

establish a case of trust, or even of fiduciary relationship between the parties.

Mr. Munshi has relied upon section 94 of the Indian Trusts Act. The obvious answer to the point is that in the case provided for by that section, the person who comes into possession of the property gives no consideration for it, and he certainly holds it in a fiduciary capacity. In this case the company gave consideration for taking over the assets as well as the liabilities. That being so, the case does not come within section 94 of the Indian Trusts Act.

I agree, therefore, that the appeal must be allowed with costs throughout.

Attorneys for appellants : Messrs. *Rustomji & Ginwala*.

Attorneys for respondent : Messrs. *Thakoredas & Madgaokar*.

Appeal allowed.

B. K. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN (ORIGINAL REFEROR), APPLICANT *v.* GOPAL VALJNATH MANCHAR (ORIGINAL ASSESSEE), OPPONENT.*

1936
March 11

Indian Income-tax Act (XI of 1922), section 66 (2)—Fee accompanying application for reference—Fee as part of costs of reference—Refund of fee.

The fee of Rs. 100 which must accompany an application for a reference under section 66 (2) of the Indian Income-tax Act, 1922, forms part of the costs of the reference. The Court has no jurisdiction to order the fee, as such, to be refunded. It can only deal with the matter in relation to costs; consequently the Court's order directing the Commissioner to pay the assessee's costs covers the return of the fee as being part of the out-of-pockets of the assessee. In cases in which the assessee is ordered to pay costs, the Court can, if it considers that credit should be given to the assessee for the fee, give the Commissioner his costs less Rs. 100.

*Civil Application No. 1161 of 1935.

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GOPAL VAIJNATH

CIVIL APPLICATION against the order of the Taxing Master, Original Side, High Court, in Civil Reference No. 2 of 1935.

By the judgment of the Court delivered on April 1, 1936, in Civil Reference No. 2 of 1935, the Commissioner of Income-tax was ordered to pay the assessee's costs to be taxed on the original side of the scale by the Taxing Master.

The Taxing Master allowed a sum of Rs. 100 in the assessee's bill in respect of an item of payment made by the assessee to the Commissioner of Income-tax as required under section 66 (2) of the Indian Income-tax Act. This allowance was objected to on behalf of the Commissioner of the Income-tax but the Taxing Master on a review of taxation confirmed the said allowance of Rs. 100.

Against the order, the Commissioner of Income-tax applied to the Court objecting to the said taxation on the following among other grounds :

"That the said sum of Rs. 100 is a fee payable to the Commissioner under section 66 (2) of the Income-tax Act and is not part of the costs of the Reference and the Taxing Master had no jurisdiction to tax and allow the said sum of Rs. 100."

Kenneth McI. Kemp, Advocate General, with *A. P. Lillie*, Government Solicitor, for the applicant.

Shavaksha, with Messrs. *Ranchoddas & Hakim*, for the opponent.

BEAUMONT C. J. This application raises a short point of practice in connection with references under section 66 of the Indian Income-tax Act. That section provides under sub-section (2) that in certain circumstances the assessee may by application, accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law. Then there is a proviso to the section, which specifies the cases

in which the Rs. 100 fee can be recovered. The proviso directs that if the Commissioner rejects the application on the ground that it is time-barred or otherwise incompetent, or if in exercise of his powers under sub-section (3), the Commissioner refuses to state a case, or if the Commissioner decides the case under section 33 in revision, the assessee may, within thirty days from the date on which he receives notice of the order passed by the Commissioner, withdraw his application, and if he does so, the fee of Rs. 100 shall be refunded. Those are the only cases in which the fee is directed to be refunded. Then sub-section (6) provides that where a reference is made to the High Court on the application of an assessee, costs are to be in the discretion of the Court. Now in this case a reference was made to the Court, and the Court made an order that the Commissioner should pay the costs on the Original Side scale, that being the usual order made in cases in which the assessee is successful. The assessee has included in his bill of costs the fee of Rs. 100 paid under section 66 (2), and the Taxing Master has allowed it, and the question on this application is whether the Taxing Master was right in so doing. Dealing with the matter in the first instance under the Act and apart from authority, the position is that this fee is to be paid as a preliminary to starting the proceedings for a reference. The Commissioner cannot be put in motion to refer a point of law to the High Court until the fee has been paid, though no doubt the fee is paid before the reference is actually made. The fact that the section, whilst providing for the return of the fee in the event of the reference not being effective, makes no provision for the return of the fee if the reference is effective and the decision of the Court goes against the Commissioner, seems to suggest that the Legislature intended that where the reference comes before the Court the question of return of the fee should be in the

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discretion of the Court as part of the costs of the reference, and as the payment of the fee is a necessary incident to the obtaining of a reference, it seems to me that under the Act it is legitimate to hold that this fee is part of the assessee's costs of the reference. We are told that it has not been the practice up to now to allow the fee, but, on the other hand, it is the practice to allow the fee in other High Courts. We have been referred particularly to a recent decision of the Rangoon High Court, *In re The Commissioner of Income-tax, Burma v. J. I. Milne*,⁽¹⁾ where the learned Chief Justice, although he rather indicates the view that if the matter had been free from authority he would have been disposed to hold that this fee was not part of the costs of the reference, nevertheless followed the practice of the High Courts of Madras, Allahabad, Patna and Lahore, and directed the fee to be treated as part of the assessee's costs. The Advocate General says that in some of the decisions of the other High Courts the fee has not been treated as part of the costs, but the Court has made an order that it be refunded. In my view the Court has no jurisdiction to order the fee as such to be refunded ; it can only deal with the matter in relation to costs. In my opinion, the fee is part of the assessee's costs of the reference, and consequently our order directing the Commissioner to pay the costs covers the return of the fee as being part of the out-of-pockets of the assessee. In cases in which the assessee is ordered to pay costs, the Court can, if it considers that credit should be given to the assessee for the fee, give the Commissioner his costs less Rs. 100. Application dismissed with costs on the Original Side scale.

RANGNEKAR J. I agree.

Application dismissed.

J. G. R.

⁽¹⁾ (1933) 11 Rang. 454.