
(1941) 02 CAL CK 0001
In the Calcutta High Court
Case No : Reference No. 10 of 1940

K. HABIBULLA

APPELLANT

Vs

RE.

RESPONDENT

Date of Decision : 18-02-1941

Acts Referred:

Income Tax Act, 1961 — Section 23(1)

Citation : (1941) 9 ITR 292

Hon'ble Judges : Derbyshire, C.J

Bench : Single Bench

Judgement

DERBYSHIRE, C.J. - The assessee for the assessment year 1938-39 was assessed under Sec. 23(1) of the income tax Act on his own return in respect of an item of Rs. 49,500 which was shown in the return under the head "salaries"; in a note attached to the return it was stated to be "current and arrear allowance drawn as mutwalli from the wakf funds."

After the assessment was made the assessee appealed to the Appellate Assistant Commissioner on the ground, amongst other things, that the sum of Rs. 49,500 was shown in the return by mistake and that though the return itself did not indicate it, the amount mentioned was really agricultural income within the meaning of Section 2 of the income tax Act and as such was not liable to tax.

The assessee stated that the first return was drawn up by his officers and that he being a busy gentleman, had not had time to scrutinise the return before he signed it, and that the return was made in error; the sum ought to have been excluded as it was really agricultural income and not assessable.

In the year previous to the assessment year a return had been made showing the sum of Rs. 22,450 as salary and in note it was stated that that was allowance from the wakf fund. The mistake appears to have been made, therefore, in the previous year.

The returns, it ought to be mentioned, were made by the manager of the wakf

estate. The wakf estate was constituted by the great grand-father of the assessee on June 1, 1854, when in a wakfnama of that date the wakif set aside a seven annas share of an estate of his and, to use his own words, dedicated.

"for ever the said 7 annas share and all rights and appurtenances thereto and dependents thereof and the income and profits derived therefrom to charitable purposes for expenses on the poor, mendicants and indigent, for the necessary expenses of the flatroofed Masjid at Kumartuli and the food for the man keeping fast and for the indigent during the month of Ramjan and for performance of all other acts of piety and I make a wakf of them in the name of God and the wakf is valid and legal."

He then went on :

"I have, therefore, from among my descendants appointed Khwaja Abdul Guni Saheb who is a man of probity and honesty, possessed of means and devoid of avarice, to the post of mutwalli with regard to the said wakf estates for performance of the duties in that contention and have made him mutwalli of the wakf estate on my behalf. I withhold myself from all rights to and enjoyment of the wakf estate and make over the same to the said mutwalli."

Later -

"The said mutwalli has no power to alienate or waste the wakf property on any way except, when he thinks it proper, he will sell (some portion of) the wakf estate and with the consideration money thereof purchase other properties and include the same in the wakf estate or exchange the wakf properties for some other properties and apply the profits to expenses in the name of god and pious purposes according to the terms mentioned above. The said mutwalli has power to appoint two or three mutwallis from among his relatives or relatives of me who make this wakf on his behalf in a legal way and delegate his powers to them. If he does not appoint any mutwalli then after him from among his male descendants he who will be pious and good shall be the mutwalli of the said wakf estate. This post of mutwalli is made hereditary in the male line of the said mutwalli. Be it known that the power to delegate authority or exchange the wakf properties vested in the said mutwalli shall always be subject to the condition that for the purpose of protection and preservation of the wakf estate and good management thereof, the mutwalli shall have the power to make alienation as stated above, if necessary, but when there is no such necessity he shall have no power to make any invalid alienation."

It is clear that the wakf intended that the mutwalli should perform the duties cast upon him by the wakfnama. Those duties were the exercise of charity towards the poor, the sick and the needy. They would, in the ordinary way, take up a certain amount of the time and energies of the mutwalli.

The property in question was by common agreement agricultural property and the income derived from it agricultural income. The property itself passed into

the ownership of the Almighty according to Mahomedan law, But the income was to be dealt with as the wakf had directed. According to Mahomedan law the mutwalli is entitled to some remuneration for his duties as mutwalli. Such remuneration could, if necessary, be fixed by Court at an amount not exceeding one-tenth of the income. The income of this wakf is, at the present time, estimated to be in the neighbourhood of three lacs of rupees.

Sometime previous to 1925 the assessee had succeeded to the office of mutwalli. Certain members of the founders family had complained of the way in which the mutwalli-the present assessee-was performing his duties and in 1925 a suit was begun by a number of members of the founders family in the Court of the District Judge of Dacca (Mutwalli Suit No. 52 of 1925). The suit was against the mutwalli and a Mr. Meyer who, one gathers, was the manager appointed by the Court of Wards in respect of the whole or part of the other nine annas share of the founders estate. The claim was for the removal of the mutwalli in his place and for accounts.

That suit proceeded some way and in 1928 it was compromised. The terms of compromise are set out at pages 14 and 15 of the paper-book and the terms include a scheme of administration. The mutwalli denied that he had been guilty of any improper use of the wakf funds, and the plaintiffs withdrew the imputations which has been made in the course of the suit to his honour or his fitness for the position.

The scheme of administration that was made part of the terms of compromise was comprehensive one and it was intended clearly to put the wakf on a proper foundation and ensure its proper management in future, paragraph 1 of the scheme provided that the assessee should continue to be the mutwalli and after him the succession to the office should be in accordance with the deed of wakf and usage of the foundation.

Paragraph 2 provided that a committee should be appointed for the purpose of assuring proper management of the wakf properties and compliance with the terms of wakfnama and the proper employment of surplus moneys.

Paragraph 3 provided that the members of the committee should be (1) the mutwalli, (2) the Commissioner of the Dacca Division, (3) the Collector of Dacca, (4) Mr. K. G. Murshed, a member of the Indian Civil Service, (5) Mr. K. Sudderuddian, (6) Mr. K. Shahabuddin, (7) Mr. Nazimuddin, (8) Kwaja Mohammed Alim and (9) Khwaja Abdul Karim. The last five gentleman were either members of the founders family or associated with him.

Paragraph 4 provided that a vacancy in the committee which might occur might be filled by a nomination by the remaining members of the committee to the District Judge of Dacca who might, in his discretion, confirm the appointment or nominate to the vacancy any other person to be chosen, if possible, from the descendants of the founder and their husbands.

Paragraph 5 provided that the mutwalli with the approval of the committee should appoint a manager and make detailed arrangements for the management of the wakf properties and that he might from time to time revise the same. In the event of a disagreement between the mutwalli and the committee recourse must be had to the discretions of the District Judge of Dacca whose directions should be binding on the mutwalli and the committee.

Paragraph 6 provided that the manager should be liable to the mutwalli for proper management of the wakf estates in accordance with the scheme for the management as framed or revised in paragraph 5 and that the manager should submit regularly to the mutwalli full and detailed budgets for the management of the wakf estates which the mutwalli should in due time lay before the committee for their directions; and again in the event of default or deadlock recourse was to be had to the District Judge of Dacca.

Paragraph 7 provided that the manager should present annually to the mutwalli for laying before the committee a return disclosing truly the condition of the properties and the results of his management during the year and a copy of the resolutions made by the committee on such return was to be sent to the Commissioner of Dacca Division for his information.

Paragraph 8 provided for the accounts of the manager at Sadar and in the Muffasal to be audited by an independent and official auditor, those accounts with the report of the auditor being laid before the committee, and the forwarding of them with the committees comments to the Commissioner of the Dacca Division.

Paragraph 10 provided that the mutwalli should submit to the committee a budget of expenditure upon objects consistent with the purposes of the wakf to be made from the anticipated surplus receipts from the manager during the coming year. There were further provisions as to the amount that might be allotted for the certain purposes.

Paragraph 11 provided that, with the exception of the amount for which provision had been made for expenditure which is mentioned in paragraph 10, the mutwalli should not make expenditure from the wakf moneys save and except (a) expenditure expressly authorised by the scheme and sanctioned by the committee.

Paragraph 12 provided that the mutwalli should present to the committee every six months an account of expenditure made by him and in event of any misfeasance or unauthorised payment, any two members of the committee should have the right to apply to the District Judge of Dacca to recover from the mutwalli personally any sum expended by him in contravention of the purposes of the wakf or in excess of his powers as defined by this scheme of administration.

Paragraph 13 provided for the accounts of the mutwalli to be audited by an independent auditor.

Paragraph 14 provided that the mutwalli should not alienate, mortgage, sell, lease, exchange or otherwise encumber the wakf properties without the sanction of the committee previously obtained and in cases where the permission of the Court was necessary, without such permission being previously obtained.

Paragraph 15 provided :

"The remuneration of the mutwalli payable from the wakf shall be rupees two thousand five hundred monthly together with a fixed allowance of rupees five hundred monthly for his conveyance, the lighting of his apartments, medical attendance and other personal charges incidental to his position. The said remuneration of Rs. 2,500 monthly shall be restored to him (except such portion of it as he voluntarily offered to surrender) with effect from the month of November, 1925".

The remuneration of Rs. 30,000 per annum is about 1/10th of the income of the wakf.

Then follow various provisions as to the calling of meeting of the committee. They are not relevant at the present stage. Practically the whole income of the wakf is derived from agricultural land and is agricultural income.

It is obvious from that scheme of arrangement that the mutwallis duties in connection with the administration of this wakf had been defined and, in some ways, his powers limited. He was to discharge the duties of his office in accordance with the wakfnama and the scheme of arrangement reading both the wakfnama and the scheme of arrangement together, it would appear that those duties would occupy some not inconsiderable portion of the mutwallis time and that they were duties which had to be performed with some degree of care and consideration.

The question that has been referred to us arises out of the payment to and receipt by the assessee of the sum of Rs. 49,500 made under paragraph 15 of the scheme. The question is -is it agricultural income and so not taxable, or is it, to use the words of Section 3(2)(viii) The reference is apparently to Sec. 3(2) (viii) of Act VII of 1918 which corresponds to Sec. 4(3)(vii) of the Act of 1922. "receipt arising from business, or the exercise of a profession, vocation or occupation" ?

As mutwalli, apart from the scheme of administration, the assessee might be entitled to one-tenth of the income as his remuneration. Under the scheme he receives Rs. 2,500 a month (about 1/10 of the wakf income plus an allowance, as remuneration of the mutwalli payable from the wakf.

For the assessee reliance has been placed upon the case of Commissioner of income tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga. (1) (1935) 62 I.A. 215: 3 ITR 305. That was a case where a money-lender lent money on a zarpeshgi lease and usufructuary mortgage of agricultural lands under which he was put in possession of the lands with the general powers and obligations of an

owner to manage the estate, collect rents, pay the Government revenue and taxes and to exercise all powers in relation to raiyats that an owner might exercise and upon terms that after deducting from a gross estimated rental the estimated costs of management and a sum (thika rent) which was to be credited towards the discharge of the debt, he was to take the balance (thika profits).

On the question whether thika profits were agricultural income, not assessable under the Act or income from a money-lending business, their Lordships of the Privy Council held that the thika profits were agricultural income and not assessable. In delivering the judgment of the Privy Council, Lord Macmillan at page 222 (of 62 I.A.) said :

"As Ashworth, J., puts it in *In re Makund Sarup* (1927) 50 All. 495 : 2 I.T.C. 199. the business of money-lending may bring in an income which is exempt from income tax on the ground that it is derived from agricultural land. The exemption is conferred, and conferred indelibly on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption conferred by the same sub-section [i.e., sub-section (1) of Section (4)] on the "income of local authorities".

It is to be noted that under the contract made by the lender of the money with the mortgagor the lender had all the rights and profits in respect of the properties demised which belonged and accrued to the proprietor of the estate, zemindar, malik or administrator. The lender in that case had the right to recover the rents of the agricultural land and although he recovered them by virtue of the contract to lend money, he recovered them as agricultural rents and they were agricultural income.

The case now before us seems to me to be somewhat different from the case I have just cited. The assessee here receives the income of Rs. 2,500 not as the owner of the land; under the Mahomedan law since the Almighty is the owner of the land. The assessee according to Mahomedan law is the curator of the land and entitled to collect the rents and profits, but he must deal with them as directed by the wakfnama and the scheme of arrangement. As mutwalli he is entitled to be paid 1/10th of the rents and profits if the Court so orders; actually the Court has authorised his remuneration as mutwalli at Rs. 30,000 (1/10 of the rents and profits) plus an allowance.

It is contended for the assessee that the Rs. 2,500 is simply part of a larger sum which is, when paid to him, and remains, where paid to him, agricultural income. I am not able to agree with that contention. The assessee as mutwalli is the holder of an office which was created by the wakfnama. As holder of that office he must, by law and under the scheme of administration by his own agreement and the Courts order, carry out the duties of that office which are set out in the wakfnama and the scheme of arrangement. If he fail to carry out those duties, a complaint may be made to the District Judge and if his failure to discharge those duties should amount to what the Court considers either a misfeasance or a

breach of trust or some conduct which shows that he is unfit to hold the office, he may, according to the Moahamedan law, be removed from that office. If he were removed from that office the remuneration of Rs. 2,500 would not be payable to him either under the Mahomedan law or under the scheme of administration. In order that he should receive that remuneration, he is bound to discharge the duties of the office as laid down in the wakfnama and the scheme of arrangement. Failure to do so may lead to his discharge from office and loss of the remuneration.

The assessee's remuneration is conditional upon his proper discharge of his duties as mutwalli and is remuneration for such work; it is money earned by performing his office, not rents and profits of agricultural land coming to him simply as a beneficiary under a settlement.

Under those circumstances, I hold that the remuneration that he receives as mutwalli is remuneration for discharging the duties of his office and as such comes within Section 3(2)(viii) of the income tax Act, 1918. The reference is apparently to Sec. 3(2)(viii) of Act VII of 1918 which corresponds to Sec. 4(3)(viii) of the Act of 1922. being a receipt arising from the exercise of his vocation whether the fund from which he is paid comes originally from an agricultural source or not.

Under those circumstances I am of the opinion that the learned Commissioner was right and that the question put to us in the case "whether in the facts and circumstances of the case the sum of Rs. 49,500 received by the assessee as his remuneration as mutwalli was agricultural income within the meaning of Section 2(1) of the income tax Act" - should be answered in the negative.

No order is made as to costs in this matter.

PANCKRIDGE, J. - I have reached the same conclusion as my Lord, the Chief Justice, but by a slightly different road.

I do not think that there is any analogy between the position of the assessee and that of the manager of a zemindary, because ordinarily the remuneration which is earned by the manager of a zemindary is payable to him by reason of a personal contract of service with the zemindar, and is not directly connected with the agricultural rents and profits which are collected under his supervision.

Similarly in the case of Lambardari Commission, which was considered in *H. T. Conville v. Commissioner of income tax, Punjab, N.W.F. & Delhi Provinces* AIR 1936 Lah. 595: 4 ITR 137. the commission earned by the Lambardar was payable to him as an agent in virtue of his agreement with his principal, and the fact that it is upon a commission basis and proportionate to the rents collected, does not alter the essential nature of the relationship.

No case has been cited to us in which a specific sum, not expressed to be the rent or revenue of land used for agricultural purposes, has been held to be exempt from income tax as being agricultural income as defined by Section 2(1)

of the Indian income tax Act, 1922.

In the case to which reference has already been made, Commissioner of income tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga (1935) 62 I.A. 215 : 3 ITR 305 there was a covenant on the part of the lessee mortgagee to pay the thika rent; and the balance of the thika profits, being the estimated balance of the rents, belonged to him.

As I read the report, the income tax authorities would not have denied that this was agricultural income, if the transaction had been an isolated one. However, they held the view that the situation was affected by the fact that the assessee was the proprietor of a regular money-lending business. This, however, did not comment itself to the Judicial Committee.

Similarly, I venture to think that the question is not disposed of by saying that the sums of Rs. 2,500 and Rs. 500 payable under the scheme of arrangement, are salaries within the meaning of the income tax Act. I incline to the view that agricultural income does not lose its right to exemption because it can be brought under one of the heads of income set out in Section 6. To my mind the important thing is that the consent decree does not purport to provide for payment of any rent or revenue to the assessee. What it provides for is the payment of a specified sum in currency.

It is not necessary to decide what the position would be, if the decree provided that the assessee should be remunerated by the rents and profits of a portion of the wakf properties, or by a proportion of the entire rent of the wakf properties.

I am not, as at present advised, inclined to agree with the submission put forward on behalf of the income tax department that rents payable to the assessee, under an arrangement such as I have mentioned, would not be entitled to exemption.

I think, it is significant, that under clause (15) of the scheme of arrangement the remuneration is payable from the wakf, and not from the rents and revenues of the wakf; that is to say, the assessee may appropriate to himself in discharge of his remuneration either income or corpus.

I cannot think that the assessee can avoid taxation by selecting one source of the remuneration payable to him rather than the other. Although it is admitted that the properties of the wakf are entirely agricultural, yet there may be cases where wakf properties consist both of agricultural properties and of urban properties. Again, I cannot think that the mutwalli in such a case could escape tax by electing to take his remuneration from the rents of the agricultural properties alone, nor do I think that the law can contemplate any sub-division of his remuneration according to the proportion which the agricultural income of the wakf bears to the non-agricultural income.

In my opinion what the assessee is receiving under the scheme of arrangement is not agricultural income as defined by the income tax Act, but a cash payment

as to the source of which the income tax department is not bound to enquire. That being so, I agree that the question propounded by the Commissioner of income tax must be answered in the negative.

Reference answered in the negative.