agrees that he shall have no power whatsoever to dispose of such rights and privileges of membership as are conferred upon him.

It seems to me clear, therefore, that this insolvent could never have disposed of his card prior to his insolvency, and accordingly that the Official Assignee can have no better rights in regard to it than he himself had.

I agree entirely with all that has been said by the learned Chief Justice on the construction of the rules, and that this appeal should be dismissed.

Attorneys for appellants : Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for respondents : Messrs. *Kanga & Co.*

Appeal dismissed.

B. K. D.

CIVIL REFERENCE.

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Murphy.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, BOMBAY, REFEROR *v.* THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED, ASSESSEE.*

1931 *February* 4.

Indian Income-tax Act (XI of 1922), sections 6 (IV), 10 and 66 (2) (5)—Life Insurance Company—Mutual insurance—Premium income received from members under participating policies not liable to tax—Company chargeable on income from investments and profits from non-participating policies or any other sources—Income-tax Rules 25 and 35—Rules have a statutory effect.

Under section 66 (5) of the Income-tax Act 1922, the High Court has power to amend the question asked by the Commissioner by raising the real question and then answering that question.

Shiva Prasad Gupta v. *Commissioner of Income-tax, U. P.*[1] and *Kajorimal Kalyanmal* v. *Commissioner of Income-tax, U. P.*[2] followed.

In the case of a life insurance company limited by guarantee and having no share capital every person who insures his life with the company under a participating policy is deemed to be a member of the company and the premium income received by the company from its members under a participating policy

*Civil Reference No. 5 of 1928

(1) (1929) 3 I. T. C. 406. (2) (1929) 3 I. T. C. 451.

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or any part thereof is not liable to be assessed to income-tax as profits or gains of a business under section 6 (IV) and setion 10 of the Indian Income-tax Act of 1922. The company can be charged for income-tax upon its income derived from investments and on profits from non-participating policies or any other sources except the contributions from the participating policy holders.

New York Life Insurance Company v. *Styles*,[1] followed.

Rules made under section 59 of the Income-tax Act, 1922, have a statutory effect. Rule 25 applies to Life Insurance Companies incorporated in British India and as the assurance company was not incorporated in British India, rule 25 had no application to the case. Rule 35 is to be applied in the absence of a more reliable data. In order to apply this rule the Income-tax Officer has first of all to find out what is the total income profits or gains of the assessee company.

REFERENCE made by the Commissioner of Income-Tax under section 66 (2) of the Indian Income-tax Act XI of 1922.

The Assessee Company's Head Office is at Melbourne and has branch offices in various places including Bombay. The company was incorporated under the laws of the State of Victoria in the year 1869 and was limited by guarantee. No capital was subscribed then or at any later time. According to the articles of association it was provided that every person who insured his life with the company under a participating policy was deemed to be a member of the company and under the guarantee given by each member his liability as regards debt and liabilities of the company was limited to the nominal sum of £1 only. There were no shareholders and all the surplus profit was divided among the members who were persons holding participating policies.

For the financial year 1926-27 the company was asked to make a return of its profits for the purposes of income-tax. The company failed to make the return but submitted a copy of the report of the Actuary for the triennium ending September 30, 1925. The consolidated revenue account of the three years covered by the

[1] (1889) 14 App. Cas. 381.

triennial report on its credit side showed various activities which resulted in its earning surplus profits of £2,659,492 14*s.* 11*d.* during the triennium. Besides the premia received from its policy-holders it earned £3,254,860 14*s.* 7*d.* as interest and £1,594,609 3*s.* 10*d.* as consideration for reinsuring the liabilities of other companies. As the surplus amounted to £569,492 14*s.* 4*d.* only against the interest income of £3,254,860 14*s.* 7*d.* it was clear that but for this interest income, there would have been no surplus at all but actually the deficit of £685,367 19*s.* 8*d.* the rates of premia levied by the company on account of its participating and non-participating policies being far beyond the actual amount required to meet its liabilities.

For the financial year 1926-27, the company was assessed by the Senior Income-Tax Officer, under rules 25 and 35 of the rules made under section 59 of the Act, as follows:—

	£	*s.*	*d.*
Surplus profit for 3 years as per the last acturial valuation	2,569,492	14	11
Premium income of the whole Company	8,224,403	14	1
Premium income of the whole Company British Indian Branches ...	88,355	0	0

$$\text{Annual profit} = \frac{88,355 \text{ (British Indian Premia)}}{8,224,403 \text{ (Total Premia)}} \times \frac{2,569,492}{3}$$

= £9,201 = Rs. 1,21,415. (Average annual profit).

Against this assessment by the Senior Income-Tax Officer, the company appealed to the Assistant Commissioner of Income-Tax, Bombay, contending that the tax was only leviable on the amount of "interest derived from the Indian Banking Account," and "interest on

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advances made to policy-holders in India" which in all amounted to Rs. 8,232-12-0 as per its calculations. The Assistant Commissioner considered the assessment levied by the Senior Income-Tax Officer as in order and confirmed the tax. The company moved the Commissioner under section 66 (2) of the Act to draw up a statement of the case to the High Court for decision on the following questions :—

"1. Whether the premium income received by the Association from its members under participating policies or any part thereof is liable to be assessed to income-tax as profits or gains of a business under section 6 (iv) and section 10 of the Indian Income-tax Act XI of 1922.

"2. Whether such income or any part thereof is liable to be assessed to income-tax or super-tax as 'income, profits or gains' under any other and if so under which of the provisions of the said Act?"

The Commissioner answered that the assessment having been levied under rules 25 and 35 of the Act and based on the acturial valuation of the company as a whole, the questions framed did not arise in the case, and that as the premium income from participating policy-holders had been swallowed up by the expenses incurred, the claims paid and provision for future liabilities, it formed no part of the income ultimately assessed. His reasons were as follows :—

"The assessment in this case has been made by the Senior Income-tax Officer under Rules 25 and 35 of the Income-tax Rules which apply to cases of this kind. The premium income as such and by itself has not been assessed by him and it cannot be assessed in any case whatsoever as these are mere gross receipts and tax is in all cases levied not on gross but on net receipts. This being life insurance business, the Senior Income-tax Officer has taken the surplus profit as ascertained by the Actuary of the Company as the basis of his assessment and this is a different matter. These questions which the Company wants Your Lordships to decide refer only to sections 6 (iv) and 10 of the Act which are general sections applicable to all kinds of business incomes. There is no reference to the above Rules under which the assessment has been specifically made and I respectfully submit it is somewhat difficult to see how such questions can arise in this assessment. The reason for this state of affair appears to be that the phraseology of these questions has been copied from the Statements of the Case, paragraph 20, in the English case of *Styles (Surveyor of Taxes)* v. *The New York Life Insurance Company* (14 App. Cases. 381; 2 Tax Cases, 460) decided by the House of Lords in the year 1889. The basis of assessment in that case was, however, entirely different, since it was not at all based on the actuary's valuation Report. Only the premium

income in the United Kingdom was taken into account (excluding interest income) and after deducting therefrom claims under policies payable in the United Kingdom and the expenses incurred in the United Kingdom, the balance of the premium income was taxed. The question naturally arose there whether the balance of the premium income on account of the participating policies which was thus assessed was liable or otherwise. Here, however, where the assessment is made under Rule specially prescribed and is based on the Actuary's triennial Valuation Report which is entirely a different matter, such a question can hardly arise. The only question that can appropriately be raised is whether the assessment under Rules 25 and 35 as made by the Senior Income-tax Officer is correctly made or otherwise."

The reference was heard in the first instance by *Marten C. J.* and *Blackwell J.* who exercising the powers under section 66 (v) referred the case back to the Commissioner to record his findings on the questions amended as follows:—(1) Whether in law rule 25 is applicable in assessing the Company to income-tax or super-tax: (2) Whether in law the Company can properly be assessed under rule 35 without the Commissioner first ascertaining and recording his finding that there was an absence of more reliable data than those mentioned in rule 35: and (3) Whether in law the existing assessment is valid and binding on the Company.

The Commissioner returned the papers to the High Court stating that the Company had the fullest possible opportunity given by the Senior Income-Tax Officer to put in reliable data but the Company did nothing further.

The reference was heard.

Coltman, with Messrs. *Craigie, Blunt & Caroe*, for the assessee:—The company here is sought to be charged under section 6 (iv) of the Indian Income-tax Act. Section 8 deals with the head of interest on securities; it does not cover dividend on shares, for it is already taxed at its source in the hands of the company. Section 10 deals with business. We are charged under that section. The insurance company has to pay tax on income derived from business.

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Under rule 35 of the Income-tax Rules the total income, profits or gains of the company must be ascertained by taking into account interest on securities. Income is a general term which is sub-divided into several heads under section 6. The assessment here is based not on materials proper under rule 35, but on other materials.

The income made on participating policies is not income at all. The premium on such policies is to be used only if it is necessary, otherwise it is to be returned to the policy-holders. There is no surplus left on these policies; and the income here is taken as arising from interest on securities. See *New York Life Insurance Company* v. *Styles*.[1] The case of *Board of Revenue* v. *Mylapore Fund*[2] carries the principle of *Styles'* case[1] a very long way. See also *Thomas* v. *Richard Evans & Co.*, *Jones* v. *South-West Lancashire Coal Owners' Association*,[3] *Probhat Chandra Barua* v. *The King-Emperor*[4] and *Mohammad Ibrahim Riza* v. *Commissioner of Income-tax, Nagpur*.[5]

The Income-tax Officer has made a random assessment. Even if he intended to apply rule 35 he has not done so.

Sir Jamshed Kanga, Advocate General, with *A. Kirke-Smith*, Government Solicitor, for the Commissioner of Income-tax:—The Income-tax Officer has not declined to follow *Styles'* case.[1] The question in that case was whether the surplus premium income over the expenditure was taxable.

The assessees were bound to make a return, which they failed to do. Their contention was that the company fell outside the scope of the Indian Income-tax Act. In absence of reliable data, the Income-tax Officer was right in proceeding under rule 35 of the Income-tax

(1) (1889) 14 App. Cas. 381.
(2) (1923) 47 Mad. 1.
(3) [1927] 1 K. B. 33.
(4) (1930) L. R. 57 I. A. 228.
(5) (1930) L. R. 57 I. A. 260.

Rules. He has to ascertain the income, profits or gains of the company, and is justified in taking into account interest on securities. Under section 59 (5) of the Indian Income-tax Act the Income-tax Rules are a part of the Act; they have a statutory effect. It is admitted that rule 35 is not *ultra vires;* we say that it is a charging section. Rule 35 applies in terms, and rule 25 is referred to only by analogy. Rule 35 refers not only to profits but to income also. It would include interest on securities.

The case of *New York Life Insurance Company* v. *Styles*[1] refers to net surplus profits. The principle of the case should not be extended owing to difference of opinion in the case. See also *Jones* v. *South-West Lancashire Coal Owners' Association*[2] and *Probhat Chandra Barua* v. *The King-Emperor.*[3]

Coltman, in reply:—What is to be taxed is the company's net income. In arriving at the income, one should not take into consideration anything which is not income. The contributions made by profit-sharing policy-holders are not income. *Styles'* case[1] makes it clear that no part of such contributions is income.

BEAUMONT, C. J.:—This is a reference to this Court under section 66 (2) of the Indian Income-tax Act. The matter originally came before this Court consisting of Sir Amberson Marten C. J. and Mr. Justice Blackwell on December 13, 1929, and it was then referred back to the Commissioner to find further facts and it was suggested by the Court that the questions raised should be amended by asking three questions which are specified in the judgment. The first two questions are really subsidiary and the third one is, whether in law the existing assessment is valid and binding on the Company. The Commissioner of Income-tax declined to raise that

(1) (1889) 14 App. Cas. 381. (2) [1927] A. C. 827.
(3) (1930) L. R. 57 I. A. 228.

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question taking the view that he had no power to do so. The case having been argued before us, it appears to us that that is the real question which arises, and we propose, therefore, to amend the questions raised by raising that question in addition to the two questions actually raised in the case. In doing so, we are following the view expressed by the High Court of Allahabad in *Shiva Prasad Gupta* v. *Commissioner of Income-tax, U. P.*,[1] and in the later case of *Kajorimal Kalyanmal* v. *Commissioner of Income-tax, U. P.*,[2] that the Court has power under section 66 (*5*) of the Indian Income-tax Act to amend the questions asked by the Commissioner by raising the real question and then answering that question.

The two questions which are originally raised in the case really involve determining whether the principle of the decision of the House of Lords in *New York Life Insurance Company* v. *Styles*[3] applies to the assessee Company.

The Commissioner has found the nature of the Company, and I think it is only necessary to say that it is a Company limited by guarantee, has no share capital, and under Article 6 of the Articles of Association every person who insures his life with the Company under a participating policy is to be deemed to be a member of the Company. The principle which the House of Lords laid down in *Styles'* case[3] was this, that where you are dealing with a mutual Insurance Company, the premiums paid by the policy-holders who are to share in the whole of the profits of the Company do not amount to profits or gains of the Company which are liable to tax. The principle at the bottom of the decision is that a man cannot make a profit out of himself: if a number of persons contribute to a common fund which

[1] (1929) 3 I. T. C. 406. [2] (1929) 3 I. T. C. 451.
[3] (1889) 14 App. Cas. 381.

immediately or later is to come back to the subscribers then there is no profit which can be liable to tax, and I see no reason why the principle of that case should not apply to the assessee Company in this case. I therefore think that any premiums paid by those entitled to participate in policies who become thereby the members of the Company are not profits of the Company.

But then the question arises, on what income ought this assessee Company to be assessed? Now, in *Styles'* case[1] the Commissioners of Inland Revenue whose decision was upheld by the House of Lords, had decided, first, that no part of the premium income of the Company received under participating-policies was liable to be assessed to income-tax as profits or gains, and, secondly, that the Company was liable to be assessed (*a*) in respect of profits made on annuities granted, (*b*) on profits made from premiums paid under non-participating policies, (*c*) on all income derived by or from investment of all premiums paid to them in the United Kingdom or abroad, and as to the latter when such money was received in the United Kingdom, and (*d*) on all profits, if any, derived in any manner other than by the annual premium contributions of the participating policy-holders. It seems to me that that is a finding that the whole of the income of the Company derived from sources other than contributions by the participating policy-holders was liable to tax, and that seems to me to presuppose that the premiums paid by the participating policy-holders must be the first fund to bear the expenses of management and so forth. That, I think, is borne out by the opening argument of Mr. Finlay, as he then was, in which he says (p. 387):—"The question is whether where members of a mutual insurance company make contributions towards the expected expenses, and there is a surplus after paying the expenses, income-tax

[1] (1889) 14 App. Cas. 381.

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is payable upon the surplus which is returned to the contributors". Clearly in that case the House of Lords was only dealing with the actual surplus of the premiums after payment of expenses, but the principle upon which the decision rests covers, I think, the whole of the premiums. It seems to me, therefore, that in this case the Company ought to have been charged upon its income derived from investments and on profits from non-participating policies or any other sources except the contributions from the participating policy-holders. So far as Indian income-tax is concerned, it is of course only chargeable *prima facie* on those sources of income in so far as they accrue or arise or are received in India.

Now it was the duty of the assessee Company under section 22 (1) of the Indian Income-tax Act to make a return of the total income of the Company during the previous year, the "total income" being defined in section 2 (15) as total amount of income, profits, and gains from all sources to which the Act applies. If the Company does not make a return, then under section 23 (4) the Income-tax Officer has to make the assessment to the best of his judgment. The assessee Company did not make any return of the income upon which in my view they were liable to tax. On February 10, 1927, their solicitors wrote a letter to the Senior Income-tax Officer in which they stated that they were only liable to be taxed on the interest and dividends of any securities and moneys held by them in this country and on the interest on loans made to members after making a reasonable allowance for office expenses, and they offered to make a declaration of their actual income on those lines. But that clearly was not enough, because they would have had to include in their return any profits made from non-participating policies issued in India. At any rate they did not in fact make any

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return. That being so, the Senior Income-tax Officer in the first instance made an assessment applying rules 25 and 35 of the rules made under section 59 of the Act, which under that section have statutory effect. Rule 25 provides:—"In the case of Life Insurance Companies incorporated in British India whose profits are periodically ascertained by acturial valuation, the income, profits and gains of the Life Assurance Business shall be the average annual net profits disclosed by the last preceding valuation", and the proviso allows certain deductions. It is to be noticed that that rule applies to Life Insurance Companies incorporated in British India, and as the assessee Company is not incorporated in British India, it is in my view plain that rule 25 has no application to the present case. Then comes rule 35 which says:—

"The total income of the Indian branches of non-resident insurance companies (Life, Marine, Fire, Accident, Burglary, Fidelity, Guarantee, etc.), in the absence of more reliable data, may be deemed to be the proportion of the total income, profits or gains of the companies, corresponding to the proportion which their Indian premium income bears to their total premium income."

It is to be observed that this rule is only to be applied in the absence of more reliable data. The learned Commissioner has, in his supplemental case referred to us pursuant to the judgment of this Court which I have mentioned, stated as a fact that he had no reliable data. I agree with him that it was not possible on the materials before him to assess this company in the manner in which, as I have indicated, I think it ought to have been assessed. I think, therefore, he was justified in applying rule 35. Now in order to apply rule 35 he has first of all to find out what is the total income, profits or gains of the assessee company. What he had got was a triennial valuation, and without any more reliable data, I think, he was justified in saying that he must assume that the profits for the year in question would be the average annual profits shown in

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the triennial valuation, that is to say, in order to make the best assessment he can under section 23 (4) of the Act, he arrives at the same result as he would reach if rule 25 applied. Now, under the triennial valuation it appears that the Company has certain sources of income which are plainly taxable. As appears from page 10 of Exhibit C, it has got consideration for annuities granted £91,000 odd, interest £3,000,000 odd, fees £600 odd, consideration for reinsuring liability of other companies £1,500,000 odd. All those are sources of income which are taxable leaving out of account premiums of participating policies which, as I have already said, are not in my view taxable. The receipts from those taxable sources are greater than the profits for the period shown in the account, so that some expenses must have been deducted from those taxable sources of income. I think, therefore, that the Commissioner was justified in coming to the conclusion that the profits shown in the triennial account did in fact represent taxable profits. In doing so he has not taken into account as taxable profits premiums paid on participating policies; he has taken the other sources of income and deducted from them the balance of expenses remaining over after the premiums on participating policies have been wiped out. Having arrived in that way at the total income, profits or gains of the Company, he then under rule 35 had to find out the proportion of the Indian income, and he did this by taking the proportion which the Indian premium income bears to the total premium income. The figures are shown in the case. The result is, I think, that the existing assessment is substantially binding on the Company, though I arrive at that conclusion by a different road to that which the Commissioner took. I answer the first question—whether the premium income received by the Association from its members under participating policies or any part thereof is liable to be assessed to

income-tax as profits or gains of a business under section 6 (iv) and section 10 of the Indian Income-tax Act XI of 1922—in the negative. I answer the second question—whether such income or any part thereof is liable to be assessed to income-tax or super-tax as income profits or gains under any other and if so under which of the provisions of the said Act—by saying that such income is not liable to assessment. I answer the third question raised—whether in law the existing assessment is valid and binding on the Company—by saying that an assessment equal in amount to the existing assessment is binding on the Company.

As regards costs, there will be no order.

MURPHY, J. :—I also answer the questions put to us in the same way as has been done by My Lord the Chief Justice for the same reasons to which I have nothing to add.

Answers accordingly

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Broomfield.

GUSTASP BEHRAM IRANI (ORIGINAL DEFENDANT NO. 2—JUDGMENT DEBTOR), APPELLANT *v.* BHAGWANDAS SOBHARAM (ORIGINAL PLAINTIFF—DECREE-HOLDER), RESPONDENT.*

1931 *February* 18.

Presidency-towns Insolvency Act (III of 1909), sections 17, 46 (3)—Adjudication order—Creditor applying for leave to sue—Application allowed with costs—Discharge of insolvent—Execution of decree for costs, maintainability of.

Costs awarded to a creditor of an insolvent in an application for leave to sue made after the adjudication order are not a provable debt within the meaning of sub-section (3) of section 46 of the Presidency-towns Insolvency Act, 1909, and as such they can be enforced against the insolvent after and notwithstanding his discharge.

Re Bluck; Ex parte Bluck[1]; *British Gold Fields of West Africa, In re*[2]; *A Debtor, In re*[3]; *Pilling, In re*[4] and *Vint* v. *Hudspith*,[5] relied on.

Buckwell v. *Norman*,[6] distinguished.

*Appeal No. 314 of 1929, from Original Decree.

(1) (1887) 57 L. T. 419.
(2) [1899] 2 Ch. 7 at p. 11.
(3) [1911] 2 K. B. 652.
(4) [1909] 2 K. B. 788.
(5) (1885) 30 Ch. D. 24.
(6) [1898] 1 Q. B. 622 at p. 624.