

(1971) 03 AHC CK 0028

In the Allahabad High Court

Case No : Income-tax Reference No. 449 of 1965

Gopal Jalan

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 23-03-1971

Acts Referred:

Citation : (1972) 86 ITR 317

Hon'ble Judges : R.S. Pathak, J;H.N. Seth, J

Bench : Division Bench

Advocate : S.B.L. Srivastava, for the Appellant; B.L. Gupta and R.R. Misra, for the Respondent

Judgement

Pathak, J.—The questions referred by the Income Tax Appellate Tribunal are:

"1. Whether, on the facts and in the circumstances of the case, it could be said that a valid charitable trust was created by the settler Sri Hari Bux Rai, and whether the payment of interest to the trust by the assessee was rightly disallowed ?

2. Whether, in the facts and circumstances of the case, the execution by the settler of the deed of trust and registering the same would amount to a complete transfer and delivery of the possession and divesting of the amount mentioned therein from the settler to the trustees of the trust?"

This reference arises out of the assessment of a Hindu undivided family for the assessment year 1961-62. Originally, a Hindu undivided family, Messrs. Harchandrai Hari Bux Rai, carried on business in Banarsi cloth. The family consisted of Hari Bux Rai Jalan, and his two sons, Sri Gopal Jalan and Vishwanath Prasad Jalan. The business suffered partition on or about October 22, 1938, and the assets were divided between the father and his two sons. After partition, the former Hindu undivided family business was converted into a firm of the same name and style with the father and the two sons as partners. Out of the assets received on partition, Hari Bux Rai created a Dharmada Trust of Rs.

25,000 on September 26, 1939, under a trust deed of that date registered on September 28, 1939. On November 10, 1939, Hari Bux Rai retired from the partnership business and the two sons, Sri Gopal and Vishwanath Prasad, and an outsider, Vishwanath Prasad Tandon, now carried on the partnership business. On November 18, 1939, Hari Bux Rai died. The trust money remained throughout in deposit with the firm in the name of the trust, and interest was credited from year to year in that account. Some years later on November 1, 1956, the firm was dissolved and the two brothers, Sri Gopal and Vishwanath Prasad, started their own separate business. It is said that each brother, apparently as karta of his Hindu undivided family, took over one half of the liability to the trust fund, which on September 9, 1957, had swollen with the accumulation of interest to Rs. 76,932-7-9. In the previous year relevant to the assessment year 1961-62, the assessee paid Rs. 2,624 as interest to the trust. In assessment proceedings in that year it claimed the payment as an allowable deduction. The Income Tax Officer rejected the claim. On appeal by the assessee, the Appellate Assistant Commissioner affirmed the decision. Thereafter, a second appeal was filed to the Tribunal, and that appeal was also dismissed. At the instance of the assessee, the Tribunal has now made this reference.

2. At the outset in its appellate order the Tribunal had addressed itself to the question whether a valid charitable trust was created by the settler Hari Bux Rai, and whether the liability to the trust fund was taken over by the assessee in respect of which interest was paid and claimed by the assessee as a deduction. The Tribunal referred to the three certainties required to create a charitable trust, namely, (1) a declaration of the trust binding on the settler (2) setting apart definite property and the settler depriving himself of the ownership thereof, and (3) a statement of the objects for which the property is thereafter to be held by the beneficiaries. The Tribunal found that there was a declaration of the trust binding on the settler according to the terms of the trust deed and that the objects of the trust were also specified. The only point, it said, that required determination was whether the property had been clearly specified and the settler had divested himself of his beneficial interest in it. It found that upon partition of the parent Hindu undivided family business the settler had been given a one-third share in the total capital of the family business which amounted to Rs. 1,09,400. The share of Hari Bux Rai was, therefore, Rs. 36,466. Hari Bux Rai was given credit for this amount in the books of the partnership firm which came into existence after the partition of the family business. Subsequently, a trust was purportedly created by Hari Bux Rai by the registered trust deed and by debiting the accounts of Hari Bux Rai in the firm with the sum of Rs. 25,347, representing Rs. 25,000 as trust money and Rs. 347 as expenses of execution and registration. An account of the Dharmada Trust was opened in the books of the firm the same day. Thereafter, every year interest was credited by the firm to this account. The Tribunal has taken the view that, as there was nothing on the record beyond the entries in the account of the Dharmada Trust in the books of the firm, there was no evidence to show how the trust was created

by Hari Bux Rai and how the amount of the trust money was handed over to the trustees. It has observed that the mere passing of those entries did not amount to setting apart a specific sum for the purposes of the trust and the settler could not thereby be said to have divested himself of his beneficial interest therein. It has pointed out that on September 26, 1939, the cash balance in the books of the firm was about Rs. 1,915 only, which was not at all sufficient to cover the amount of Rs. 25,000 said to have been settled on trust. It was pointed out by the assessee that the department had all along allowed the interest as an allowable deduction and also that the interest had been deducted in the hands of the other brother who had taken over the other half of the liability of the trust. The Tribunal, however, proceeding on the view that the cash balance available with the firm on the date of the creation of the trust was insufficient to cover the amount of Rs. 25,000 held that a valid trust did not come into existence. In coming to this conclusion, the Tribunal relied on HANMANTRAM RAMNATH Vs. COMMISSIONER OF Income Tax BOMBAY., .

3. There is no dispute that Hari Bux Rai did execute a trust deed, which was subsequently registered, and that he specifically stated therein that he was setting apart in trust a sum of Rs. 25,000 to be spent either towards the education of students or on a hospital. He was to remain the trustee, but after his death the management of the trust would be vested in five trustees who included, according to the terms of the trust deed, the sons of the settler as well as Thakurdas, a vakil, Ram Ballabh Ladia and Brijmohan Das Kejariwal. Detailed directions were given in the trust deed as to the manner in which the objects of the trust were to be carried out. The Tribunal has not found that the transaction was a sham and that there was no intention on the part of the settler to create a valid trust. The only consideration which prevailed with the Tribunal in deciding against the validity of the trust is that the partnership firm, in which the account of the trust was opened, did not have an adequate cash balance to make Rs. 25,000 available in cash on the date the trust was created. We think that this consideration is insufficient. In the case of the gifts, the courts in India have repeatedly affirmed that a valid gift can be effected by a partner by the firm making upon his instructions, appropriate debit entries in his account in the books of the firm and corresponding credit entries in the account of the donee, in those books. And that is so, it has been pointed out, even where the cash balance in the books of the firm on the date of the gift was not large enough to enable actual delivery in cash to the donee of the amount gifted. Reference may be made to COMMISSIONER OF Income Tax, AHMEDABAD Vs. NEW DIGVIJAYSINHJI TIN FACTORY., . South Indian Lucifer Match Works Vs. Commissioner of Income Tax, Madras, , E. S. Hajee Abdul Kareem and Son Vs. Commissioner of Income Tax, Madras, , BALIMAL NAWAL KISHORE Vs. COMMISSIONER OF Income Tax, PUNJAB., and Naunihal Thakar Dass Vs. Commissioner of Income Tax, . Finally, there is the decision of this court in Gopal Raj Swarup Vs. Commissioner of Wealth Tax, .

4. The Tribunal relied upon Hanmaniram v. Ramnath. In that case the entries

were made by the assessee in his own books and there was nothing to make him liable to anyone. The learned judges pointed out:

"It is not disputed that till the transfer of Rs. 41,000 and Rs. 11,000 from the two accounts, those accounts did not constitute trust accounts. They were only accounts in the books of the assessee. The assessee was entitled to deal with the amounts standing to the credit of those accounts as he thought right, without being liable to account to anyone. By making these three transfer entries, was any property so separated as to prevent the assessee from claiming any beneficial interest therein thereafter? In our opinion the answer to that is in the negative."

It is true that the learned judges then went on to consider whether the entire amount settled in trust was available in cash, on the date when the trust was created, and holding that it was not available they concluded that no valid trust had come into existence. This circumstance, we think, was adverted to by the learned judges for the purpose of showing that on the relevant date the assessee was not possessed of sufficient funds. In the case before us the facts are different.

5. Reference was made on behalf of the revenue to Commissioner of Income Tax Vs. Smt. Shyamo Bibi, . That is a case which also turned on the circumstance that the transfer entries were made by the assessee in her own accounts and, therefore, it could not be said that there was any setting apart or appropriation of the fund. The learned judges observed :

"She might have had assets in the partnership but she did not transfer them or any interest in them. The partnership might have been owing money to her but she did not transfer any money out of that to Om Nath; she did not instruct the partnership to transfer Rs. 1,00,000 out of the money due to her to the account of Om Nath. If she wanted to make a gift of the money due to her from the partnership the most reasonable way was to instruct the partnership to debit her account, and credit that of Om Nath, with the amount of the money. Simply making transfer entries in own accounts cannot be said to be the most direct and effective method of vesting him with possession, dominion and control. As the account books were in her own possession, dominion and control, so were the entries and simply by making entries in them she did not vest Om Nath with possession, dominion and control over the money. It was open to her to delete or reverse the entries, at any time she liked subsequently."

Upon the aforesaid considerations we are of opinion that a valid charitable trust was created by the settler Hari Bux Rai, and therefore, the payment of interest to the trust by the assessee was wrongly disallowed. The first question is answered accordingly.

6. In the circumstances, learned counsel for the assessee does not press for an answer to the second question. Therefore, we return no answer to that question.

7. The assessee is entitled to its costs, which we assess at Rs. 200. Counsel's fee is assessed in the same figure.