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payment is made,—*vide Leavis. v. Leavis*, (1)]. In cases where the defaulter spouse has initiated proceedings under the Hindu Marriage Act, stay of proceedings may not be adequate and other steps may have to be taken to put the indigent spouse in funds to prosecute the proceedings. When the defaulter gives reasonable ground for non-compliance with the order, then it may be sufficient merely to adjourn the proceedings to enable him (or her) to comply with the order. If, however, the defaulter wilfully neglects or wilfully refuses to comply with the order then I see no reason why contempt proceedings in accordance with law should not be taken against such a defaulter, even if ultimately these proceedings result in imprisonment because his conduct obstructs the judicial proceedings and prevents the trial to be equitably conducted. It is, however, not necessary to discuss the matter of contempt in this judgment at length because that stage has not yet arisen in the present case. The wife in the present case has merely made an application for stay of the proceedings till the husband complies with the order made under section 24 of the Hindu Marriage Act.

For these reasons it must be held that the trial Court was in error in holding that it had no power to take any steps in the matrimonial proceedings to make the husband comply with the order made under section 24 of the Hindu Marriage Act. It is for the trial Court to exercise its discretion in accordance with law. We accordingly accept this appeal with costs and return the case to the trial Court to decide the wife's application on merits. The parties have been directed to appear before the trial Court on 27th May, 1960.

B.R.T.

SUPREME COURT.

Before Sudhanshu Kumar Das, J. L. Kapur and M. Hidayatullah, JJ.

M/s. PIYARE LAL-ADISHWAR LAL,—Appellants.

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—
Respondents.

(Civil Appeal No. 123 of 1957)

Income-tax Act (XI of 1922)—Sections 7 and 10—Karta of a Hindu undivided family appointed Treasurer of a bank and furnishing security of the joint family property—Whether a servant of the bank or independent contractor—Emoluments received from the bank—Whether assessable as part of the income of Hindu undivided family or as his separate income.

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The father of S. C. was the Treasurer of the several branches of the Central Bank of India Ltd., and during his father's life-time, S. C. was employed as an overseer in the Bank. After his father's death, S. C. applied for and was appointed Treasurer of the Bank at Delhi and sixteen other branches on his furnishing security to the Bank of certain properties of the Hindu undivided family, of which he was the Karta. An agreement was entered into between the Bank and S. C. giving in detail the mutual duties and obligations of the Parties and the extent and nature of the control to be exercised by the Bank. Two questions arose (i) Whether S. C. was a servant of the Bank or an independent contractor; and (ii) Whether his emoluments as Treasurer were his individual income or the income of the Hindu undivided family of which he was the Karta.

Held, on the consideration of the agreement between the Bank and the Treasurer and its effect as a whole, that the Treasurer was a servant of the Bank and not an independent contractor.

Held, that the emoluments received by S. C. as Treasurer from the Bank were in the nature of salary and,

therefore, assessable under section 7 of the Income-tax Act and not under section 10 as profits and gains of business and the salary was the income of the individual, i.e., S. C., and not the income of the Hindu undivided family of which he was the karta. Treasurership is an employment of responsibility, trust and fidelity and personal integrity and ability and mere ability to furnish a substantial security is not the sole or even the main reason for being appointed to such a responsible post in a Bank like the Central Bank of India. On the other hand his previous experience as an overseer of the Bank and his being appointed on his applying for the post are indicative of personal fitness for it. There is nothing to show that S. C. had received any particular training at the expense of the family funds or his appointment was the result of any outlay or expenditure of or detriment to the family property. The mere fact of giving joint family property in security for the good conduct of a member of the family employed in a post of trust is not sufficient to make the emoluments of the post joint family property because of any detriment to family property or risk of loss.

Appeal from the Judgment and Order, dated the 12th May, 1955, of the Punjab High Court in Civil Reference No. 17 of 1953.

For the Appellants : Mr. A. V. Viswanatha Sastri, Senior Advocate (M/s. S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him).

For the Respondent : Mr. C. K. Daphtary, Solicitor-General of India (M/s. R. Ganapathy Iyer and D. Gupta, Advocates, with him)

JUDGMENT

The following Judgment of the Court was delivered by

Kapur, J.

KAPUR, J.—This is an appeal against the judgment and order of the High Court of Punjab

made on a reference under s. 66(1) of the Indian Income-tax Act which was answered in favour of the Commissioner of Income-tax. The appellant is the assessee—a Hindu undivided family—with Sheel Chandra as its Karta and the respondent is the Commissioner of Income-tax.

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The appeal relates to the assessment year 1951-52. The appellant, a Hindu undivided family, consisted of Sheel Chandra and his younger brother Their father Adhishwar Lal, upto his death on April 16, 1950, was the Treasurer of several branches of the Central Bank of India (which in the judgment will be referred to as the Bank). During his father's lifetime Sheel Chandra was employed as an Overseer in the Bank on a salary of Rs. 400 a month. Sheel Chandra was appointed Treasurer of the Bank at Delhi and sixteen other branches of the Bank. As Treasurer he furnished security to the Bank of certain properties of the Hindu undivided family, which consisted of title deeds of immovable properties in Chandni Chowk, Delhi and Government of India securities of the value of Rs. 75,000. The Hindu undivided family owns considerable property. Its income from house property alone is Rs. 50,000 per annum and it owns stocks, shares and Government securities also of considerable value. As Treasurer Sheel Chandra received in the year of account from the Bank a sum of Rs. 23,286 and the question for decision is whether this sum is the individual income of Sheel Chandra as salary or it is part of the income of the Hindu undivided family. The Income-tax Authorities held this sum to be the latter and taxed it as such. The Income-tax Appellate Tribunal in upholding this view held that on a proper construction of the written agreement between Sheel Chandra and the Bank, the emoluments received by the Treasurer were profits and gains of business and it

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further held that as the security furnished by Sheel Chandra came out of the joint family properties; the emoluments could not be said to have been earned without detriment to the family property and, therefore, were part of the income of the Hindu undivided family. At the instance of the appellant the Tribunal referred under section 66(1) the following two questions to the High Court:—

- (1) "Whether in the facts and circumstances of the case and on a true construction of the agreement between the Central Bank of India and Sheel Chandra the salary and other emoluments received by Sheel Chandra as Treasurer of the said Bank are assessable under the head 'salary' or under the head 'Profits and gains of business'".
- (2) "Whether in the facts and circumstances of the case, Sheel Chandra's emoluments as Treasurer of the Central Bank of India Ltd., were rightly assessed in the hands of the Hindu undivided family of which he is the Karta".

Both questions were answered against the appellant.

On a consideration of the various clauses of the agreement between Sheel Chandra and the Bank, the High Court held that the relationship between them was not one of master and servant but that of an employer and independent contractor and, therefore, the emoluments received by Sheel Chandra as Treasurer were not salary but profits and gains of business. As to the second question the High Court was of the opinion that the emoluments were the income of the Hindu undivided family because Sheel Chandra was not

appointed Treasurer on account of any personal qualification but he was appointed because (a) his father was a Treasurer of the Bank before him and (b) he had furnished substantial security which was part of the property of the Hindu undivided family. Against this judgment and order the appellant has come in appeal to this Court.

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The nature of the employment of Sheel Chandra has to be gathered from the agreement dated September 19, 1950, between him and the Bank. It shows that on his application for appointment as a Treasurer at Delhi and sixteen other branches of the Bank, the Bank appointed him Treasurer for those branches and he could, by mutual agreement, be appointed at other branches in the Punjab, U.P. and Rajasthan. The appointment took effect from April 16, 1950. Sheel Chandra undertook to perform the duties and be responsible as Treasurer of the various branches of the Bank and was required to engage and employ subordinate staff called the Cash Department Staff such as Head Cashiers, Cashiers, Potdars, Guaranteed Peons, Godown Keepers, Assistant Godown Keepers, Chowkidars and Clerks and other persons necessary for the efficient working of the said offices. He had the power to "control, dismiss and change" this Staff at his pleasure, but he could not engage or transfer any member of the Staff except with the approval of the Bank and had to dismiss any such member if so required by the Managing Director of the Bank or Agent of the Office.

The Treasurer and the Cash Department Staff were to do and be responsible for all work in connection with receipts and payments of monies and had to do such other work as was customarily done by cashiers and shroffs of Banks. The Treasurer was also responsible for the correctness and genuineness of all hundies and cheques bearing signatures and endorsements in vernacular and

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for genuineness of all signatures and writings in any language or character or any securities, voucher deeds, documents and writings which the Treasurer or the Cash Department Staff dealt with and in case of any loss or damage arising out of any forged signatures and endorsements on any document accepted or dealt with by the Cash Department Staff as correct and genuine, the Treasurer was responsible to make good the loss. He was also required, when asked by the Bank, to engage the necessary staff, to look after the goods pledged with the Bank and he was responsible for the good conduct of such staff. It was also his duty to make enquiries and report upon the identity, credit and solvency of persons dealing with the Bank and was liable for any loss arising out of any wilful mis-representation or negligence in the enquiry or report made by him or his representative in any matter arising in the course of employment. He or his representative were also required, when asked, to give reliable information in regard to hundi business but he was not responsible for any damage or loss arising therefrom. He also undertook when required by the Officers of the Bank to value and give correct certificate in regard to the genuineness, fineness and weight of bullion and gold ornaments and other valuables pledged with the Bank. He was responsible for any loss to the Bank in case of any wilful mis-representation or negligence in regard to this branch of his duty. He further undertook to supply to the Bank as many persons as were required at the various branches of the Bank which the Bank opened in future. He undertook responsibility for the safe sustody of the monies and ornaments and other valuables kept with or pledged with the Bank as also for the bills of exchange, promissory notes, hundies or other securities. Besides this he was required to satisfy the

Agent or the Manager of the branch that all the monies of the Bank and other valuable securities, which had not been duly used and accounted for were intact and in their proper places.

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Sheel Chandra was paid a salary of Rs. 1,750 per mensem for all the branches he was employed in. Besides this he was paid certain sums of money for guaranteeing the conduct of Godown Keepers, Assistant Godown Keepers and Chowkidars supplied by him. If the branches or out-agencies were increased he was to receive such increase in salary as might mutually be agreed upon. On the closing of any branch there was to be a corresponding reduction in the remuneration. The members of the Cash Department Staff were to be paid travelling allowance according to the rules of the Bank. In addition to the remuneration above-mentioned the Treasurer or his authorised representative when visiting different branches were to get actual railway fare. The various members of the Cash Department Staff were to be paid their salary directly by the Bank but the Bank was not bound to pay more than the scale laid down by it. The permanent members of the Cash Department Staff were to get the usual increments and benefit of Provident Fund and travelling allowance in accordance with the rules of the Bank. The Treasurer was required to engage members of the Cash Staff on salaries laid down by the Bank and if he paid anything more than the usual Bank scale he had to pay it himself. The Treasurer was also entitled to nominate and appoint a representative to carry on the duties undertaken by him at the various offices of the Bank, but these appointments were subject to the approval of the Bank.

The Treasurer was responsible for the acts of omission and commission and for neglect and

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default of his representatives and for each and every member of the Cash Department Staff. There are various clauses in the agreement requiring the Treasurer or his representative to perform their duties efficiently, honestly and in a proper manner. The Treasurer and the Cash Department Staff were under the control of the Bank. They were required to make entries in the books of account which were furnished by the Bank giving full particulars of all monies received and paid by them and in such manner as the Agent of the Bank might from time to time direct in writing. The Treasurer had to carry out his duties faithfully and any communication made by the Bank to any member of the Cash Department Staff was to be considered as a communication made to the Treasurer himself and he was bound to take notice of it. The agreement could be terminated by three calendar months' notice in writing by either side, but in the event of any breach of any condition of the agreement by the Treasurer his services could be terminated forthwith; but his liability was to continue. There was also an arbitration clause.

Counsel for the appellant contended that the various provisions of the agreement showed that Sheel Chandra was a servant of the Bank and not an independent contractor. He laid particular emphasis on the fact that he was appointed a Treasurer on a monthly salary and his services could be terminated forthwith in certain circumstances. Besides this he was to carry out his duties as directed by the Bank and was to discharge his duties faithfully and if in the discharge of his duties he caused any loss to the Bank he was liable to make good the loss. These factors, according to him, showed that he was not an independent contractor or an agent of the Bank, but was a

3 salaried servant. The contention on behalf of the respondent on the other hand was that the agreement showed that Sheel Chandra was carrying on a business in that he was supplying cashiers and other members of the Cash Department Staff for a monetary consideration. He guaranteed their fidelity which was an insurance undertaken by him. He was to get certain sums of money for supplying each member of certain classes of servants to the Bank and the agreement between the Bank and Sheel Chandra could be terminated by notice and there was an arbitration clause and he was not required to serve personally.

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Undoubtedly there are some terms in the agreement which are unusual as ordinary agreements of service go but in the case of an agreement between a Bank and a Treasurer they are not so unusual. There was an agreement with very similar clauses in *Shivanandan Sharma v. The Punjab National Bank Ltd.* (1) and it was held to be an agreement of service and not of agency.

Now, the duties of Sheel Chandra under the agreement are such as are peculiar to the employment of Treasurers. It is true that as Treasurer, Sheel Chandra had also undertaken to indemnify the Bank not only for his own default, but also for the default of the members of the Cash Department Staff. But Banks have to deal with monies, valuable securities, gold and other valuables and must necessarily employ servants whose honesty is guaranteed and it is necessary for the Bank to have some one in its employment who can perform these duties in a responsible manner and be answerable to the Bank for negligence and default in the performance of this class of work. In the very nature of things one man cannot do all this work,

(1) [1955] 1 S. C. R. 1427.

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not even at one branch, what to say of several branches; other people have therefore to be employed and although the persons employed in the Cash Department are servants of the Bank they do the work which Treasurers ordinarily and customarily do and consequently the Treasurer is made responsible for any damage which the Bank suffers due to the default of the Treasurer or of those employed to do the work of the Cash Department.

It is difficult to lay down any one test to distinguish the relationship of master and servant from that of an employer and independent contractor. In many cases the test laid down is that in the case of master and servant the master can order or require what is to be done and how it is to be done but in the case of an independent contractor an employer can only say what is to be done but not how it shall be done. But this test also does not apply to all cases, e.g., in the case of Ship's master, a chauffeur or a reporter of a newspaper. It was pointed out in *Cassidy v. Ministry of Health* (1) that in the case of contract of service "a man is employed as part of the business, and his work is done as an integral part of the business whereas under a contract for services the contractor is not integrated into the business but is only accessory to it". In certain cases it has been laid down that the indicia of a contract of service are (a) the master's power of selection of the servant; (b) the payment of wages or other remunerations; (c) the master's right to control the method of doing the work and (d) the master's right of suspension or dismissal; *Short v. J. and Henderson Ltd.* (2). *Bhagwati, J., in Dharangadhra Chemical Works Ltd. v. State of Saurashtra* (3) said that in all cases the correct method of approach

(1) (1951) 2 K. B. 343, 352-3.
(2) 62 T. L. R. 427, 429.
(3) (1957) S. C. R. 152, 160.

is whether having regard to the nature of work there was due control and supervision by the employer.

We have given above the duties of the Treasurer in the present case, his obligations and the manner of control exercised over him and the staff employed by him to carry out the work of the Cash Department of the Bank. It is no doubt true that the Treasurer guaranteed his fidelity, good faith and honesty of the persons who were employed in the Cash Department of the Bank but that was a part of the duty that he undertook and that is peculiar to the very nature of his employment. Applying the test which was laid down by Bhagwati, J., in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra* (1) that having regard to the nature of the work whether there was due control and supervision of the Bank over the Treasurer, the Treasurer in the instant case must be held to be a servant of the Bank. What we have to see is the effect of the agreement as a whole and taking the various clauses together it must be held that Sheel Chandra, the Treasurer, was a servant of the Bank. In view of this it is not necessary to discuss in detail the various cases that were cited at the Bar. *K. P. Bhargava v. The Commissioner of Income Tax, U.P.* (2) was the case of a Treasurer of the Central Bank of India at Agra. There he was paid a salary of Rs. 100 and a commission for his work as a Guarantee Commission Agent but the terms of the contract were different and that was clearly a case of a Guarantee Commission Agency.

Lala Jeewan Lal v. Commissioner of Income-Tax (3) was also a case of commission agency and in the peculiar circumstances of that case it was held to be business within s. 2(5) of the Excess

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(1) [1957] S. C. R. 152, 160.

(2) 26 I. T. R. 489.

(3) 24 I. T. R. 217.

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Profits Tax Act. The assessee there was paid a commission of 4 annas per cent. on the value of the contracts secured by him. Subsequently the commission was increased to Re. 1 per cent. and for this extra commission he agreed to reimburse the mill in case of failure of a person purchasing through him to pay the price. Counsel for the respondent also relied on *Commissioner of Income Tax, West Bengal v. Kalu Babu Lal Chand* (1) where the Managing Director's remuneration was held to be the income of a joint family to be assessed as such in its hands. That case is distinguishable. There the *karta* of a Hindu undivided family took over a business as a going concern and carried on the business till the company was incorporated. The shares in the name of *karta* and his brother were acquired with the funds of the joint family. The company was floated with the funds of the joint family and was financed by it and the remuneration received was credited in the books of the family. The office of the Managing Director itself was assignable. The Articles of Association provided that the *karta* or his assigns or successors in business "whether under his name or any other style or firm" would be the Managing Director of the Company and he was to continue for life until removed because of fraud or dishonesty. Thus the acquisition of business, the floatation of the Company and the appointment of the Managing Director were inseparably linked together. The facts of that case were quite different from that of the present case which are akin to the facts in *Shivnandan Sharma v. Punjab National Bank Ltd.* (2).

The next question for decision is whether the salary of Sheel Chandra as Treasurer of the Bank is assessable as part of the income of Hindu undivided family of which he is the *karta* or as his

(1) 37 I. T. R. 123.

(2) (1955) I. S. R. 1427.

separate income. Both the Appellate Tribunal and the High Court were of the opinion that the emoluments as Treasurer were not acquired without any detriment and risk to the family property and therefore formed part of the income of the Hindu undivided family. Treasurership is an employment of responsibility, trust and fidelity and personal integrity and ability and mere ability to furnish a substantial security is not the sole or even the main reason for being appointed to such a responsible post in a Bank like the Central Bank of India. On the other hand his previous experience as an Overseer of the Bank and his being appointed on his applying for the post are indicative of personal fitness for it.

There is nothing to show that Sheel Chandra had received any particular training at the expense of the family funds or his appointment was the result of any outlay or expenditure of or detriment to the family property. But it was argued on behalf of the respondent that because he had lodged joint family property by way of security his earnings as Treasurer became a part of the income of the Hindu undivided family for the reason that the acquisition was not without risk to the family estate. He relied on *Gokul Chand v. Firm Hukum Chand-Nath Mal* (1) and *Commissioner of Income-tax, West Bengal v. Kalu Babu Lal Chand* (2). In the former case a member of the joint family entered the Civil Service and that was made possible by the expenditure of family funds which enabled him to acquire the necessary qualifications and it was that fact which made his earnings part of the family income. The following passage in that judgment at p. 168 was emphasised:—

“It may be said to be direct in the one case and remote in the other, but if risk of or

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(1) 48 I. A. 162.

(2) 37 I. T. R. 123.

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or detriment to family property is the point in both cases, there appears to be no such merit in "science", recognised by the sages of the Hindu law, as would warrant the exclusion of gains of science as such from the category of partible acquisitions".

Counsel particularly relied on the words 'risk of' and contended that by reason of the family property being given in security, the risk as understood in that judgment had arisen; because it became liable for any loss that might be incurred during the course of employment of Sheel Chandra. The word 'risk' in that judgment must be read in the context in which it was used. Family estate was used and expenditure was incurred for equipping one of its members to join the Indian Civil Service. It was in that connection that the words 'risk of' or 'detriment to' family property were used. The latter case, *Kalu Babu Lal Chand's case* (1), has already been discussed. The facts and circumstances of that case were different.

The cases which the Privy Council relied upon in *Kokul Chand's case* (2) were all cases where joint family funds had been expended to fit a member of the joint family for the particular profession or avocation the income of which was the subject matter of dispute but the respondents were not able to refer to any decision in which it was held that the mere fact of giving joint family property in security for the good conduct of a member of the family employed in a post of trust was sufficient to make the emoluments of the post joint family property because of any detriment to family property or risk of loss. It has not been shown that in this case there was any detriment to the family property within the meaning of the term as used in decided cases.

(1) 37 I. T. R. 123

(2) 48 I. A. 162

In our opinion the judgment of the High Court was erroneous on both questions which were referred to it and they should both have been decided in favour of the appellant.

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The emoluments received by Sheel Chandra were in the nature of salary and therefore assessable under s. 7 of the Income Tax Act and not under s. 10 of the Act as profit and gains of business and the salary was the income of the individual, i.e., Sheel Chandra and not the income of the Hindu undivided family.

We therefore allow this appeal and set aside the judgment and order of the High Court. The appellant will have its costs in this Court as well as in the High Court.

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LETTERS PATENT APPEAL.

Before Bishan Narain and I. D. Dua, JJ.

WADDU MAL GIAN CHAND MASAND—Appellant.

versus

CANTONMENT BOARD, JULLUNDUR,—Respondent

Letter Patent No. 429 of 1958

Code of Civil Procedure (Act V of 1908)—Section 9—Suit for a permanent injunction against the cantonment Board restraining it from recovering the octroi tax on the ground that its demand was unauthorised, contrary to law and ultra vires the provisions of the Cantonments Act—Whether entertainable by a civil court—Cantonments Act (II of 1924)—Sections 84 to 88—Effect of—Specific Relief Act (I of 1877)—Sections 54 and 55—Permanent injunction in such a suit—Whether should be granted.

1960

April 28th