1952

KRISHNAJI BABA-CHARYA v. STATE

Chagla C. J.

any jury in the world or any Sessions Court in the world can possibly convict the accused without any evidence. Therefore, in my opinion, the fact that there is no evidence at all against the accused is a question of law on which the High Court can certainly interfere and quash the committal order. If any authority was needed for this proposition, it is to be found in the decision of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*,[1] where their Lordships emphasise that according to the well known principles of our law a decision that there is no evidence to support a finding is a decision of law. As I am satisfied in this case that there is no evidence at all against accused No. 1, the order of the learned Magistrate cannot be sustained.

I, would, therefore, quash the order of committal passed by the learned Magistrate against accused No. 1.

Order quashed.

M. W. P.

[1] (1914) L. R. 41 I. A. 110 p. 119.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

MESSRS. KIRLOSKAR BROS. LTD. (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX, BOMBAY MOFUSSIL, BOMBAY (RESPONDENT)*

1951 *Sept.* 17

Indian Income-tax Act (XI of 1922), s. 4 (1) (a)—Non-resident Company—Contract for sale of Machinery to Government of India—Payment by cheques by Government of India—Acceptance of cheques in unconditional payment and discharge of Government's Liability—Cheques despatched by post from Delhi to Aundh—Amounts not received in British India.

The assessee, a non-residant Company, received payment in respect of machinery sold to the Government of India, by cheques sent by post by the Government of India from Delhi to the assessee in Aundh State. It was found as a fact that under an arrangement with the Government of India, the assessee received the cheques in unconditional payment and discharge of the Government's liability. The cheques have been drawn on the Reserve Bank of India in Bombay, the assessee had the cheques cashed (through its bank) by sending the cheques to Bombay.

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*Income-tax Ref. No. 18 of 1949.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

Held, that as the cheques were not accepted by the assessee subject to their being encashed but were accepted in unconditional discharge of the Government's liability, the assessee received payments at Aundh where they were sent by post on the dates when the assessee received the cheques. Consequently the assessee did not receive the moneys in British India.

Keshav Mills Co. v. *Commissioner of Income-tax*[1], followed *Commissioner of Income-tax, Bihar & Orissa* v. *Maharajdhiraja of Darbhanga*[2], distinguished.

Commissioner of Income-tax v. *Maheshwari Saran Singh*[3]; *Westminster Bank Ltd.*, v. *Osler*[4], and *Felix Hadley & Co.* v. *Hadley*[5], referred to.

Held, also that the posting of the cheques in Delhi by the Government of India would not constitute a receipt by the assessee of the cheques at Delhi unless the assessee had nominated the post-office as it's agent.

Commissioner of Income-tax, Bihar & Orisa v. *Maharajadhiraja of Darbhanga*[2], distinguished.

Commissioner of Income-tax v. *Maheshwari Saran Singh*[3]; *West minister Bank Ltd.*, v. *Osler*,[4] and *Felix Hadley & Co.* v. *Hadley*,[5] referred to.

The assessee's contention was that by reason of its acceptance of cheques of the Government of India as unconditional payments and in discharge of Government's liability at Aundh, it received the sale proceeds in Aundh.

The Tribunal however accepted the Department's contention that the sale proceeds were received in Bombay and held that the profits made by the assessee from this transaction with the Government of India were liable to tax.

At the instance of the assessee the following question of law was referred to the High Court:—

"Whether on the facts of the case, income, profits and gains in respect of sales made to Government of India was received in British India within the meaning of s. 4 (*1*) (*a*) of the Act"?

The reference was heard.

Y. P. Pandit with *J. P. Pandit*, for the applicant.

G. N. Joshi for the respondent.

CHAGLA C. J.—We directed the Tribunal in this reference to submit a supplementary statement of the case, and that statement has now been furnished to us. The question that arises for determination is as to whether a certain sum of money was received by the assessee in British India so as to make it liable to tax.

[1] (1949) 18 I. T. R. 407.
[2] (1933) L. R. 60 I. A. 146.
[3] (1950) 19 I. T. R. 83.
[4] (1933) 1 I. T. R. 65.
[5] (1898) 2 Ch. Div. 680.

The assessee is a non-resident company, and it is not disputed that its liability to pay tax depends upon receipt of income within British India. The receipt took the form of cheques being sent by Government to Aundh where the assessee carried on business, these cheques being on a bank in Bombay; and we asked the Tribunal to find as to whether the cheques were received by the assessee in full satisfaction of the debt of the Government of India to them, and whether the Government debt was discharged by the acceptance of these cheques by the assessee. We also asked them to find whether the cheques received by the assessee were sent to their bank for collection and the bank acted as agents for collection and the amounts were collected in British India. Now, it is sufficient to dispose of this reference on the first finding.

With respect to the Tribunal, they have not really applied their mind to the question that was submitted to them for a further and supplementary statement of the case. As pointed out by us in *Keshav Mills Co.* v. *Commr. I. T.*,[1] ordinarily the payment of a debt by a cheque never results in the discharge of the debt; but there may be an arrangement between a creditor and a debtor that the receipt of a cheque or a Hundi by a creditor may result in an unconditional discharge of the debt, and in the event of the cheque or the hundi not being honoured the creditor would have no right to sue on the original cause of action but only on the cheque or the hundi. Therefore, what we wanted the Tribunal to find was whether, in this particular case, there was an arrangement between the creditor and the debtor from which it could be said that the acceptance by the creditor of the cheque from the Government resulted in an unconditional discharge of the debt. Now, what the Tribunal has found on this part of the case is (1) that, under the agreement with the Government of India, the assessee had undertaken to receive the payment in India, and (2) that the assessee made a specific request to the Government to make the payment of the bill by a cheque drawn on a bank in Bombay. Now, neither of these two findings really touch the question which we have to decide in order to determine the liability of the assessee to pay tax. But, fortunately, the Tribunal has stated all the facts from which the necessary inference can be drawn as to whether there was an arrangement between the debtor and the creditor as to the discharge of the debt by the

[1] (1949) 52 Bom. L. R. 72 at p. 79.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

giving of the cheque; and the relevant facts are that, when the assessee applied for a contract with the Government, they agreed to the conditions operating the working of the contract, and one of the conditions was that the payment for the delivery of the stores would be made on submission of bills in the prescribed form in accordance with the instructions given in the acceptance of tender by cheque on a Government Treasury in India or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. Further, when the bills were submitted by the assessee to the Government, there was an endorsement on the bills to the effect, "Kindly remit the amount, by a cheque, in our favour, on any bank, in Bombay," and when the cheque was received by the assessee, the assessee sent to the Government an acknowledgement in the following terms:—

"The undersigned has the honour to acknowledge cheque No..... dated.....for Rs.....in payment of the bills noted in the first column."

Therefore, on these facts, it is clear that the cheques were not accepted by the assessee subject to their being encashed. It was open to the assessee, when it passed the receipt, to make the receipt conditional upon the cheque being paid; but the assessee chose to accept the cheque itself as an unconditional discharge of the Government's liability. And the reason for it is very obvious: the assessee was dealing with the Government of India, and there could be no suggestion that a cheque issued by the Government of India was likely to be dishonoured. It may be that, if the assessee company was dealing with a private party, it would have made it a condition of accepting the cheque that it was subject to encashment. But when the assessee was dealing with the Government of India, it looked upon the liability of the Government as discharged as soon as it received the cheque from the Government, and that is why we find the receipt in the form which I have indicated.

Now, Mr. Joshi has raised a new point which was not really urged when we decided *Keshav Mills Co.'s* case, and the point raised by Mr. Joshi is that, whatever the contractual obligations of the parties may be, we are only concerned with the receipt of income within the meaning of the Income-tax Act. Mr. Joshi says that it may be that, when the assessee company received the cheque, the liability of the debtor—the Government—was discharged. But notwithstanding the discharge of the liability, the question still remains whether, on the receipt

of the cheque, it could be said that the assessee company had received income which was liable to tax. And Mr. Joshi's contention is that mere receipt of a cheque can never be receipt of income, and that income is only received when the cheque is cashed. When it was put to Mr. Joshi whether, in order to attract tax under the Income-tax Act, it was necessary that the assessee must always receive cash, Mr. Joshi had to concede that it must be cash or it must be money's worth; and according to Mr. Joshi, a cheque does not represent money's worth and it is only when the cheque is converted into money by its being cashed by the bank that income is received by the assessee and it is liable to tax. Now, this point raised by Mr. Joshi is undoubtedly a very important one, and it requires a rather close examination.

I shall presently turn to the authorities, but it seems to me that once it is accepted that what is liable to tax as income is not necessarily receipt of cash but receipt of anything which can be looked upon as money's worth, then it is difficult to understand why a cheque is not as much money's worth as any goods or chattels received in lieu of money. The test of an article being money's worth must be that the article is capable immediately of being realised into money. And that particular quality is possessed by all negotiable instruments. The mere fact that an instrument is negotiable means that, by means of transfer, by means of negotiation, or by means of endorsement, the person who holds the negotiable instrument can get money for it. In this case also, the assessee company, instead of sending the cheque received by it from the Government to its bankers to be cashed; could have negotiated it in Aundh itself and got the money for the cheque. Therefore, on principle, and apart from authorities, there seems to be no reason why a cheque should stand on a different footing from any other article of which it could be said that it is money's worth. It is also well settled in commercial practice, as I shall presently point out, that a cheque is looked upon as a payment if a creditor accepts a cheque in place of the country's currency: if he accepts the cheque, then he is paid, although the payment may not be an unconditional discharge. But the only condition is that, if the cheque is not cashed, then the liability of the debtor will continue; but if the cheque is cashed then the payment is not as of the date when the cheque is cashed but it is of the date when the cheque was given to the creditor. Therefore, if we were to apply the principles of

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

commercial practice, the assessee company was paid and it received the payment on the date when it received the cheque from the Government of India and not on the date when the cheque was cashed by the bank. That again seems to me should be so, because it stands on a very clear principle; it cannot be left to the assessee to determine when he has received payment by his mere act of sending the cheque to the bank to be cashed at any time that he likes. An assessee may get a cheque on a particular date and he may not choose to cash it for a week or a fortnight or a month; but it cannot be said that the payment takes place on the date when the assessee chooses to have the cheque cashed. The payment has already taken place, and the payment continues to be of that date. If the cheque is cashed in the ordinary course, nothing further has got to be done; but if the cheque is dishonoured, then the liability of the debtor revives and he is liable to make the payment.

Now, let us see whether there is anything in the authorities relied upon by Mr. Joshi which is contrary to what I am suggesting is the correct approach to this question. Mr. Joshi has strongly relied on the judgment of the Privy Council in *Income-tax Commissioner* v. *Maharajadhiraja of Darbhanga*.[1] We considered that case in *Keshav Mills Co.* v. *Commr. I. T.* and, it will be remembered, we pointed out that the Privy Council was considering the payment to the assessee of certain sums towards interest and these sums were made up of seven items, and these seven items consisted, among others, of shares in different companies, bills receivable by brokers, a decree, a transfer of a loan, pro-notes and hand-notes of third parties, and handnotes from the debtor himself; and the question was whether the receipt by the assessee of these assets constituted a receipt of income within the meaning of the Income-tax Act. It is in this connection that Lord Macmillan, delivering the judgment of the Board, stated (p. 161):—

"...There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth..."

[1] (1933) L. R. 60 I. A. 146, s. c. 35 Bom. L. R. 731.

Having laid down this test, their Lordships applied it to the seven items, and they said that the first six items may reasonably be regarded as the equivalent of cash, but the seventh item, which consisted of hand-notes from the debtor himself, was clearly not the equivalent of cash. And it is in connection with these promissory-notes of the debtor that the Privy Council observes (p. 161):—

"...A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes."

Mr. Joshi says that these remarks also apply to a cheque paid by a debtor to his creditor. Now, obviously, these remarks do not apply to a cheque; these remarks must be understood in their own context, and the context was a promissory-note given by a debtor in respect of principal and interest which was due at the date when the promissory-note was passed, and the debtor, instead of paying the principal and interest, acknowledged the debt and promised to pay what was then due at a future date. It is in this context that the Privy Council said that a debtor's own promissory-note is not equivalent to cash. Now, when we have a cheque given by a debtor on a bank, which is accepted by the creditor in lieu of cash, it is impossible to say that these observations apply to a document of that character. But we have a more direct observation of no less a judicial authority than Lord Lindley in *Gresham Life Assurance Society* v. *Bishop*[1]. In that case, the real question that arose was whether an entry in an account was equivalent to a receipt of income, and the House of Lords held that a mere taking into account of an item of interest did not constitute a receipt of that income in the United Kingdom. It is in relation to these facts that Lord Lindley observes (p. 296):—

"First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by businessmen. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst businessmen is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret...."

Now, it will be noticed that Lord Lindley very rightly, with respect, emphasizes what businessmen consider to be the

(1) [1902] A. C. 287.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

equivalent of a receipt; and there can be no doubt that businessmen do consider payment by cheque as a receipt in lieu of payment by cash or by the coins of the realm. And Lord Lindley also emphasizes that businessmen do consider payment by transfer of a negotiable instrument to be as much a payment as by the transfer of a coin.

There is also another decision to which attention may be usefully drawn, and that is a judgment of the Allahabad High Court in *Commr. of Inc. Tax* v. *Meheshwari Saran Singh.*[1] The Allahabad High Court held that the receipt of U. P. Government Bonds in lieu of interest due was a receipt of income and was assessable to income-tax. And in the judgment, at page 95, the test their Lordships apply is as follows:—

> "An important factor in considering the question whether it is substitution of security or payment, is whether the bonds were transferrable and could, therefore, be deemed to be money's worth..."

The contention was that the giving of the Government Bonds was merely a giving of security and not a payment, and the learned Judges of the Allahabad High Court rejected that contention because they held that the Bonds were transferable and could be realised in to money, and, therefore, they must be deemed to be money's worth. And they go on to say (p. 95):—

> "...We have already said that these Encumbered Estates Bonds were just as much saleable in the market as any other Government security and the assessee could, therefore, have sold them in the market if he wanted to, of course at the market price. It is not suggested that the market price of these bonds was less than their face value."

I hope the Department will not suggest that the market value of a cheque issued by the Government of India is any less than its face value. It is rather interesting that the learned Judges of the Allahabad High Court considered the Privy Council decision in *Income-tax Commissioner* v. *Maharajadhiraja of Darbhanga,*[2] and they have distinguished it by pointing out that, in the case of a debtor's promissory-note, it is a mere substitution of a promise to pay at a later date for the obligation to make a payment presently due, and also by relying on a dictum of Lord Justice Mackinnon in *Westminster Bank, Ltd.,* v. *Osler,*[3] that "there can never be payment of his debt by a debtor by giving his own promise to pay at a future date."

[1] (1950) 19 I. T. R. 83.
[2] (1933) L. R. 60 I. A. 146. s. c. 35 Bom. L. R. 731
[3] (1933) 1 I. T. R. 65.

With regard to how a cheque operates as payment, Benjamin on "Sale of Personal Property" at page 789 of the eighth edition points out:—

"...a man who prefers a cheque on a banker to payment in money is not considered as electing to take a security instead of cash, for a cheque is accepted as a particular form of *cash* payment, and if dishonoured, the seller may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken."

And Byles on "Bills of Exchange" at page 23 of the 20th edition enunciates the position in law that "a cheque, unless dishonoured, is payment." And we have the position in law laid down in *Felix Hadley & Co.* v. *Hadley,*[1] that a payment under a cheque relates back to the date of the cheque. So it is immaterial when a cheque is cashed; what is material is when the cheque was given, and the payment is made when the cheque was given and not when the cheque was cashed at the instance of the creditor. Therefore, the position in law seems to be that, even when a cheque is accepted by a creditor as a conditional payment, the preference by the creditor of accepting a cheque rather than cash operates as a payment to the creditor when the cheque is given, although the liability of the debtor may revive in the event of the cheque not being ultimately cashed.

Now, in this particular case, as we have held that there was an unconditional acceptance of the cheque by the assessee company and there was a discharge of the liability of the Government, it is not necessary to go as far as holding that, although there was a conditional acceptance of the cheque, the acceptance of the cheque by the assessee company constituted payment. But, as I have pointed out, that seems to be the effect of the authorities to which reference has been made. In this view of the case, it is unnecessary to decide the second question with regard to which we had asked the Tribunal to submit a supplementary statement of the case, namely, as to whether the assessee's bankers acted as agents on behalf of the assessee and collected the proceeds of the cheque from the Government bankers in Bombay.

Mr. Joshi wanted to raise a new contention which had not been urged before us at the time when the reference first came before us, and that contention was that, as the cheque was posted in Delhi at the instance of the assessee company, the

[1] [1898] 2 Ch. 680.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

assessee company received the cheque in Delhi, and, therefore, the receipt of the income was in British India and not in Aundh, outside British India. Now, the Tribunal was asked to submit a supplementary statement on two rival contentions placed before us when we first heard the reference: the contention of the assessee that the receipt of the income was in Aundh State because the cheques were received in Aundh, and the contention of the Department that the receipt of the income was in British India because the cheques were cashed in Bombay. The contention now attempted to be urged by Mr. Joshi was never put forward before us. But we have allowed Mr. Joshi to argue this matter on the assumption that the cheques were posted by the Government in Delhi. Now, assuming that it is so, it is difficult to understand how the posting of the cheque in Delhi by the Government would constitute a receipt by the assessee company of this cheque in Delhi. Unless the post office was an agent of the assessee company to receive the cheque, the mere posting of the cheque would not, in law, amount to the cheque being received by the assessee company when the cheque was posted. All that the assessee company asked the Government to do was to remit the amount by cheque. It did not indicate how the cheque should be sent; it did not suggest that the cheque should be sent by post. It is only in those cases where the receiver nominates the post office as his agent that the posting of a letter constitutes the receipt of the letter by the receiver at the time and at the place where the letter is posted. If the post office is not nominated an agent by the receiver, then by posting the letter the sender constitutes the post office as his agent, and when the letter is delivered to the receiver, it is delivered by the agent of the sender and not of the receiver. I do not think that this principle of law can be seriously disputed. If that be the correct principle of law, then, as I have pointed out, it is immaterial whether the cheque was posted in Delhi by the Government or not. The posting of the cheque would become material provided there was a request by the assessee company to the Government to send the cheque by post. As there is no such request found in the statement of the case, we do not think that there is any substance in Mr. Joshi's contention that the cheque was given to the assessee company in Delhi and not in the Aundh State.

Mr. Joshi wanted a remand to the Tribunal for determining whether the cheques were posted in Delhi. We do not

think a remand is necessary, because, as I have pointed out, even assuming that fact in favour of Mr. Joshi, in our opinion the result can only be in favour of the assessee. Therefore, it is unnecessary to have this fact determined by the Tribunal.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

We, therefore, answer the question submitted to us in the negative.

The Commissioner to pay the costs, including the costs of the remand.

Attorney for applicant: *Y. P. Pandit.*

Attorney for respondent: *N. K. Petigara.*

Answer accordingly.

A. J. P.

APPELLTAE CRIMINAL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas

STATE *v.* JAYANTILAL GOVINDDAS AND ANOTHER (ORIGINAL ACCUSED NOS. 1 AND 2).*

1953 *March* 11

Bombay Prevention of Gambling Act (IV of 1887), ss. 12 (a), 7—Find of marked money in possession of accused, whether in itself incriminating circumstance—Panch accompanying bogus punter—Credibility of Panch witness—Presumption under s. 7 of the Act.

Although the mere find of marked money in the possession of an accused is not by itself an incriminating circumstance, when there is positive evidence that the money was given to the accused for laying a bet, a conviction under s. 12 (*a*) of the Bombay Prevention of Gambling Act, 1887, is not illegal.

Mere fact that the Panch witness accompanied the bogus punter to lay a bet is not sufficient justification for discarding or discrediting his evidence.

In order that a presumption may arise under s. 7 of the Bombay Prevention of Gambling Act, 1887, it is not necessary that the things seized must be proved to be instruments of gaming. It would be sufficient if there are reasonable grounds, in the particular circumstances of each case, for suspecting that the things seized were instruments of gaming.

Emperor v. *Harilal Gordhan*,[1] distinguished.

*Criminal Appeal No. 116 of 1952

[1] (1937) 39 Bom. L. R. 613.