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KHAJA MOHAMAD NOOR, J.

appeal on its own merits irrespective of what has happened in the complaint of Ram Singh.

With these remarks I would discharge the reference.

LUBY, J.—I agree

Reference discharged.

REFERENCE UNDER THE INCOME-TAX Act, 1922.

Before Courtney Terrell, C. J. and Agarwala, J.

1934.

September, 18, 19. *October*, 11.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

v.

MAHARANI LAKSHMIBATI SAHEBA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 14(*1*), *whether applies to a sum in which assessee has no vested right until actual receipt—maintenance to a member of Hindu undivided family, when not assessable to income-tax—question of fact raised for the first time before High Court, whether can be said to arise out of the appellate order—section* 66(*2*).

Section 14, Income-tax Act, 1922, provides:—

"(*1*) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family..... ".

Held, that sub-section (*1*) of section 14 has no application to a sum in which the assessee has no interest until it is actually received, which is so in the case of a person who receives a maintenance allowance out of income in which he has no vested right.

*Miscellaneous Judicial Case no. 108 of 1933. Reference made under section 66(2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, on the 12th September, 1933.

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The difference between the exemptions granted by sub-sections (*1*) and (*2*), respectively, of section 14 is that under sub-section (*1*) the assessee is exempt even though the sum has not in fact been taxed at source, but under sub-section (*2*) the assessee is entitled to exemption in respect of sums taxed at source.

The first sub-section relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family. It does not relieve him from the necessity of showing that the sum received is a part of income, or property, in which he had a vested right as a member of a Hindu undivided family.

Where the assessee did not, during the assessment by the Income-tax officer, or on appeal from that assessment, raise the issues necessary for the determination of the question of fact which arose under section 14(*1*).

Held, that the question raised for the first time on a reference under section 66(*2*) of the Act did not arise "out of the appellate order".

Reference under section 66(*2*) of the Income-tax Act, 1922.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

K. P. Jayswal (with him *Murari Prasad* and *K. P. Upadhya*), for the assessee.

Manohar Lal, for the Commissioner of Income-tax.

AGARWALA, J.—The assessee has been assessed to income-tax on a sum of Rs. 26,000 which she claims is not subject to tax. The question referred for our decision is whether this sum is taxable. The only ground of exemption argued before us is that it is a sum to which section 14 (*1*) applies. That sub-section runs as follows:—

14(*1*) "The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The section premises (*i*) a Hindu undivided family, (*ii*) that the person claiming exemption is a member of the family and (*iii*) that the sum referred to is received as a member of the family.

The assessee is a widow of the brother of the late holder of the Darbhanga Raj, which is an impartible estate. On the death of her husband she and a co-widow claimed the estate alleging that their husband had been separate from his brother. Ultimately the widows withdrew their claim on certain terms, two only of which are material at present. It was agreed (*a*) that each of the widows should receive for life, as maintenance, properties yielding Rs. 70,000, net, per annum, (*b*) that on the death of either of them the survivor should be entitled to receive for the remainder of her life an additional sum of Rs. 1,300 per annum. The sum assessed represents two such payments, which were in fact received in the year for which the assessment has been made. In the course of the assessment, and the appeal from the order of assessment, the assessee claimed exemption either on the ground (*a*) that the annual payment should be regarded as part of the consideration paid to her as the price of immoveable properties, and, therefore, as capital and not income, or (*b*) as agricultural income. Both these contentions were rightly negatived and have not been pressed before us. In view of these contentions, however, the tribunals of fact were not called upon to investigate the question whether the assessee is a member of a Hindu undivided family, or, indeed, whether the late Maharajadhiraj and the assessee's husband were joint or separate. It is urged, however, that the two widows having abandoned the claim that their husband had been separate from his brother, it must be held as a matter of law that they were joint. The admission made by the widows, however, is not binding on the Crown which was not a party to the suit in which the admission was made. It is next contended that the presumption of law being in favour of jointness the onus

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lies on the Income-tax Department to rebut that presumption. Conceding that this is so the question still remains whether the sum in question was received by the assessee "as a member of an undivided family". It is contended that when a member of a Hindu undivided family receives a grant by way of maintenance from the head of the family it is necessarily received "as a member of the family". I am unable to accept this contention. It is only in the case of a Hindu undivided family that the statute provides that a sum received as a member is exempt from the tax and it seems to me that the reason for this special consideration is obvious. In the case of an undivided Hindu family all the members have an interest in the joint income of the family and are entitled as of right to enjoy it. The fact that, by reason of well recognized disqualifications, such as certain diseases or sex, certain members are unable to claim the rights of fully participating co-parceners does not affect their inherent right to be maintained out of the joint income. It is well established, however, that when there is no joint property and no joint income, there is no right to be maintained except in certain cases. "Where there may be no property but what has been self-acquired, the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children" (Mitakshara, cited in Mayne on "Hindu Law and Usage", paragraph 451). In the case of a wife and minor children, therefore, the legal obligation of a Hindu to maintain them is the same as the obligation of a non-Hindu. He is bound to maintain them out of his own property and income. In the case of other dependants, there is no legal obligation to maintain them at all, in the case of a non-Hindu or a separated Hindu, but in the case of an undivided Hindu family a member is entitled to be maintained to the extent of his or her interest in the joint income, a widow not being entitled to maintenance in excess of what her deceased husband could have claimed. When a

maintenance allowance is received by a member of an undivided Hindu family out of the joint income of the family the recipient receives only what is his, or her, own. The sum received by the recipient is taxable in the hands of the family. If it has not in fact been taxed in the hands of the family it would be taxable in the hands of the recipient but for the exemption provided for in section 14 (*1*). That sub-section exempts it from taxation whether it has in fact been assessed in the hands of the family or not. It appears to me that the object of section 14(*1*) is to assure this exemption and no more. The remainder of section 14 lends support to this view. Sub-section (*2*) exempts from assessment sums received by an assessee (*a*) by way of dividend as a share-holder in a company or (*b*) out of the profits of a firm of which he is a partner. It will be observed, therefore, that what the second sub-section exempts are sums which belonged to the assessee even before they actually reached him. Reading section 14 as a whole I am able to see no reason why the first sub-section should be held to apply to a sum in which the assessee has no interest until it is actually received, which is so in the case of a person who receives a maintenance allowance out of income in which he has no vested right. The difference between the exemptions granted by sub-sections (*1*) and (*2*), respectively, of section 14 is that under sub-section (*1*) the assessee is exempt even though the sum has not in fact been taxed at source, but under sub-section (*2*) the assessee is entitled to exemption only in respect of sums taxed at source. The first sub-section relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family. It does not relieve him from the necessity of showing that the sum received is a part of income, or property, in which he had a vested right as a member of a Hindu undivided family. In the present instance the assessee did not, during the assessment by the Income-tax Officer or in her appeal from that assessment,

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raise the issues necessary for the determination of the questions of fact which arise under section 14(*1*). For this reason the question now raised does not arise "out of the appellate order". An impartible estate may or may not be self-acquired property. Even assuming that the assessee is a member of an undivided family the estate is impartible and the facts necessary for the determination of the question referred are not before us because the assessee did not raise the proper issues before the tribunals of fact. I would, therefore, answer the question referred to us in the affirmative. The Commissioner of Income-tax is entitled to the costs of this reference. Hearing fee five gold mohurs.

AGARWALA, J.

COURTNEY TERRELL, C.J.—I agree.

Order accordingly.

APPELLATE CRIMINAL.

1934.

October 31.

Before Courtney Terrell, C. J. and Agarwala, J.

RAHMAN

v.

KING-EMPEROR.*

Privy Council Appeal—Criminal appellate jurisdiction—Code of Criminal Procedure, 1898 (Act V of 1898), sections 307 and 374—confirmation of death sentence by High Court—Judge and Jury, disagreement between—reference to High Court—conviction and sentence—High Court, whether exercises criminal appellate jurisdiction in such cases—application for leave to appeal, whether should be made direct to the Privy Council—High Court, power of, to grant certificate—Letters Patent of the Patna High Court—clause 33, scope of.

Clause 33 of the Letters Patent of the Patna High Court lays down :—

"And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna made in the exercise

* Privy Council Appeals nos. 24 and 25 of 1934. In the matter of an application for leave to appeal to His Majesty in Council.