BOARD OF REVENUE, MADRAS v. MOOPANNA SOMARAZU.

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case does not seem to come under clause (*a*). This is what FIELD, J., says on the point:

"Now, although there is an authority to the mortgagees and trustees, to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession."

The mortgagor, on the breach of a covenant, may refuse to give possession and drive the mortgagee to a suit to enable him to enforce the covenant as regards possession. A document that contains such a provision is, I think, not contemplated by clause (*a*) of article 33.

I therefore agree with my learned brother that this document is not a document which falls under clause (*a*), but under clause (*b*), and should be stamped accordingly.

BEASLEY, J.

BEASLEY, J.—I agree.

N. F.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Krishnan and Mr. Justice Beasley.

1926, April 21.

THE COMMISSIONER OF INCOME-TAX, MADRAS (REFERRING OFFICER),

v.

THE NEDUNGADI BANK, LTD., CALICUT (ASSESSEE).*

Section 4, Explanation and sec. 10 (2) (ix) of Indian Income-tax Act (XI of 1922)—Profits of branch offices situated outside British India—Head office situate in British India—Profits of branches utilized by head office—Income-tax on such profits—Fund set apart by the firm with itself for provident fund of employees—No deduction allowable under sec. 10 (2) (ix) of the Act.

Where in addition to taking into account in the balance sheet the profits or gains of a branch situated outside British

* Referred Case No. 22 of 1925.

India, the head office of a firm situated in British India credited them in the accounts of the head office and utilized such profits in various ways in British India, e.g., (*a*) for payment of dividends, (*b*) for remuneration of directors, (*c*) for reserve fund, etc., *held* that such profits must be deemed to have been received in British India and were assessable to income-tax under section (4) (1) and (2) of the Income-tax Act.

Amounts contributed by a firm towards the provident fund of its employees cannot be deducted under section 10 (2) (ix) of the Act, if they have not been actually paid to the employees but retained by the firm itself for future payment.

CASE stated under section 66 (2) of the Income-tax Act, 1922, by the Commissioner of Income-tax in his letter No. 1301 of 1925, dated 20th October 1925, on the following questions :—

1. "Whether that portion of the Bank's profits Rs. 56,567, which can be conventionally held to have been cashed in Cochin and Travancore, can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act."

2. "Whether the moneys set aside by the Bank as contributions to its employees' provident fund can be regarded as expenditure incurred for the purpose of the business within the the meaning of section 10 (2) (ix)."

The facts appear from the judgments.

T. V. Muthukrishna Ayyar for the assessee.—The assessee (bank) is not chargeable with income-tax on the profits made by the branches situated outside British India, simply because those profits were taken into account in the balance sheet prepared by the head office situated in British India; see explanation to section 4 of the Act. The profits were not sent over to British India, but were retained by the branches. In order to be so chargeable those profits must have been actually or notionally received or adjusted in British India. Right to send for profits from such branches is not enough. *Gresham Life Assurance Society* v. *Bishop*(1), *Forbes* v. *Scottish Provident Institution*(2), *Standard Life Company* v. *Allan*(3). Simply because some of the dividend warrants which were all payable by the head office were paid by the branches it cannot be deemed that the profits were received in British India and the dividends were repaid by

(1) [1902] A.C., 287. (2) (1895) 3 Tax Cases, 443.
(3) (1901) 4 Tax Cases, 445, 454.

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the head office out of them, especially when there were sufficient funds in the head office to pay them. *Aurangabad Mills, Limited, In re*(1). The change made in 1922 in the wording of section 4 does not make any difference. Under section 10 (2) (ix) of Act the assessee is entitled to a deduction of assessment in respect of money set apart for payment of provident fund to the employees; see *Smyth* v. *Stretton*(2) and page 105 of the rules appended to the Income-tax Manual.

[*Court.*—The amount so set apart was not only not expended but was not even invested in any outside bank but was only separately kept by this very bank. Hence how can it be deducted?]

M. Patanjali Sastri for the Crown.—Much more than what is contained in explanation to section 4 has taken place in this case. Not only dividends have been paid by the branches but all their profits have been appropriated by the head office for various purposes, such as reserve fund, provident fund, dividends, remuneration of directors, etc. The branches are not independent firms dealing on their own account. The deposits made there and the profits earned there are all sent over to the head office and the accounts of both are also inseparably mixed. Hence *Gresham Life Assurance Society* v. *Bishop*(3) has no application to this case. When money is sent from a foreign branch to the head office, the presumption is that it is out of profits and not out of capital. *Scottish Provident Institution* v. *Allan*(4). He was stopped.

T. V. Muthukrishna Ayyar replied.

JUDGMENT.

SPENCER, J.

SPENCER, J.—The first question referred to us relates to the liability to income-tax of the profits of the Nedungadi Bank at Calicut which are asserted to have been earned in Cochin and Travancore. This Bank has these two branches outside the limits of British India. Under section 4 (2) of the Income-tax Act, the profits and gains of a business accruing or arising outside British India may be deemed to have accrued or arisen in British India, provided that they are received or brought into British

(1) (1921) I.L.R., 45 Bom., 1286.
(2) (1904) 5 Tax Cases, 36.
(3) [1902] A.C., 287.
(4) [1903] A.C., 129.

India within three years of the end of the year in which they accrued. The balance sheet of this Bank for the year ending 31st December 1923 shows Rs. 1,38,460 as net profits of the Bank. No separate account has been drawn up to show what the profits in its branches amounted to. There is only one account and no separate profit and loss account of the branches. This sum of Rs. 1,38,460 is shown in the appropriation account on the credit side, and the unappropriated balance of the previous year is added to it, and on the debit side figures are given which show how these profits were distributed, e.g., Rs. 71,000 were paid out in dividends; Rs. 20,000 as Managing Director's remuneration; Rs. 2,869 towards Provident fund; and certain amounts were allotted to the special reserve funds which included bad debts, pensions and gratuities; and the balance of Rs. 24,000 is transferred to the balance sheet. There is no reserve fund representing the profits of the branches kept apart from this general fund. The Assistant Commissioner in his order concluded that the entire profits of these branches had been actually remitted to the office in British India by book transfer, because, as he finds, the profits and expenses have been transferred by a regular book transaction from the foreign branch offices to the head office, and there are no materials left at the branch offices for drawing up a separate profit and loss statement. Thereafter the profits which may be held to have remained with the branch offices so as to be available for the branches for employment for their own business are not ascertainable, and no balance is left at the end of the year in the revenue and expenditure account of the branch offices from which a profit and loss account could have been drawn up, all income received by the branches having been transferred to the head office account and all expenditure directly chargeable against revenue

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having been similarly transferred to the head office account. The explanation to section 4 merely states that profits or gains arising outside British India are not necessarily to be deemed to be brought into British India by reason that they are taken into account in the balance sheet. It seems to me that in this case there has been a good deal more done to the profits arising out of the transactions in the branch banks than merely taking them into account in the balance sheet for the information of the shareholders. These sums have been amalgamated with the net profits of the head office and out of the amalgamated sum dividends have been paid and directors have been remunerated, and otherwise the branch banks' profits have been appropriated. Under such circumstances I am prepared to hold that the sums which were appropriated for payments made at the head office must be deemed to have been "received or brought into" the Calicut office, which is in British India, and therefore that the whole of the amount shown as net profits of the Bank is liable to income-tax.

The second question is whether the Bank can exclude the amount paid as contribution to the employees' Provident fund under the heading of "expenditure incurred for the purpose of the business" within the meaning of section 10, clause (2) (ix). It appears that the Bank makes itself liable for paying a certain proportion of the sums which are invested with itself for the benefit of its employees. Until the employee withdraws the amount standing to his credit in the Provident fund, it is no "expenditure" for the purpose of the business but only a liability. The case quoted on behalf of the assessee, *Smyth* v. *Stretton*(1) can be distinguished on the ground that in that case the

(1) (1904) 5 Tax Cases, 36.

college invested £35 annually for the benefit of its assistant masters in an Insurance fund. The money was actually paid out to the Insurance company and was claimed as an expenditure. Upon these facts the High Court held that each master had obtained an addition to his salary on which he was liable to pay tax. The liability of Dulwich College which made those contributions was not considered at all. Even supposing that the college treated those sums as expenditure, it does not follow that the Bank in the present case can so treat these amounts which have not been actually expended. I therefore consider that the second question should be answered in the negative.

SPENCER, J.

KRISHNAN, J.—This is a reference under section 66 (2) of the Income-tax Act of 1922 by the Commissioner of Income-tax with reference to the assessment of income-tax of the Nedungadi Bank at Calicut. That Bank has branches both in British India and Travancore and Cochin. The first question submitted for our opinion is :—

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> "Whether that portion of the Bank's profits Rs. 56,567 which can be conventionally held to have been earned in Cochin and Travancore can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act."

Section 4 (2) refers to profits and gains of business arising outside British India of a person resident in British India. The Nedungadi Bank has its head office in British India, namely, at Calicut. The question is whether the profits and gains of its business carried on in Travancore and Cochin can be said to have been brought into British India so as to be liable to income-tax. The question really turns upon the way in which these profits and gains have been treated by the Bank. The Assistant Commissioner of Income-tax in his order has gone into the facts very fully and has come to the

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conclusion that the profits and gains made in Cochin and Travancore must be treated as having been brought into British India and the Commissioner of Income-tax has supported that conclusion. The reasons are fully set out in the Assistant Commissioner's order where he points out the way in which the accounts were kept. All the income received by the foreign branches was transferred to the head office account and all expenditure directly chargeable against revenue was similarly transferred to the head office account in the accounts of both the head office and the branch offices in Cochin and Travancore. The result was that at the end of the year after these transfers took place there was really no balance left in the revenue and expenditure account of the branch offices, the amount being treated as having been transferred to the head office account. As pointed out by him, there was a frequent flow of remittances to and from the head office and the branch office. Flow of money by book entries can also amount to remittances. There seems to be ample evidence which justifies the Assistant Commissioner's conclusion that the balances with the branches in Travancore and Cochin were really remitted to or brought into the head office at Calicut. The way in which the profit and loss appropriation account is made out certainly seems to show that the whole income of the branches and the head office was treated as one lump sum for the purpose of ascertaining and payment of dividends. The balance is dealt with partly as special reserve funds and partly as a general reserve fund; so that the whole profits including the profits of the branches in Cochin and Travancore are dealt with in Calicut. When moneys are remitted without any special allocation to profit or capital accounts, between the branches and the head office of the Bank, the contention that the profits were kept back

in the branch offices and only other moneys were remitted to the head office cannot possibly be accepted. It is quite true that for the payment of dividends there was enough money obtained as profits and gains by the branches in British India alone. But the payment of the dividends were not restricted to those profits as shown by the way in which these accounts were kept by the Bank and its branches. This is not a case merely of reliance being placed upon the balance sheet for the purpose of holding that the profits and gains were brought into British India, which is a matter dealt with by the explanation to section 4. Here there is very much more evidence to make it quite clear that the amounts earned as profits in the foreign branches were transmitted to the head office and treated as so transmitted for the Bank's purpose and for payment of dividends. We are not bound to go into questions of fact in a reference under section 66 (2). We must take the facts as stated by the Commissioner, and, unless it can be established by the assessee that there is no evidence to support the finding of the Commissioner that the profits were brought into the British India, we cannot decide the question in his favour. I am of opinion that there is sufficient evidence to justify the finding of the Income-tax authorities, and on that ground I answer the first question in the affirmative.

The second question referred to us is with regard to the employees' provident fund which the Bank has maintained. For every rupee paid by the employee which represents a certain proportion of his pay every month the Bank contributes the same amount and the two amounts are entered in the Bank's books to the credit of the employee in question. It is claimed that the Bank is entitled to deduct the sums contributed by the Bank towards this Provident fund under section 10 (2) (ix) as

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expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no doubt section 10 (2) (ix) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

BEASLEY, J. BEASLEY, J.—I agree.

N.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Devadoss and Mr. Justice Wallace.*

1926, April 29.

APPA RAO MUDALIAR (ACCUSED), PETITIONER,

v.

JANAKI AMMAL (COMPLAINANT), RESPONDENT.*

Sections 202, 203, 204 *and* 436, *Criminal Procedure Code* (*V of* 1898, *as amended*)—*Practice of Magistrates sending notice to accused on receipt of complaint—Dismissal under ss.* 203 *and* 204 (3) *of complaint after appearance of accused, not a discharge within sec.* 436.

Unless and until a Magistrate is satisfied from an examination of the complainant and his witnesses that there is a *prima*

* Criminal Revision Case No. 790 of 1925 and Criminal Revision Petition No. 649 of 1925.