

RAJASTHAN HIGH COURT

Educational and Civil List Reserve Fund No. 1,

Vs.

Commissioner of Income-tax, Delhi and Rajasthan

Civil Ref. No. 69 of 1961
(I.N. Modi And L.N. Chhangani, JJ.)

03.01.1963

JUDGMENT

Modi, J.

1. This is a consolidated reference by the Income-tax Appellate Tribunal, Bombay Bench 'B' arising out of a group of twelve reference applications under Section 66(1) of the Indian Income-tax Act. The applicant in all these cases is His Highness Maharana Bhagwat Singhji of Udaipur who alleges himself to be the trustees of three funds known as (i) Raj Kutumb Fund (ii) Educational and Civil List Reserve Fund No. I and (iii) Educational and Civil List Reserve Fund No. II. The Tribunal has referred to the applicant as the sole trustee and the three funds respectively as the R.K. Fund, No. I Trust Fund and No. 2 Trust Fund and we shall adhere to the same nomenclature in the rest of our judgment. These twelve reference applications arose out of the several assessments made in respect of the aforesaid three funds for the assessment years 1953-54, 1954-55, 1955-56 and 1956-57 the relevant accounting years being the financial years ending 31st March, 1953, 1954, 1955 and 1956 respectively. The facts giving rise to certain questions of law which have been referred to us are, generally speaking, similar and are identical in so far as they relate to each of the funds mentioned above with, respect to the several years of assessment thereof and this is how a consolidated reference has been made by the Tribunal.

2. The questions thus referred to us are as follows :-

(1) Whether the appeals preferred by the sole trustee to the Appellate Assistant Commissioner against the assessment orders as made by the Income-tax Officer for the assessment years 1953-54, 1954-55, 1955-56 and 1956-57 in respect of

No. I and No. II Trust Funds were incompetent to him and consequently the appeals filed to the Tribunal from the Appellate Assistant Commissioner's resulting orders were competent ?

(2) Whether a trust was in existence at any time material to the assessment years 1953-54, 1954-55, 1955-56 and 1956-57 in respect of the sum of Rs. 1,75,000/- (referred to in the statement as No. II Trust Fund) ?

(3) Whether the provisions of the first proviso to Section 41(1) were rightly brought into operation in making the assessment upon the sold trustee in respect of the R.K. Fund and No. I Trust Fund and if the answer to question No. (2) is in the affirmative, in the case of that trust as well?

It appears from the reference that, of these three questions, the second and the third have been referred to this Court at the instance of the applicant and the first at the instance of the department. It may as well be noted at this place that the Tribunal did not consider it necessary to give any finding on the first question set out above namely whether the appeals filed by the sole trustee to the Appellate Assistant Commissioner against the orders of the Income-tax Officer with respect to No. 1 Trust Fund and No. II Trust Fund were incompetent and further the appeals filed by him against the orders of the Appellate Assistant Commissioner to the Tribunal relating thereto were equally incompetent. Nevertheless, this question has been included in the reference to us.

3. A question, therefore, arises at the very threshold of this case whether the reference made to us is not improper inasmuch as the Tribunal has made it without deciding all the questions raised before it. But before we address ourselves to that question, we may state a few facts which have culminated in the present reference.

4. His late Highness Maharajadhiraj Maharana Shri Sir Bhupalsinghji of Mewar (hereinafter referred to as Maharana Bhupal Singhji for the sake of brevity) as the then Ruler of that state promulgated the Constitution of Mewar in May, 1947, which was to come in force from the 1st May, 1948. Clause 15 of Article III of this Constitution made the following provision :-

"15(1) A Rajkutumba Fund shall be maintained by the State with an initial amount of Rs. 2,00,000/- and a sum of Rs. 25,000/- shall be added to it annually as also such sum or sums as might be added to it by Shriji from his privy purse.

(2) The Fund, its income and the accumulations thereof shall be used by Shriji

in his discretion in such manner as he deems proper for or on the occasion of the marriage of his child."

The term "Shriji" has been defined by clause (1) of same Article as follows : -

"Shriji as the Dewan of Shri Parameshwarji shall be the temporal Head of the State and his person being sacred shall not be subject to any process of law."

Clause (1) of Article II defines "Shri Parameshwarji" as the Sovereign of Mewar whose sole representative was Shriji who as such shall exercise on His behalf all rights, authority and jurisdiction which appertains to or are incidental to such sovereignty except in so far as may be otherwise provided for by or under this Constitution or as may be otherwise dejected by Shriji.

5. To implement clause 15 referred to above, Maharana Bhupalsinghji as the ruler of the State issued an order No. 9165 dated the 23rd April, 1948, by which he directed the Accountant General of the State to pay Rs. 2,25,000 at of the State treasury to his Household (See Annexure-A). By another order No. 9472 dated the 28th April, 1948, (Annexure-B) Maharana Bhupalsinghji directed the Accountant General to pay a further sum of Rs. 7,75,000/- to his Household, debiting the same to the State, for the creation of a Civil List Reserve Fund and Education Fund. It appears from Annexure C Order No. 2YI/3 dated the 12th July, 1948, that Rs. 10,00,000/- as sanctioned by Maharana Bhupalsinghji had been received by his Household, and, out of this, a sum of Rs. 3,00,000/- was ordered by him to be sent to the present applicant, being his only on and successor, for the education of his three children, namely, Maharajkumar Mahendrasinghii, Maharajkumar Arvindkumar Singhji and Baijilal Yogeshwari Kumariji.

6. It is a matter of recent history that after the lapse of the British paramountcy, the princely States of Rajasthan were invited to accede to the Dominion of India on certain specified subjects which they did and were eventually persuaded by the Central Government to form themselves into a Union of States, so that the First United State of Rajasthan comprising a few smaller States was inaugurated on the 25th March, 1948; and the second United State including the Mewar State with Maharana Bhupalsinghji as its Rajpramukh came to be inaugurated on the 18th April, 1948. This was soon followed by a still larger Union of States with Maharana Bhupalsinghji as the Maria Rajpramukh thereof in 1949, until the Part B State of Rajasthan was formed

under the Constitution on the 26th January, 1950 to be climaxed by the present State of Rajasthan under the States Reorganisation Act, 1956.

7. The point to be noted is that under the changing pattern of governance it became necessary to fix the private properties of Maharana Bhupalsinghji as distinguished from the property of the State of Mewar (as indeed of other ruling princes qua their respective States), and in that connection it was agreed between Maharana Bhupalsinghji and the Central Government that out of the sum of Rs. 10,00,000/- as set apart above, a sum of Rs. 3,00,000/- shall be refunded to the State, and the amount of the Fund would stand at Rs. 7,00,000/- only; but it was further agreed out of respect for the sentiments of Maharana Bhupalsinghji that the refund may not be effected during his life-time (See Annexure-D). Maharana Bhupalsinghji died on the 4th July, 1955. It has been found by the Income-tax authorities that consequent upon his death, estate duty had been paid on the sum of Rs. 1,75,000/- (being the amount of (the alleged) Trust No. II in the course of assessment under the Estate Duty Act 1953, on the footing that it was included in the personal estate left by Maharana Bhupalsinghji. It has also been found that the income arising from this fund was throughout shown as included in the income of the deceased for purposes of making assessment under the Income-tax Act. It may also be mentioned at this place that the recovery of the sum of Rs. 3,00,000/- from the applicant being the successor of Maharana Bhupalsinghji was ordered to be waived by the Rajasthan Government in consultation with the Government of India, vide Annexure-K dated the 13th July, 1956. Thereafter on the 22nd April, 1947, the applicant made three distinct declarations, namely, Annexure-D, E, and F, with respect to the three funds, by which he declared that the various sums which were set apart for the several funds, together with accretions thereof, shall be held on trust and utilised for the education, marriage, maintenance and for the moral and material upliftment of his three children and that the amount of the said funds shall belong equally to them. The income-tax authorities have found that these declarations do not and cannot have a direct bearing on the questions raised by this reference as they pertain to the period subsequent to the assessment years with which we are concerned.

8. The question of making assessment with respect to the income relating to these three funds came up in the normal course, and this brings us to the assessment years 1953-54, 1954-55, 1955-56 and 1956-57. Voluntary returns were filed in each case by the applicant as the sole trustee of the funds for the several years in question.

9. The position taken up by the Department with respect to each of these funds for all the assessment years in question may now be summarized.

10. As regards the R.K. Fund, it was contended on behalf of the applicant before the Income-tax Officer that the shares of the three beneficiaries were determinate and known in the material accounting years and therefore it should be taxed equally in the hands of the three beneficiaries. The income-tax officer held that even though a trust had been established with respect to the amount under this head, the individual shares of the beneficiaries were indeterminate and unknown and so the income of this fund was taxable in the hands of the beneficiaries at the maximum rate under the first proviso of Section 41(1) of the Income-tax Act.

11. As regards No. I Fund, it was also claimed by the applicant that the income of this fund was assessable as being in the hands of his three children and that he was merely a trustee of the fund. The Income-tax Officer held that no trust was created by the late Maharana Bhupalsinghji with respect to the sum of Rs. 3,00,000/- comprising this fund, and, therefore, the income accruing there from should be taxed in the hands of the applicant in his personal capacity as contra-distinguished from his capacity as a trustee thereof. The Income-tax Officer, however made a precautionary assessment with respect to this fund as being in the hands of the three children of the applicant on their one-third share each in the income of the fund.

12. As regards No. II Fund, the Income-tax Officer held that there was no trust whatever created by Maharana Bhupalsinghji with respect to it and that it had been taxed in the hands of the late Maharana as his own property. Consequently the submission of the applicant that the assessment with respect to this fund be made in his capacity as the trustee of the alleged trust was turned down, and assessment was made on the basis that it was his personal property.

13. Appeals were filed to the Appellate Assistant Commissioner in all the twelve cases. The Appellate Assistant Commissioner agreed with the Income-tax Officer that no trust had at all been created by Maharana Bhupalsinghji with respect to No. II Trust Fund and, therefore, refused to interfere with the order of assessment made by the Income-tax Officer with respect to that fund and dismissed the appeals relating to it. He however found that trusts were validly created with respect to the remaining two funds; yet he rejected the applicant's contention that the individual shares of the three

beneficiaries were determinate or known qua these two trusts, and so after giving notice for enhancement under the first proviso to Section 31(3) he eventually held that the income of these two funds should be taxed in the hands of the applicant at the maximum rate of income-tax and in accordance with the first proviso under Section 41(1) and directed the Income-tax Officer to modify the assessments for the four years under appeal accordingly.

14. The applicant then went in appeal from the aforesaid orders to the Income-tax Appellate Tribunal, Bombay, Bench B. It was contended before the Tribunal that a trust had been created with respect to No. II Fund also prior to the declaration made on the 22nd April 1957, and that the Department itself having accepted that trusts had been so established with respect to the other two funds even before the declarations made by the applicant on the last-mentioned date, and as the beneficiaries there under were known and their shares determinate, there was no justification for making the assessment in these cases under the proviso to Section 41(1) of the Income-tax Act, and to impose the maximum rate of income-tax under that provision, find it was, therefore, submitted that each beneficiary should have been assessed directly on his share of the trust income and at the rate appropriate to him. It was alternatively prayed before the Tribunal that if an assessment was to be raised upon the sole trustee himself, then the tax should be levied on him in the like manner and to the same extent as it should have been livable upon each of the three beneficiaries. A further contention seems to have been raised for the first time before the Tribunal that assuming while denying that the shares of the beneficiaries were indeterminate or unknown, still an assessment should be made under Section 40(1) and not under Section 41(1) inasmuch as the beneficiaries in the present case during all the relevant accounting years were minors and therefore the specific section namely Section 40(1) which deals with minors, was applicable, and not the general Section 41(1) which deal with trusts generally, and that as there was no provision for the assessment at the maximum rate under Section 40(1), the trustee should be assessed at the rate appropriate to the income of the trust. The Tribunal repelled all these contentions and upheld the orders of the Appellate Assistant Commissioner. As observed by the Tribunal in its appellate order :

"On the view that we have taken on merits in all these 12 appeals, we do not find it necessary to go into the contention raised by the Department that the appeals in regard to No. I Trust and No. II Trust were incompetent to the

Appellate Assistant Commissioner and consequently the appeals to us arising from the orders of the Appellate Assistant Commissioner."

Thereupon the applicant required the Tribunal to state certain points of law which, according to him, arose out of its order to this Court, and this is how the present reference has come before us.

15. We have already set out the questions in the foregoing part of our judgment and need not repeat them here. As already stated, questions Nos. 2 and 3 have been referred at the instance of the applicant, while question No. 1 has been referred at the instance of the Department.

16. Now this first question relates to the competence of the appeals filed by the applicant before the Appellate Assistant Commissioner against the orders of the Income-tax Officer with respect to No. I Trust Fund and No. II Trust Fund for the several years of assessment that is 1953-54, 1954-55, 1955-56 and 1956-57 and the consequent incompetence of the appeals filed to the Tribunal against the orders of the Appellate Assistant Commissioner relative to them. As it has transpired, the Tribunal has referred this question to us for answer without itself deciding it when the point was admittedly raised before it on behalf of the Department.

17. The first question which, therefore, strikes us in this connection is whether in view of the failure of the Income-tax Appellate Tribunal to decide this question, the present reference is proper and valid. Consequently, we called upon learned counsel for both parties to satisfy us on the point that the present reference was proper in spite of the position that one of the questions raised before us which was likely to go to the root of the matter had not been considered and decided by the Tribunal even though it was raised before it in appeal and that was the admitted position in the case.

18. As we look at the matter and having regard to the nature of the orders passed by the Income-tax Officer and the Appellate Assistant Commissioner, we are far from satisfied that this question is of merely academic interest. On the other hand, it seems to us that if eight of these appeals as filed were incompetent both before the Appellate Assistant Commissioner and the Tribunal, then the order of the Income-tax Officer would become final so far as the two funds in question go and both the appellate authorities would have no jurisdiction to decide them on the merits. Learned counsel were not able to cite any authority to us which pointedly governs a case of the present

character. Our attention was drawn to *Commissioner of Income Tax v. Scindia Steam Navigation Co., Ltd.*,¹ as affording guidance in the decision Of the question before us.

19. Be that as it may, we have given the matter our anxious and careful consideration and have come to the conclusion that the present reference is not valid. Section 66 obviously governs the decision of the point before us. It lays down, among other matters with which we are not concerned for our present purposes that the assessee or the Commissioner may require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and after it to the High Court.

20. The narrow question which emerges for determination, therefore, is whether a question of law which was raised before the Tribunal but which it has avowedly refused to consider or decide can be said to arise out of such order.

21. But before we deal with this question, we should like to dispose of the point whether, in an application for reference made by the assessee, it is open to the Department also, on such an application, to ask for a reference on a question of law, which, according to it, arises from the order of the Tribunal. This question came up before a Bench of the Bombay High Court in *Girdhardas and Co. v. Commissioner of Income Tax*,² It was there held relying on an earlier decision of the same Court that, no matter, whoever may be a party who asks for a reference, once it is decided to be made by the Tribunal, all questions of law which arise out of the order of the Tribunal, can be referred to the High Court for its determination, and that such questions may be suggested not only by the party which wants a reference but by the party which is content with the decision of the Tribunal. It was further held that once the decision of the Tribunal is assailed and is required to be brought before the High Court, there is no reason why the party that loses should be given the sole or exclusive right of suggesting questions of law that arise from the order of the Tribunal, but it should be equally open to the winning party to point out to the Tribunal that certain other questions of law also arise from its order and that these may well be considered by the High Court. The ratio underlying this view has been stated by Chagla, C.J., as follows :-

"It is obvious that there may be cases where a winning party would be seriously

prejudiced if it was precluded from raising a question of law merely because it had not made an application for a reference and the reference was asked for at the instance of the losing party. The winning party can never apply for a reference.

But it may happen that if the Court takes a particular view on the reference asked for by the losing party, certain other questions of law may arise which may have to be decided in the interest of the winning party. Therefore, it would not be proper to shut out a party before the Tribunal from raising a question of law which clearly arises from the order of the Tribunal merely because it so happens that it has not made an application for a reference."

We are in respectful agreement with this view. We are, therefore, disposed to think that it was open to the Department to have suggested that the particular question regarding the maintainability of the appeals of the assesses before the Appellate Assistant Commissioner and the Appellate-Tribunal be also referred to the High Court, as the point had undoubtedly been raised on behalf of the Department before the Tribunal though, unfortunately, it did not consider it necessary to deal with it.

22. This brings us to the main question which we have set out above. The precise point is : what do the words "any question of law arising out of such order" (that is, the order of the Appellate Tribunal) mean ? Do these words permit a reference on a point which was raised before the Tribunal but which it has said it would not answer. As we have adverted to above, it seems to us that this question is not directly covered by the case law which has been brought to our notice. The question as to the exact meaning of the words "any question of law arising out of the order of the Tribunal came up for direct consideration before their Lordships of the Supreme Court in 1961-42 ITR 589 (Supra).

Their Lordships while accepting the correctness of the view generally hold by the High Courts in India that Section 66 created a special jurisdiction and that such jurisdiction was of an advisory or consultative character and not appellate or supervisory, and that the power of the Tribunal to make a reference and the right of the litigant to require it must be sought within the four walls of Section 66(1) posed the further question, on which there was disagreement between the High Courts in our country, namely, whether it is competent to the Tribunal or the High Court to decide a question of law which was not either raised before the Tribunal or decided by it where it arises on the facts found by it. Their Lordships held, disagreeing with the view expressed in *Madanlal Dharnidharka v. Commissioner of Income Tax*,³ and

approving that adopted in *Abboy Chetty and Co v. Commissioner of Income*⁴ on a balance of all the relevant considerations that they were unable to construe the words "any question of law arising out of such order" as meaning any question of law arising out of the findings in the order of the Tribunal, but they properly mean a question of law which must have been raised before the tribunal and considered by it. Then their Lordships summed up the law in the following four propositions :-

- (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.
- (2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.
- (3) When a question is not raised before that Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.
- (4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Quite clearly, the question with which we are concerned in the present reference does not fall within the categories of cases exemplified by the first, third and fourth propositions set forth above. At first sight it may appear that the situation we are at present considering is covered by the second proposition as the question here was raised before the Tribunal; but the latter omitted to deal with it. It clearly appears from their Lordships judgment however that this proposition is intended to cover those cases where a question having been raised before the Tribunal it has failed to consider it by mistake or inadvertence, that is to say where the omission is unintentional.

23. We do not think, that this clause was intended to cover a case of the present kind where a Tribunal fails to deal with a, point not by mistake or inadvertence; but, if we may say so, without meaning any disrespect, by design or deliberation, and yet chooses to refer such a question to the Court. While discussing the true scope of the jurisdiction of the High Court under Section 66, their Lordships in the course of their judgment cited above made the following observations which require to be carefully noted :-

"If the true scope of the jurisdiction of the High Court is to give advice when it

is sought by the Tribunal, it stands to reason that the Tribunal should have had an occasion to consider the question so that it may decide whether it should refer it for the decision of the Court. How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the Court should be sought ? " (The underlining (here in ' ') is ours)

24. A little later in this very judgment their Lordships proceeded to observe as under :

-

"The correct view to take, in our opinion, is that the right of the litigant to ask for a reference, the power of the Tribunal to make one, and the jurisdiction of the Court to decide it are all coextensive and therefore a question of law which the applicant cannot require that Tribunal to refer and one which the Tribunal is not competent to refer to the Court, cannot be entertained by the Court under Section 66(5). In view of the above considerations, we are unable to construe the words "any question of law arising out of such order" as meaning any question of law arising out of the findings in the order of the Tribunal."

That being so, it seems to us to follow that a Tribunal cannot legitimately ask for advice on a question which it was called upon to consider but which it deliberately refused to decide although it had an opportunity of deciding it. This appears to us to be a legitimate extension of the view contained in the observation of the Supreme which we would, with respect, repeat here :

"How can it be said that the Tribunal seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the Court should be sought ?"

If we any adapt the phraseology of their Lordships to suit the present occasion, then we put it somewhat like this.

"How can it be said that the Tribunal seek for advice on a question which it was called upon to consider and which it had therefore an opportunity to consider and decide but which it deliberately refused to decide ?"

It seems to us that the answer to this question has to be in the negative. We should also like to add that in the circumstances of this case, we are altogether unable to hold that this particular question should be deemed to have been dealt with by the Tribunal or treated as having been answered by it against the department when it has fully conscious of it and yet it deliberately refused to answer the question. So far as we are able to understand the spirit and intendment of Section 66, it does not seem to go so far as to contemplate that a Tribunal can be held to be within its bounds in seeking for advice on a question which was specifically raised before it but which it has not thought fit to decide not by mistake or accident but by deliberate choice. Under the circumstances, we have felt persuaded to hold that we should decline to answer the reference.

25. In *Kusumben v. Commissioner of Income Tax*,⁵ it was laid down by the Supreme Court that Section 66 does not confer jurisdiction on the High Court to decide a different question of law from those arising out of such orders and that it is possible that the same question of law may involve different approaches for its solution, and the High Court may amplify the question to take in all the approaches. But the question must still be one which was before the Tribunal and was decided by it. It must not be an entirely different question which the Tribunal never considered.

26. We are further fortified in coming to this conclusion on the strength of what the Tribunal has itself stated in its reference in graph 18 thereof. That reads as follows :-

"Before we part with these applications, we wish to make it clear that having regard to finding given by the Tribunal in regard to the main issue, it did not give any finding on certain other contentions raised before it and set out in paragraph 14. If necessary, these contentions will be disposed of by the Tribunal on receipt of the High Court's answers to the question referred to it."

Turning then to paragraph 14, we find that one of the points mentioned there under is that the Departmental Representative had raised a contention before the Tribunal that since there were no assessments made upon the sole trustee in regard to No. I and No. II Trust Funds, appeals filed by the sole trustee to the Appellate Assistant Commissioner were not competent, and consequently the appeals filed from the orders passed by the Appellate Assistant Commissioner to the Tribunal were incompetent. Then certain points raised on behalf of the assessee have been mentioned. We cannot help thinking that the attitude adopted by the Tribunal that it will be still open to it to

decide the question of the maintainability of the appeals, assuming of course that we may decline to answer this question ourselves as not properly or fairly arising out of the order of the Tribunal - after we have decided the other points raised in the reference - seems to us to be in the nature of putting the cart before the horse.

27. Again, suppose that we decide to decline to answer the first question but answer the other questions referred to us, then it would be open to the Tribunal to decide the question of the maintainability of the appeals as well as the other questions referred to in paragraph 14 of the reference. If so, the result of our answers on the other questions may perhaps stand nullified by the decision of the Tribunal on the questions which it has reserved for its own decision, although we should not be understood to express any firm or considered opinion on this aspect of the case. We called upon learned counsel for the department to satisfy us that the result we apprehend was not possible. He candidly conceded that a contingency like that was possible. That being so, we have no manner of hesitation in saying that that is a kind of procedure which does not commend itself to us and is definitely one which we should not be prepared to encourage.

28. For the reasons mentioned above, we have come to the conclusion, though not with a certain amount of regret, that we must decline to answer this reference in the form in which it has been made to us. It will be open to the Tribunal to make a proper reference after deciding all the questions which were raised before it, should it become necessary to do so according to law. Having regard to all the circumstances of the case, we would leave the parties to bear their own costs of the hearing in this Court.

Order accordingly.

Cases Referred.

1. (1961) 42 ITR 589
2. AIR 1957 Bom 4
3. (1948) 16 ITR 227
4. Tax, 1947-15 ITR 442
5. AIR 1960 SC 907