

44. I may add that if I had taken the view that the plaintiff was not entitled to a declaration of nullity, I would have had no hesitation in granting him a decree for divorce under the provisions of the Bombay Hindu Divorce Act, on the ground that the defendant was at the time of her marriage and still is impotent.

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Defendant has not chosen to lead any evidence to show that her impotency is curable. This issue, therefore, does not arise.

The plaintiff will be entitled to a decree in terms of prayer (a). Plaintiff to pay the defendant's costs of the suit. Two counsel certified.

45. Before I part with this case I would like to record my deep appreciation of the very valuable assistance I have received in this case from counsel on both sides, and particularly from Mr. Dave, who has brought to bear upon this question his great erudition as a sanskrit scholar.

Attorneys for plaintiff: *Mulla & Mulla.*

Attorneys for defendant: *Shah & Co.*

*Suit decreed.*

K. B. S.

### INCOME-TAX REFERENCE

*Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.*  
 ABDULLABHAI ABDUL KADER (APPLICANT) *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY CITY (RESPONDENT).\*

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*Indian Income Tax Act (XI of 1922), ss. 42 and 43—Non-resident having business connection in taxable territories in years of account—Assessee appointed agent of non-resident under s. 43 for years of account—Orders of such appointment passed after non-resident's death—Legality of such orders—Expression "business connection in taxable territories" in s. 42: meaning of—Whether connection must be permanent and exclusive—Connection must not be of casual character but must have some continuity in it.*

A non-resident had business connection with the assessee in the taxable territories in the years of account and the assessee was appointed the agent of the non-resident for those years under s. 43 of the Indian Income-tax Act, 1922. But the orders appointing the assessee such agent were passed after the death of the non-resident. On the question whether the assessee could be so appointed agent of the non-resident after the latter's death,

\* Income-tax Reference No. 30 of 1949.

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*Held*, that if the non-resident had business connection in the years of account in the taxable territories, a statutory agent can be appointed under s. 43 of the Act, notwithstanding that at the date of the appointment of the agent, the non-resident was not alive. The material and relevant period to consider is not the date of the appointment of the statutory agent but the period covering the years of account.

*Held*, therefore, the Department was within its rights in appointing the assessee the agent of the non-resident, though at the date of such appointment, the non-resident was not alive.

The assessee was for several years including years of account acting as the agent of the non-resident and had entered into several transactions on his behalf, though he was not the sole agent of the non-resident and there were other persons also through whom the non-resident transacted business in taxable territories. On the question whether on these facts the assessee was rightly appointed a statutory agent of the non-resident under s. 43 of the Act—

*Held*, that the non-resident had business connection within the meaning of s. 42 (1) of the Act and that the assessee was rightly treated as an agent of the non-resident for the years of account.

The expression “any business connection in taxable territories” is by no means a precise expression, capable of being construed with precision. It may be that the Legislature advisedly used a vague and uncertain expression so that the interpretation should not be restricted to any narrow limits. But it is clear that the Legislature did not intend to tax a non-resident in respect of income, profits or gains arising or accruing from any business connection ‘with’ taxable territories. The preparation used is ‘in’ and not ‘with’. So all those cases are excluded where a non-resident is merely doing business with India.

It is also clear from the expression that the non-resident must be carrying on business in India through some agency. Such agency may not be of permanent or exclusive character but there must be an element of continuity in it. Any isolated transaction or even a connection for a short period would not necessarily constitute business connection contemplated by s. 42 of the Act.

It is not possible to give an interpretation to this expression which would be good interpretation for all the innumerable cases which may arise. It is only possible to interpret the expression negatively rather than positively. It is possible to point out what is excluded from this expression but it is not possible to say what is included in it. In most cases it would depend upon the facts of each particular case as to whether the business connection has been established or not.

*Hira Mills Ltd., Cawnpore v. Income Tax Officer, Cawnpore*,<sup>(1)</sup> explained.

*The Commissioner of Income-tax, Burma v. Messrs. Steel Brothers and Co. Ltd.*,<sup>(2)</sup> *The Commissioner of Income-tax, Bombay Presidency and Aden v. The National Mutual Association of Australasia, Ltd.*,<sup>(3)</sup> and *Commissioner of Income-tax, Bombay v. Metro Goldwyn Mayer (India) Ltd.*,<sup>(4)</sup> referred to.

<sup>(1)</sup> (1946) 14 I. T. R. 417.

<sup>(2)</sup> (1925) 3 Rang. 614.

<sup>(3)</sup> (1933) 57 Bom. 519.

<sup>(4)</sup> (1936) 7 Bom. 176.

Abdullahai Abdul Kader (Assessee Applicant) had for several years including Samvat years from 1997 to 2,000 been acting as the agent of Haji Mahomed Syed, Alberbary (non-resident) of Post Sudan, and had entered into several transactions on behalf of the non-resident and under his instructions. In respect of the assessment year 1942-43 (the relevant year of account being S. Y. 1997) an order under s. 43 of the Indian Income-tax Act, 1922, was passed on March 12, 1945, treating the assessee as the agent of the non-resident for that year. In respect of assessment years 1943-44, 1944-45 and 1945-46 (the relevant years of account being Samvat Years 1998, 1999 and 2,000) notices were issued respectively on February 14, 1945, February 19, 1945 and October 10, 1945, by the Income-tax officer intimating to the assessee his intention to treat the assessee as the agent of the non-resident under s. 43 of the Act for these years and requiring him to state the assessee's objection, if any, in that behalf. The non-resident died on March 26, 1946. After hearing the assessee the Income-tax Officer passed orders under s. 43 of the Act on June 27, 1946, treating the assessee as the agent of the non-resident in respect of the assessment years 1943-44, 1944-45 and 1945-46. On appeal to the Income-tax Appellate Tribunal the orders were confirmed.

At the instance of the applicant and the respondent the following questions were referred to the High Court:—

(1) Whether Haji Mahomed Syed Alberbary aforesaid had a business connection in British India within the meaning of s. 42 (1) of the Indian Income-tax Act?

(2) Whether Abdullahhai Abdul Kader was rightly treated as the agent of the non-resident for the assessment years 1942-43, 1943-44, 1944-45, and 1945-46?

(3) Whether the death of Haji Mahomed Syed Alberbary in any way, affected the liability of Abdullahhai Abdul Kadar under s. 42 (1) of the Indian Income-tax Act?

(4) Whether Abdullahhai Abdul Kader could be taxed under s. 42 (1) on profits made by the non-resident on the sale of goods purchased through other commission agents in British India?

This reference came on for hearing before the Chief Justice and Mr. Justice Tendolkar on March 22, 1950, who directed the Income-tax Appellate Tribunal to submit a supplementary Statement of the case giving, *inter alia*, a clear finding of fact as to whether the applicant was the sole selling agent of the non-resident, Haji Mahomed Syed Alberbary. The supplementary statement having been submitted the reference was heard.

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*Sir J. B. Kanga* with *R. J. Kolah*, for the applicant.

*C. K. Daphtary*, Solicitor-General, with *G. N. Joshi* for the respondent.

CHAGLA C. J. This reference was before us on March 22, 1950. On that day we directed the Tribunal to submit a supplementary statement of the case. That supplementary statement has now been submitted by the Tribunal; and on this supplementary statement various questions arise which have got to be considered.

The first question which has been argued by Sir Jamshedji on behalf of the assessee is, that with regard to the assessment years 1943-44, 1944-45 and 1945-46 his client cannot be assessed as an agent under s. 43 in view of the death of the non-resident. Now, the facts which are necessary to be considered with regard to this contention are that the assessee was appointed a statutory agent under s. 43 for the year 1942-43 on March 12, 1945. The non-resident died on March 26, 1946, and the orders appointing the assessee statutory agent with regard to assessment years 1943-44, 1944-45 and 1945-46 were passed on June 27, 1946. Sir Jamshedji's contention is that inasmuch as the non-resident was dead, no order can be passed after his death, appointing the assessee as statutory agent. It is perfectly true that when one has to deal with a contractual agency, death of the principal brings the agency to an end. But under s. 43 we are dealing, not with a contractual agency, but with a statutory agency, and a statutory agent can be appointed under s. 43 provided the conditions laid down in that section are satisfied; and the conditions necessary are that any person employed by or on behalf of the person residing out of the taxable territories or having any business connections with such person or through whom such person is in the receipt of any income, profits or gains can be appointed a statutory agent. Now the employment contemplated, the business connection contemplated, and the receipt of income contemplated by this section are all within the accounting year. We are concerned here with business connection; therefore, if there was a business connection in the year of account, a statutory agent can be appointed under s. 43, notwithstanding the fact that at the date of the appointment of the statutory agent the non-resident was not alive. The material and relevant period to consider is, not the date of the appointment of the statutory agent, but the period covering the year of account. Now, admittedly

during the accounting period the non-resident was alive; and we are concerned with the business connection which he had within the taxable territories. Therefore, the Department was within its rights in appointing the assessee the statutory agent on June 27, 1946, notwithstanding the fact that the non-resident died on March 26, 1946.

The next question urged by Sir Jamshedji is a much more important and interesting question; and the question that falls to be considered is, what is the true meaning to be given to the expression used by the Legislature in s. 42 "any business connection in the taxable territories"? When can it be said that a non-resident has a business connection in the taxable territories so as to render him liable to pay tax under s. 42 on the ground that income has deemed to accrue or arise within the taxable territories, Now, before considering the question of law it is necessary to state the facts of this particular case.

It has not been found by the Tribunal that the non-resident, Haji Mahomed Syed Alberbary, had been exporting or importing goods only through the assessee. The Tribunal has also held that the assessee was not the sole selling agent of the non-resident. But it has also been found by the Tribunal that the assessee acted as a commission agent of the non-resident for several years and that the assessee entered into several transactions on behalf of the non-resident. The Income-tax Officer who has made an order under s. 43 found that the assessee had been regularly purchasing and selling goods on behalf of the non-resident and under his instructions. The assessee also transacted ready and forward business in cotton piecegoods and other articles on behalf of the non-resident and they were regularly purchasing and selling goods on behalf of the non-resident and under his instructions. These findings have been accepted by the Tribunal. The question is whether on these facts it can be stated that the assessee was rightly made a statutory agent of the non-resident under s. 43 of the Act. Now, it is not necessary to emphasize the fact that s. 43 merely sets up a machinery to give effect to the substantive provisions of s. 42. Therefore, before we can go to s. 43 we must find that the non-resident was liable to pay tax under s. 42. It is only when he is so liable that the question of appointing a statutory agent under s. 43 can arise. Now, the non-resident would only be liable to pay tax under s. 42 in this particular case provided he had any business connection in the taxable territories. Now, it is no use concealing

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the fact that the expression "any business connection in the taxable territories" is by no means a very precise expression, capable of being construed with any precision. It may be that the Legislature advisedly used a vague and uncertain expression so that the interpretation should not be restricted to any narrow limits. But one or two aspects of this expression may be emphasized. It is clear that the Legislature did not intend to tax a non-resident in respect of income, profits or gains accruing or arising from any business connection with taxable territories. In other words it is not sufficient that a non-resident should do business with India, in order that he should make himself liable under s. 42. The business connection contemplated by s. 42 is something wider than mere doing business with India. The preposition used by the Legislature is "in" and not "with", and proper emphasis must be given to the particular word "in" used by the Legislature. Therefore, we can easily exclude all those cases in which we find that a non-resident is merely doing business with India. It is also clear from the expression "any business connection in the taxable territories" that the non-resident must be carrying on business in India through some agency. There must be some connection between the non-resident and the taxable territories. The contention of Sir Jamshedji is that the agency which connects the non-resident with the assessee must be an agency of permanent and exclusive character. Now, we were not prepared to accept that contention. It is difficult to understand why only a permanent and exclusive agency can constitute a business connection between a non-resident and an assessee. As I have already pointed out the language used by the Legislature is very wide; any business connection is not necessarily that business connection which is constituted by a permanent and exclusive agency. On the other hand a mere casual connection, a connection which has no continuity, would also not be a business connection as contemplated by the Legislature under s. 42. Therefore, in order that the agency which constitutes a connection between a non-resident and the assessee should be a business connection as contemplated by s. 42 there must be an element of continuity in the agency. An isolated transaction through an agent, or even a connection for a short period, would not necessarily constitute business connection. It is impossible to give an interpretation to this expression which would be a good interpretation for all the innumerable cases which may arise. It is only possible to interpret the expression negatively rather than positively. I can only point

out what is excluded from the expression "business connection" but it is not possible to say what is included in it. In most cases it would depend upon the facts of the particular case as to whether the business connection has been established or not.

Now, applying this test to the facts of the present case it is clear that the connection between the assessee and the non-resident was not of a casual character. We have not here a case where an assessee entered into a few isolated transactions with the non-resident. Continuity of agency has been definitely established on the facts of the case. As I pointed out for several years the assessee has been acting as a commission agent of the non-resident. During these years he has entered into a large number of transactions. It is true that the assessee is not the sole agent of the non-resident. It is also true that the non-resident does business through other agents as well. But the mere fact that the non-resident has more than one agent is not sufficient to my mind to lead me to the conclusion that the assessee is not necessarily a person who can be appointed a statutory agent under s. 43.

Turning to the authorities on which reliance is placed, Sir Jamshedji has very strongly relied upon a decision of the Allahabad High Court, *Hira Mills Ltd., Cawnpore v. Income-Tax Officer, Cawnpore*.<sup>(1)</sup> In that case the Allahabad High Court held that business connection was not established between the Hira Mills which was a non-resident company and carried on business of manufacturing cloth at Ujjain, Gwalior State, and British India. The facts proved in that case were that the assessee company sold goods in India to British Indian customers if and when the customers either directly or through brokers offered to purchase them by sending an order to Ujjain. Therefore, the mills sold the cloth to customers in British India either directly or through brokers who offered to purchase the cloth on behalf of their constituents. It is in the light of these facts found that the observations made by the learned Judges of the Allahabad High Court must be appreciated. Now, in the first place the Allahabad High Court rejected the view taken by the Rangoon High Court of the expression "business connection" in *The Commissioner of Income-tax, Burma v. Messrs. Steel Brothers & Co., Ltd.*<sup>(2)</sup> The view taken by the Rangoon High Court was that the expression "business connection" was a compendious expression to cover such concerns in the nature of trade, commerce, or

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<sup>(2)</sup> (1925) 3 Ran. 614.

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manufacture as arise through a branch, factorship, agency, receivership or management. The Allahabad High Court took the same view as was taken by this Court in *Commissioner of Income-tax, Bombay v. National Mutual Association of Australasia Ltd.*<sup>(1)</sup> that the Rangoon view placed too narrow a construction on the words "business connection." But what is emphasized by Sir Jamshedji is that at p. 430 of the judgment in the Allahabad case the learned Judges point out that—

"...The brokers were not, as far as we know, retained by the assessee. The assessee had no claim upon goodwill of the brokers."

Sir Jamshedji says that these sentences make it clear that their Lordships of the Allahabad High Court were emphasizing the fact that the agent must be retained by the principal before he can be constituted a statutory agent under s. 43. In other words Sir Jamshedji says that there must be contractual obligation upon the agent to accept the work sent to him by the principal. According to Sir Jamshedji a distinction was drawn in this case between the free lance brokers, as the learned Judges called the brokers in Cawnpore who entered into the transaction on behalf of the constituents in British India with the mills, and an agent under an obligation to act as such. Now, in my opinion that is not the true reading of this case. The learned Judges have used the expression "retained" not in the sense in which Sir Jamshedji wants us to understand it. All that the learned Judges emphasized (as they were entitled to do) is that the brokers were not employed or engaged by the mills. The brokers were free lance brokers in the sense that they offered to purchase cloth on behalf of their constituents. No occasion arose for the Allahabad High Court to lay down that there must be a contractual obligation upon the agent to act as an agent before he could be appointed a statutory agent under s. 43. On the facts of that particular case it is clear that no business connection within the meaning of s. 43 was established. It may be pointed out that at p. 428 of the report in the judgment it is pointed out that no definition of the expression "business connection" was given by the Act itself and the Legislature had apparently deliberately chosen to use words of wide, if uncertain, meaning; and it is stated at p. 430 that every question that had got to be decided as to the application of s. 42 should be what their Lordships chose to call a "practical question."

<sup>(1)</sup> (1932) 57 Bom. 519.

A reference may also be made to a decision<sup>3</sup> of our High Court, *Commissioner of Income-tax, Bombay v. Metro-Goldwyn Mayer (India), Limited.*<sup>(1)</sup> Beaumont C. J. was also considering what proper construction should be put upon the expression "business connection," and at p. 383 he points out that

"...I think, there must be some element of continuity in the relationship between the parties, and in every case one has to look at the particular facts of the case to see whether it falls within s. 42."

Therefore, in my opinion, the non-resident, Haji Mahomed Sayed Alberbary, had a business connection in India within the meaning of s. 42 (1) of the Act and the assessee was rightly treated as an agent of the non-resident for the accounting years 1942-43, 1943-44, 1944-45 and 1945-46.

The result, therefore, is that we answer the questions submitted to us as follows:

No. 1:—In the affirmative.

No. 2:—In the affirmative.

No. 3:—In the negative.

No. 4:—This question has been withdrawn by the Solicitor General and we therefore do not answer this question.

The additional question raised on the supplementary statement of the case will be answered in the affirmative.

Assessee to pay three-fourths of the costs of the reference.

Attorneys for applicants: *Amarchand & Mangaldas.*

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

*Answer accordingly.*

P. M. P.

(<sup>1</sup>) (1938) 41 Bom. L. R. 379.

### INCOME-TAX REFERENCE

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

THE AMBIKA SILK MILLS CO., LTD., (APPLICANTS) *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY CITY, (RESPONDENT).\*

*Indian Income-tax Act (XI of 1922), ss. 10 (2) (VI)—Proviso 17 (7): 6, 10, 24 (1)—Allowable deduction on account of depreciation exceeding business profits for the accounting year—Total income of assessee including item of capital gains—Whether depreciation not absorbed by*

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