

PATNA HIGH COURT

Commissioner of Income-Tax

Vs

Khan Bahadur M. Habibur Rahman

(Fazl Ali, C.J.)

14.12.1944

JUDGMENT

Fazl Ali, C.J.

1. The question of law which has been referred to this Court by the Income-tax Appellate Tribunal is as follows :-

"Whether upon the facts found by the Tribunal and upon a true construction of the waqf deed, dated the 16th July, 1930, the assessee mutawalli should be taxed for the years 1940-41 and 1941-42 on the basis of profits falling to the share of each beneficiary and the individual rates applicable separately to the total income of each beneficiary or on the footing of all the beneficiaries constituting an association of persons."

The deed of waqf to which reference is made was executed by Khan Bahadur Habibur Rahman, who for the sake of brevity will be hereafter referred to as the assessee, in regard to his distillery business known as the Sultanganj Distillery, which together with its warehouses, depots and branches in various places is valued at two lakhs of rupees. The relevant provisions of this deed are set out in the appellate order of the Assistant Commissioner of Income-tax dated the 23rd February and may be reproduced as follows :-

"Whereas I am solely and exclusively in possession of the above property, and personally and directly in charge of the organisation, conduct, discretion, superintendence, and management of the business associated therewith; and in the sole and exclusive enjoyment of the income, gains and profits of the said property and business, and Whereas I wish and propose permanently and perpetually to dedicate the entire property with the business incomes, and revenue..... by way of waqf, for the following objects namely :-

For the maintenance of and support of my family, children and descendants; and for my

own maintenance and support during my time and for the payments of my debts out of the rents and profits thereof; and for helping the deserving Musalman boys in the District of Ranchi in prosecuting higher studies; and ultimately on the extinction of my family for the benefit of the poor; and whereas I consider and believe the above object to be meritorious, pious, and charitable, and whereas I am legally competent to make waqf, I hereby permanently and perpetually appropriate, devote and dedicate the entire property and business... by way of waqf as contemplated by the Muslim Waqf Validating Act, 1913, in order to give effect to and fulfil the objects specified and enumerated above be it therefore noted :-That in the event of profit, the beneficiaries shall benefit concurrently and in the same proportion. That out of the net income of the business aforesaid a sum of rupees two hundred and forty shall be annually placed at the disposal of the authorities of the Patna University."

Before the Income-tax Officer it was not disputed that the assessment upon the income from the waqf property during the accounting year was to be made under the provisions of Section 41 of the Indian Income-tax Act. What was seriously disputed was the question whether the tax should be levied upon the share of each beneficiary under the waqf applying the individual rates applicable separately to the total income of each beneficiary or it should be levied at the maximum rate under the first proviso of Section 41 on the ground that the individual shares of the persons to be benefited by the waqf are indeterminate or unknown. It appears that the Income-tax Officer before making the assessment tried to ascertain who the beneficiaries under the deed were and by a letter dated the 24th March, 1941, the assessee's auditors filed a list showing thirteen names besides the settlor, comprising his 5 sons, 7 daughters and wife. The Income-tax Officer, however, came to the conclusion that all the beneficiaries having been "kept unknown and the share of each having not been clearly demarcated in the deed it was not possible to apply Section 41 (1) to the case or to collect tax from the mutawalli on behalf of each beneficiary" and therefore the income-tax should be deducted "at the maximum rate and super-tax at the appropriate rate applicable to all the beneficiaries as a whole or association." The matter was then taken to the Appellate Assistant Commissioner of Income-tax in appeal who came to the same conclusion as the Income-tax Officer. In arriving at this conclusion the learned Assistant Commissioner expressed the view that the assessee's contention that the beneficiaries include only his sons and daughters could not be accepted and the word "family" was wide enough to include his grandchildren also. He further observed that the beneficiaries in sons and daughters of the assessee and that the term "family" was wide enough to include a daughter-in-law, the son of a half brother, the son and grandson of a maternal uncle and the son of a half-sister. The view of the Assistant Income-tax Commissioner was not fully accepted by the Income-tax Appellate Tribunal on appeal. The members of the Tribunal held in agreement with the Assistant Commissioner that the firm "family" included the grandchildren of the respondent but they

proceeded to observe as follows :-

"The exact number of children and descendants can be known and is definitely determinable under the Mohammadan law at any given time. The largeness of their numbers is no ground either for failing to ascertain the beneficiaries or for treating them as indeterminate and unknown. The number may be variable from time to time but since the assessing officer is concerned with the constitution of the family as it was in the relevant accounting period, its subsequent variation or expansion is wholly immaterial."

The final conclusion arrived at by the Tribunal is summed up in these words :-

"That the persons entitled to be treated as beneficiaries under the waqf deed are the settlor, his wife, his five sons and seven daughters and his ten grandchildren and they take the profits simultaneously and in equal shares and that the profits falling to the share of each beneficiary should be calculated separately and the rate applicable to the total income of each beneficiary should be applied thereto and tax determined accordingly and the total amount of the taxes so calculated payable by all the beneficiaries shall be leviable upon and be recoverable from the appellant."

Thereafter the Commissioner of Income-tax filed an application under Section 66 (1) asking the Tribunal to refer the question which has already been stated to this Court and hence this reference. It appears that the only question which was seriously disputed before the Income-tax authorities was whether the beneficiaries were an indeterminate body or they could be ascertained. It was conceded before us, as it seems to have been conceded throughout, that if their numbers could be ascertained there was no difficulty in finding out their individual shares because under the waqf deed the beneficiaries were entitled to take the profits "simultaneously and in equal shares." The view of the learned Appellate Assistant Commissioner was that it was not possible to ascertain the number of beneficiaries as the respondent had numbers grandchildren and the expression "family" included a daughter-in-law and various other relations like the son of a half-brother, the son and grandson of a maternal uncle and the son of a half-sister. The Tribunal, however, came to the conclusion that the persons who were entitled to share the profits were 24 in number and included the settlor, his wife, his five sons and seven daughters and has ten grandchildren. It seems that no question was raised before the Tribunal as to whether any relations of the various categories, to which reference was made by the Appellate Assistant Commissioner, such as the son of a half-brother, the son and grandson of the maternal uncle etc., were in existence and therefore entitled to share the income. The Tribunal took the view that in the accounting year the 24 persons, to whom reference has already been made, were the only persons who were entitled to share the profits. In the application which the Commissioner of Income-tax made to the Tribunal for referring this case under Section 66 (1) this finding does not

seem to have been questioned as will appear from the fourth and fifth paragraph of the application. In the fourth paragraph the Commissioner was required to state the error of law which had been committed by the Tribunal in arriving at the findings of fact and all that he stated under it was as follows :-It is not necessary in this case to examine the question whether Section 41 is a purely machinery etc."It is not suggested that the term "family" had been misconstrued by the Tribunal and it was wide enough to include certain other relations who were interested. Under paragraph 5 the Commissioner was required to state "any other fact that may in the circumstances be considered necessary," but under this paragraph all that is states is "Nothing to add." It seems to me therefore that the finding of the Tribunal that there were only 24 persons who were entitled to share the profits in the accounting year and that they were entitled to equal shares therein must be accepted. As it does not seem to have been contended that the assessee had any other relations than those enumerated by the Tribunal who would be entitled to share the profits, it is academic to discuss whether the various categories of persons referred to by the Appellate Commissioner of Income-tax were included in the term "family" or not.I would, therefore, answer the question referred to us in these words : The assessee muttawalli should be taxed on the basis of profits falling to the share of each beneficiary and not on the footing of all the beneficiaries constituting an association of persons, that is to say, the first proviso of Section 41 (1) is inapplicable and the tax should be levied in the manner indicated by the Appellate Tribunal.The assessee is entitled to the costs of this Court : hearing-fee Rs. 150.

MANOHAR LALL, J. - I agree. I desire to express my appreciation of the order of the Appellate Tribunal dated 17-8-43 which is to be commended for clearness of articulation and lucidity of expression.

Reference answered accordingly.

