DASTAGIR, *In re.*

has not definitely said that a Court can refuse to grant a copy if it sees no contradiction itself.

Following, with respect, the Patna and Rangoon decisions referred to above, I hold that the learned Magistrate was wrong in refusing to grant the copy, and, subject to anything which he may find under the second proviso, direct him to grant it and proceed with the enquiry.

V.V.C.

INCOME-TAX REFERENCE.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, Mr. Justice Varadachariar and Mr. Justice King.

THE TRICHINOPOLY TENNORE HINDU PERMANENT FUND LIMITED, PETITIONERS,

1937, October 22.

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS, RESPONDENT. *

Indian Income-tax Act (XI of 1922), sec. 3—Mutual benefit society—Banking concern or—Company registered under Indian Companies Act whether a—Company a banking concern—Amount paid by, to shareholders and subscribers in excess of their contributions—Deduction in respect of, under sec. 10 (2) *(iii) of Act—Company's right to*—Res judicata—*Doctrine of—Applicability of, to assessment by Income-tax Officer.*

The assessee company was a company registered under the Indian Companies Act. Its objects were stated in its original memorandum to be:—"(*a*) to enable persons to save money; (*b*) to enable persons to secure loans at favourable rates of interest on sufficient securities; and (*c*) to do all such other things as are incidental or conducive to the attainment of the above objects". The company made considerable profits

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out of lending money to non-members. The memorandum and the articles of association of the company were subsequently altered. For the word "persons" the word "members" was substituted. After the said alteration the nominal capital of the company was Rs. 9,90,000 divided into seven classes of shares, namely—(*a*) 1,800 fully paid up "permanent" shares of Rs. 50 each; (*b*) 2,120 "original" term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2; (*c*) 400 "A" class term shares of Rs. 93 each payable in 31 consecutive monthly calls of Rs. 3; (*d*) 2,880 "B" class term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2; (*e*) 4,600 "C" class term shares of Rs. 83 each payable in 83 consecutive monthly calls of Re. 1; (*f*) 500 "reserve" shares of Rs. 50 each payable in 10 calls of Rs. 5 each, Rs. 5 on application and the remaining calls whenever required on not less than one month's notice; and (*g*) 6,000 "ordinary" shares of Re. 1 each fully paid up. The ordinary shares were issued to persons who under the former scheme would have been non-member borrowers. A person who required a loan had under the altered articles to become a member, but he could become a member on payment of one rupee and he was entitled to have that one rupee paid back to him at the end of two years. Though by borrowing from the company the holders of ordinary shares, those who had taken one rupee shares, made for the company large profits, they were not allowed to share therein, nothing being paid to them out of the profits either by way of dividend or in reduction of interest.

Held that in the circumstances it was impossible for the company even after the alteration of its memorandum and articles to contend that it was a mutual benefit society and that, therefore, its income was not taxable.

The holders of ordinary shares were members in name only. Their membership did not in any sense give them the benefits of membership of a mutual benefit society.

Leeds Benefit Building Society v. *Mallandaine*(1) relied upon.

Board of Revenue v. *Mylapore Fund*(2) distinguished.

Held further that in computing the assessable income the assessee company was not entitled to claim a deduction in

(1) [1897] 2 Q.B. 402. (2) (1923) I.L.R. 47 Mad. 1 (S.B.).

respect of the amount paid to the shareholders and subscribers in excess of their contributions as being interest on borrowed capital within section 10 (2) (iii) of the Indian Income-tax Act.

An Income-tax Officer does not constitute a Court and, therefore, the doctrine of *res judicata* can have no application to an assessment made by him.

In the matter of the Indian Income-tax Act XI of 1922.

K. S. Krishnaswami Ayyangar for *N. Srinivasa Ayyangar* for assessees.

M. Patanjali Sastri for Commissioner of Income-tax.

The JUDGMENT of the Court was delivered by LEACH C.J.—The real question involved in this reference is whether the Trichinopoly Tennore Hindu Permanent Fund Limited, a company registered under the Indian Companies Act, is a banking concern or a mutual benefit society. The question was raised on a former occasion, namely in respect of the income-tax year, 1925–26. The Income-tax authorities then treated the company as an ordinary banking concern and taxed it on that basis. At the instance of the company the question was referred by the Commissioner of Income-tax to this Court, which decided that the Income-tax authorities had taken the correct view; *Trichinopoly Tennore Fund* v. *Commr. of Income-tax*(1). After this decision had been given, the company took steps to alter its memorandum and articles of association. In the original memorandum the objects of the company were stated to be :

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"(*a*) to enable persons to save money; (*b*) to enable persons to secure loans at favourable rates of interest on

(1) (1927) 2 I.T.C. 386.

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sufficient securities; and (*c*) to do all such other things as are incidental or conducive to the attainment of the above objects".

For the word "persons" the word "members" was substituted. The company had made considerable profits out of lending money to non-members and this was the reason for the decision that the company was a banking concern and not a mutual benefit society.

The nominal capital was originally Rs. 2,99,970 made up as follows:—(1) 1,800 fully paid up permanent shares of Rs. 50 each, amounting to Rs. 90,000. (2) 2,333 term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2, amounting to Rs. 2,09,970. After the alteration of the memorandum and the articles of association, the nominal capital of the company was Rs. 9,90,000 divided into seven classes of shares, namely:—

	RS.
(*a*) 1,800 fully paid up "permanent" shares of Rs. 50 each, amounting to	90,000
(*b*) 2,120 "original" term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2, amounting to	1,90,800
(*c*) 400 "A" class term shares of Rs. 93 each payable in 31 consecutive monthly calls of Rs. 3, amounting to	37,200
(*d*) 2,880 "B" class term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2, amounting to	2,59,200
(*e*) 4,600 "C" class term shares of Rs. 83 each payable in 83 consecutive monthly calls of Re. 1, amounting to	3,81,800

	RS.
(*f*) 500 "Reserve" shares of Rs. 50 each payable in 10 calls of Rs. 5 each, Rs. 5 on application and the remaining calls whenever required on not less than one month's notice, amounting to	25,000
(*g*) and 6,000 "ordinary" shares of Re. 1 each fully paid up, amounting to	6,000
	9,90,000

A person who required a loan had under the altered articles to become a member, but he could become a member on payment of one rupee, which he was entitled to withdraw at the end of two years. In passing I should mention that it is conceded that the ordinary shares have been issued to persons who under the former scheme would have been non-member borrowers. After the memorandum and the articles had been altered, the company contended that it was in fact a mutual benefit society, and therefore, its income was not taxable. The contention was accepted for the years 1928–29, 1929–30 and 1930–31, but in respect of the 1931–32 assessment the income-tax authorities reconsidered the question and came to the conclusion that the company was in reality still a banking concern. In accordance with this decision they re-opened the assessment for the year 1930–31. In respect of the year 1930–31 the Income-tax Officer assessed the company on an income of Rs. 24,458, which was subsequently enhanced to Rs. 24,995. Thereupon the company asked the Commissioner of Income-tax to state a case to this Court under

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the provisions of section 66 of the Act, but the Commissioner declined to do so. An application was then made under section 66 (3) of the Act to this Court and the Commissioner was directed to state a case on the following questions :—

(i) Whether the assessment of the petitioner to income-tax upon a sum of Rs. 24,995 for the year 1930–31 is valid and maintainable ?

(ii) Whether the present case is not governed by the decision in *Board of Revenue* v. *Mylapore Fund*(1) and whether the petitioner is not therefore liable to pay income-tax ?

(iii) Whether the petitioner is not entitled to claim in computing the assessable income a deduction of the amount paid to the shareholders and subscribers in excess of their contributions as being interest on borrowed capital within section 10 (2) (iii) of the Act ?

(iv) Whether the Income-tax authorities are precluded in law from levying income-tax on the petitioner having regard to the fact that the petitioner was recognised and treated by them as a mutual benefit society and exempted from payment of income-tax since the year 1927 ?

(v) Whether the assessment of the petitioner for the year 1930–31 under section 34 of the Act is valid and maintainable ?

It will be convenient to take questions (i) and (ii) together. The case referred to in question (ii) is that of the *Board of Revenue* v. *Mylapore Fund*(1). There, the capital of the society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest on loans given to its members, every one of whom was by the rules eligible to take loans. It was held that such income did not constitute "profits" within the meaning of the Income-tax Act, 1918. The Trichinopoly Tennore Hindu Permanent Fund

(1) (1923) I.L.R. 47 Mad. 1 (S.B.).

Limited, however, differs in material respects from the Mylapore Hindu Permanent Fund Limited. In the case of the Trichinopoly Tennore Hindu Permanent Fund Limited, the company obtained, as I have already mentioned, considerable income from loans to non-members. No doubt it now only gives loans to persons who become "members", but it is said that the membership is in many cases merely nominal and that the company carries on in reality the same business as it did before the memorandum and the articles of association were altered. It appears to us that there is much substance in this contention.

A person who wants a loan can obtain one from this company, if he pays one rupee for a share, and he is entitled to have that one rupee paid back to him at the end of two years. Out of a gross income of Rs. 33,954–7–8 for the nine months ended 31st March 1930 a sum of Rs. 14,217–13–9 represented interest on loans granted to persons who had each acquired an ordinary share of one rupee and only Rs. 139–11–4 was paid to these persons by way of dividend. The holders of permanent shares received in dividends Rs. 6,542–2–6, the holders of original term shares Rs. 5,550–9–5, the holders of "B" class term shares Rs. 3,660–5–9, and the holders of "C" class term shares Rs. 3,338–9–5. In other words, the large profits which the company made were distributed to its real shareholders. The nominal members, those who had taken one rupee shares, invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. By borrowing from the company they made for

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the company large profits, in which they were not allowed to share. In the circumstances it is impossible for the company to contend that it is a mutual benefit society and its income is not taxable.

A very similar question to the one which arises here was dealt with in the case of *Leeds Benefit Building Society* v. *Mallandaine*(1). This society consisted of members who held one or more shares or one or more fifth parts of a share and the shares were divided into two classes : (i) investors' shares and (ii) borrowers' shares. The members were divided into classes according to the shares they held. The society lent money to its members at a fixed rate of interest. The repayment of the loans was by weekly payments of a fixed sum, which covered both principal and interest. No deduction was allowed by the income-tax authorities to be made by the borrower in respect of income-tax and the society was assessed on the interest it received as being interest of money within section 2 of the Income-tax Act, 1853. On a case being stated it was held that the expression "interest of money" in section 2 of that Act was not restricted to annual interest and that the interest received by the society was not in respect of a loan on land, but of a contract relating to interest of money lent, and was, therefore, assessable in their hands to income-tax. In the case before us likewise borrowers become members, but the holders of ordinary shares are members in name only. Their membership does not in any sense give them the benefits of membership of a mutual

(1) [1897] 2 Q.B. 402.

benefit society. Therefore, we consider that the answer to question No. (i) should be in the affirmative and the answer to question No. (ii) should be that it is not governed by the *Mylapore Fund* case(1).

The answer to question No. (iii) has been correctly stated by the Commissioner of Income-tax in his reference. He points out that there is no payment of interest to shareholders or subscribers on the capital subscribed by them. The company pays dividends to its members and these are dependent on the earning of profits. The sums so paid are not in the nature of interest on borrowed capital, which is allowable under section 10 (2) (iii) of the Act. The company is, therefore, not entitled to claim a deduction in respect of these sums.

Questions (iv) and (v) can also be taken together. What is really contended for here is that the doctrine of *res judicata* operates in respect of an assessment made by an Income-tax Officer. This is clearly erroneous. The Income-tax Officer does not constitute a Court, and, therefore, the doctrine can have no application. His assessments are final, unless they can be re-opened under some provision of the Act. Consequently the answer to the question No. (iv) is in the negative and the answer to the question No. (v) is in the affirmative.

As the reference has been answered in favour of the Commissioner of Income-tax he will be entitled to costs, which we fix at Rs. 250.

A.S.V.

(1) (1923) I.L.R. 47 Mad. 1 (S.B.).