the true meaning to be given to the expression used by the Legislature in Section 42 "any business connection in the taxable territories"? When can it be said that a non-resident has a business connection in the taxable territories so as to render him liable to pay tax under Section 42 on the ground that income has deemed to accrue or arise within the taxable territories? Now, before considering the question of law it is necessary to state the facts of this particular case.

4. It has been found by the Tribunal that the non-resident, Haji Mahomed Syed Alberbary, had been exporting or importing goods only through the assessee. The Tribunal has also held that the assessee was not the sole selling agent of the non-resident. But it has also been found by the Tribunal that the assessee acted as a commission agent of the non-resident for several years and that the assessee entered into several transactions on behalf of the non-resident. The Income-tax Officer who has made an order under Section 43 found that the assessee had been regularly purchasing and selling goods on behalf of the non-resident and under his instructions. The assessee also transacted ready and forward business in cotton piecegoods and other articles on behalf of the non-resident and they were regularly purchasing and selling goods on behalf of the non-resident and under his instructions. These findings have been accepted by the Tribunal. The question is whether on these facts it can be stated that the assessee was rightly made a statutory agent of the non-resident under Section 43 of the Act. Now, it is not necessary to emphasize the fact that Section 43 merely sets up a machinery to give effect to the substantive provisions of Section 42. Therefore, before we can go to Section 43 we must find that the non-resident was liable to pay tax under Section 42. It is only when he is so liable that the question of appointing a statutory agent under Section 43 can arise. Now, the non-resident would only be liable to pay tax under Section 42 in this particular case provided he had any business connection in the taxable territories. Now, it is no use concealing the fact that the expression "any business connection in the taxable territories" is by no means a very precise expression, capable of being construed with any precision. It may be that the Legislature advisedly used a vague and uncertain expression so that the interpretation should not be restricted to any narrow limits. But one or two aspects of this expression may be emphasized. It is clear that the Legislature did not intend to tax a non-resident in respect of income, profits or gains accruing or arising from any business connection with taxable territories. In other words, it is not sufficient that a non-resident should do business with India, in order that he should make himself liable under Section 42. The business connection

contemplated by Section 42 is something wider than mere doing business with India. The preposition used by the Legislature is "in" and not "with", and proper emphasis must be given to the particular word "in" used by the Legislature. Therefore, we can easily exclude all those cases in which we find that a non-resident is merely doing business with India. It is also clear from the expression "any business connection in the taxable territories" that the non-resident must be carrying on business in India through some agency. There must be some connection between the non-resident and the taxable territories. The contention of Sir Jamshedji is that the agency which connects the non-resident with the assessee must be an agency of permanent and exclusive character. Now, we were not prepared to accept that contention. It is difficult to understand why only a permanent and exclusive agency can constitute a business connection between a non-resident and an assessee. As I have already pointed out, the language used by the Legislature is very wide; any business connection is not necessarily that business connection which is constituted by a permanent and exclusive agency. On the other hand a mere casual connection, a connection which has no continuity, would also not be a business connection as contemplated by the Legislature under Section 42. Therefore, in order that the agency which constitutes a connection between a non-resident and the assessee should be a business connection as contemplated by Section 42 there must be an element of continuity in the agency. An isolated transaction through an agent, or even a connection for a short period, would not necessarily constitute business connection. It is impossible to give an interpretation to this expression which would be a good interpretation for all the innumerable cases which may arise. It is only possible to interpret the expression negatively rather than positively. I can only point out what is excluded from the expression "business connection" but it is not possible to say what is included in it. In most cases it would depend upon the facts of the particular case as to whether the business connection has been established or not.

5. Now, applying this test to the facts of the present case it is clear that the connection between the assessee and the non-resident was not of a casual character. We have not here a case where an assessee entered into a few isolated transactions with the non-resident. Continuity of agency has been definitely established on the facts of the case. As I pointed out for several years the assessee has been acting as a commission agent of the non-resident. During these years he has entered into a large number of transactions. It is true that the assessee is not the sole agent of the non-resident. It is also true that the non-resident does business through other agents as well. But the mere fact that the non-resident has more than one agent is not sufficient to my mind to lead me to the conclusion that the assessee is not necessarily a person who can be appointed a statutory agent under Section 43.

6. Turning to the authorities on which reliance is placed, Sir Jamshedji has very strongly relied upon a decision of the Allahabad High Court, *Hira Mills Ltd., Cawnpore v. Income-tax Officer, Cawnpore*<sup>1</sup>, In that case the Allahabad High Court held that business connection was not established between the Hira Mills which was a non-resident company and carried on business of manufacturing cloth at Ujjain, Gwalior State, and British India. The facts proved in that case were that the assessee company sold goods in India to British Indian customers if and when the

customers either directly or through brokers offered to purchase them by sending an order to Ujjain. Therefore, the mills sold the cloth to customers in British India either directly or through brokers who offered to purchase the cloth on behalf of their constituents. It is in the light of those facts found that the observations made by the learned Judges of the Allahabad High Court must be appreciated. Now, in the first place the Allahabad High Court rejected the view taken by the Rangoon High Court of the expression "business connection" in *Commissioner of Income Tax, Burma v. Steel Brothers and Co. Ltd.*<sup>2</sup>, The view taken by the Rangoon High Court was that the expression "business connection" was a compendious expression to

<sup>1</sup>1946-14 ITR 417 (all)

<sup>2</sup>3 Rang 614 (FB)

cover such concerns in the nature of trade, commerce, or manufacture as arise through a branch, factorship, agency, receivership or management. The Allahabad High Court took the same view as was taken by this Court in *Commissioner of Income Tax, Bombay v. National Mutual Association of Australasia Ltd.*<sup>3</sup>, that the Rangoon view placed too narrow a construction on the words "business connection". But what is emphasized by Sir Jamshedji is that at p.430 of the judgment in the Allahabad case the learned Judges point out that:

".....The brokers were not, as far as we know, retained by the assessee. The assessee had no claim upon goodwill of the brokers."

Sir Jamshedji says that these sentences make it clear that their Lordships of the Allahabad High Court were emphasizing the fact that the agent must be retained by the principal before he can be constituted a statutory agent under Section 43. In other words Sir Jamshedji says that there must be contractual obligation upon the agent to accept the work sent to him by the principal. According to Sir Jamshedji a distinction was drawn in this case between the free-lance brokers, as the learned Judges called the brokers in Cawnpore who entered into the transactions on behalf of the constituents in British India with the mills, and an agent under an obligation to act as such. Now, in my opinion that is not the true reading of this case. The learned Judges have used the expression "retained" not in the sense in which Sir Jamshedji wants us to understand it. All that the learned Judges emphasized (as they were entitled to do) is that the brokers were not employed or engaged by the mills. The brokers were free-lance brokers in the sense that they offered to purchase cloth on behalf of their constituents. No occasion arose for the Allahabad High Court to lay down that there must be a contractual obligation upon the agent to act as an agent before he could be appointed a statutory agent under Section 43. On the facts of that particular case it is clear that no business connection within the meaning of Section 43 was established. It may be pointed out that at p.428 of the report in the judgment it is pointed out that no definition of the expression "business connection" was given by the Act itself and the Legislature had apparently deliberately chosen to use words of wide, if uncertain, meaning; and it is stated at p.430 that every question that had got to be decided as to the application of Section 42 should be what their Lordships chose to call a "practical question."

7. A reference may also be made to a decision of our High Court, *Commissioner of Income Tax,*

*Bombay v. Metro-Goldwyn Mayer (India), Ltd.*, 41 Bom LR 379. Beaumont C.J. was also considering what proper construction should be put upon the expression "business connection", and at p.383 he points out that :

" .... I think, there must be some element of continuity in the relationship between the parties, and in every case one has to look at the particular facts of the case to see whether it falls within Section 42."

Therefore, in my opinion, the non-resident, Haji Mahomed Syed Alberbary, had a business connection in India within the meaning of Section 42(1) of the Act and the assessee was rightly treated as an agent of the non-resident for the accounting years 1942-43, 1943-44 and 1945-46.

<sup>357</sup> Bom 519

8. Another question has been raised on this reference and that is with regard to the loss of S.S. Rehmani which took place sometime in July 1943. We asked the Tribunal to raise the following question :

"Whether there was any evidence on record to justify the finding of the Tribunal that the statement of the Applicant that the loss of S.S. Rehmani and the said goods came to the knowledge of the applicant only in December 1947 is not true 1"

Now S.S. Rehmani carried goods belonging to the non-resident from Bombay and was on her way to Port Sudan, but she was sunk by enemy action. The case of the assessee was that he came to know of the loss only in December 1947 and therefore, he claimed deduction in the assessment on the basis of the loss having occurred in December 1947. Now, on the statement submitted to us it is clear that we have not to review or re-assess the evidence led before the Tribunal or to consider its sufficiency. The only question of law that arises is whether there was any material on which the finding of the Tribunal that the loss of S.S. Rehmani was known to the applicant prior to December 1947 was justified. Now, materials may be direct evidence or they may be circumstances and probabilities on which a tribunal may act. Inferences may be drawn from proved facts and the fact-finding tribunal may act on those inferences. The question of law will only arise when there is no material at all which would justify the finding of a particular fact. Now, the assessee can only ask us to interfere with the finding of the Tribunal provided he satisfies us that there was no material at all on which the finding of the Tribunal could be justified. Mr. Kolah has taken us through the evidence led before the Tribunal which is annexed to the supplementary statement of the case. Now, as I said before, we refuse to re-assess that evidence; but certain salient and undisputed facts emerge on which really the finding of the Tribunal is baser. The most important of these facts is that on 3-8-1943, the Indian Shipping Adviser by a secret letter informed Messrs. Turner Morrison and Co., Ltd., who were the agents of the Moghul Line, to which the ship belonged, that S.S. Rehmani would not arrive at Aden having been lost by enemy action, and he asked Messrs. Turner Morrison and Co., that that information could be used confidentially for business and insurance purposes, but was not to be

published. This information was circularised by Messrs. Turner Morrison and Co. on August 4. It is the case of the Department that this circular was received by the assessee. It is perfectly true as pointed out by Mr. Kolah that it has not been established as a fact that this circular was received by the assessee either by hand delivery or by post. But the fact still remains that the loss of S.S. Rehmani was no longer a State secret but was known to the shippers about 5-8-1943. As pointed out by the Tribunal it is difficult to believe that even if the assessee may not have got the specific circular informing him about the loss of S.S. Rehmani he would not have known of it right up to December 1947, that the ship in which he had sent his goods to Port Sudan never reached its destination, but was sunk before she reached Aden. It is also pointed out by the Tribunal and we agree with them that it is a very important circumstance that correspondence was going on between the assessee and the non-resident from 1943 to 1947. It is again impossible to believe that although the non-resident never received the goods sent to him by the assessee from Bombay he should never have written to the assessee making any inquiry as to what had happened to the goods or to the ship.

The only point strongly urged by Mr. Kolah is that if the assessee had known of the loss he would have claimed the necessary deduction from the Income-tax Authorities. According to him the very fact that he did not make any such claim till the assessment for the year 1947-48 conclusively shows that he did not know of the loss. Here Mr. Kolah asks us to enter into the region of speculation. We do not know why and under what circumstances the assessee did not choose to claim deduction for this loss; but at best this is one circumstance which might weigh in favour of the assessee as against which there are other circumstances to which our attention has been drawn. If the Tribunal after weighing these circumstances has chosen to come to the conclusion that on the probabilities of the case the statement of the assessee that he did not know of the loss of S.S. Rehmani till December 1947 is false it is not a finding which can be said to be not justified by any materials on the record.

9. The result, therefore, is that we answer the questions submitted to us as follows :

No.1: - In the affirmative.

No.2 : - In the affirmative.

No.3 :- In the negative.

No.4 :- This question has been withdrawn by the Solicitor General and we, therefore, do not answer this question.

10. The additional question raised on the supplementary statement of the case will be answered in the affirmative.

11. Assessee to pay three-fourths of the costs of the reference.

Reference answered.