made and the legal authority to proceed with the execution is withdrawn by the order of stay.

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Grover, J.

In view of what has been discussed above, the contention of the decree-holders must fail and consequently this appeal treated as revision will stand dismissed. In the circumstances I make no order as to costs.

K.S.K.

SUPREME COURT.

Before Sudhi Ranjan Das, C. J., T. L. Venkatarama Aiyar, Sudhanshu Kumar Das, A. K. Sarkar, and Vivian Bose, JJ.

NOHIRIA RAM —*Appellant.*

versus

1. THE UNION OF INDIA (IN C.A. No. 116 OF 1957),

2. DIRECTOR GENERAL OF HEALTH SERVICES, GOVERNMENT OF INDIA (IN C.A. No. 117 OF 1957),

3. GOVERNMENT OF INDIA (IN C.A. No. 117 OF 1957)
Respondents.

1957
Nov. 8th

Constitution of India (1950)—Articles 309 and 310—Fundamental Rule 9(4)—Cadre—Meaning of—Appellant appointed in post outside the cadre of the regular establishment—Whether entitled to claim seniority in that office—Fundamental Rules 111 and 113—Appellant holding lien on additional post—Whether liable to be transferred to foreign service—Declaratory decree—Appeal against—Effect of—Appellant, whether entitled to refuse to serve in the previous post.

Held, that Fundamental Rule 9(4) explains what is meant by a cadre; it means in effect the strength of an establishment or service (later amended to include a part of a service) sanctioned as a separate unit.

Held, that the post to which the appellant was appointed permanently in April, 1930, was outside the cadre of the

regular establishment of the Director-General, Indian Medical Service, although under his control for administrative purposes and as the appellant was not a member of the regular establishment of that office, he was not entitled to claim seniority in that office.

Held, that the appellant held a lien on the additional post in which he was confirmed; therefore, his transfer on foreign service was admissible under Fundamental Rule 111. He did not, however, belong to a cadre immediately before his transfer, and Fundamental Rule 113 had no application in his case.

Held, that the appellant could not refuse to do the work given to him simply because he had obtained a decree from a court, the decree being only declaratory and even that decree had been put in jeopardy by the respondent having appealed from it.

Appeals by Special Leave from the Judgment and Order, dated the 30th October, 1953, of the Circuit Bench of the Punjab High Court at Delhi in Civil Regular First Appeal No. 190 of 1951 and Civil Writ No. 82-D of 1952.

For the Appellant: Mr. D. R. Prem, Senior Advocate. (M/s. T. S. Venkataraman and K. R. Chaudhry, Advocates, with him).

For the Respondents: M/s. R. Ganapathy Iyer, Porus A. Mehta and R. H. Dhebar, Advocates.

JUDGMENT

The Judgment of the Court was delivered by:

Das, J. S. K. DAS, J.—These are two appeals by special leave. Pt. Nohiria Ram is the appellant in both appeals. He had also filed a petition (petition No. 397 of 1955) under Article 32 of the Constitution in which he had prayed for the issue of an appropriate writ to the Union of India, respondent 1, and the Director-General of Health Services, New Delhi, respondent 2, directing them to forbear from giving effect to

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an order of dismissal passed by respondent 2 against the petitioner on October 3, 1955. That petition was, however, dismissed as withdrawn. Therefore, the present judgment is confined to the two appeals, and the relevant facts relating thereto are stated below.

Formerly, the appellant held a permanent appointment as a civilian clerk in the office of the Royal Air Force, No. 3 (India) Wing, Quett. On March 17, 1928, he applied for the post of a clerk in the office of the Director-General, Indian Medical Service, New Delhi (now known as the Director-General, Health Services, New Delhi). The appellant succeeded in his application and on March, 28, 1928, he was told that there was a vacancy in the office of the Director General in the grade of Rs. 75—4—155, it was further stated that the appointment would be for one year in the first instance, though there was likelihood of its being made permanent and if the appellant agreed to accept the post, he was directed to join in the office of the Director General at Simla on April 16, 1928. A request was also made to the authorities of the Royal Air Force to grant the appellant a lien on his permanent post in the Royal Air Force till February 28, 1929, by which date the question of the permanency of the appointment in the Director General's office was to be decided. The appellant joined his new post on April 16, 1928. On February 26, 1930, the Government of India in the Department of Education, Health and Lands, which was the controlling Department so far as the office of the Director-General, Indian Medical Service, was concerned, conveyed sanction to the appointment, with effect from April 1, 1930, of an additional clerk in the office of the Director General in the grade of Rs. 75—4—155 to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the appointment together

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with leave and pensionary contributions thereon was to be recovered from the Association. On April 30, 1930, the Director General, Indian Medical Service, wrote to the Secretary, Public Service Commission, intimating that the appointment of an additional clerk had been sanctioned by the Government of India for work of the Indian Research Fund Association; the Director General then stated that the incumbent of the additional post was the appellant, who formerly held a permanent post in the Royal Air Force, Quetta, and as he was not a candidate who had passed through the Public Service Commission, the Commission was asked to give approval to his permanent appointment in the said post. To this the Secretary, Public Service Commission, gave the following reply :—

> "With reference to your letter No. 219/516, dated the 30th April, 1930, I am directed to say that the Public Service Commission have no objection to the confirmation of the temporary clerk who is at present employed on the work of the Indian Research Fund Association subject to the condition that this will not give him any claim to appointment as a Routine Division clerk in the Secretariat and its attached offices."

This reply of the Public Service Commission was shown to the appellant and he was specifically asked to note the condition that he would have no claim to an appointment as a routine division clerk in the Secretariat or attached offices, the office of the Director General, Indian Medical Service, being an office attached to the Secretariat. On May 26, 1930, the appellant saw the letter of the Public Service Commission and noted—"Seen. Thanks". On June 12, 1930, the appellant was confirmed in

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the additional post with effect from April 1, 1930. On April 10, 1931, the appellant was transferred on foreign service under the Indian Research Fund Association as a second grade assistant in the grade of Rs. 120—8—160—10—350 on condition that the Association would continue to pay the average cost of the post together with leave and pensionary contributions, etc. The appellant continued to serve under the Indian Research Fund Association till September 17, 1944, with some breaks for small periods during which he reverted to the office of the Director General to officiate as assistant, first grade or special grade, on Rs. 200—12—440. On June 10, 1932, the Governor General-in-Council sanctioned the transfer of the appellant to foreign service under the Indian Research Fund Association with effect from April 10, 1931. On August 15, 1944, the appellant made a representation to the Secretary, Indian Research Fund Association, in which he made a request that he should be reverted to his parent office. The reason given was that the appellant was "being treated indifferently and there had been some misapprehensions in the past and there might be similar misapprehensions in the future." On September 11, 1944, the Secretary, Indian Research Fund Association, wrote to the appellant to say that his application for reversion to the office of the Director General was granted and that the appellant should revert to the office of the Director General with effect from September 18, 1944. As the previous consent of the Director General had not been obtained to the reversion, there was naturally some trouble and the Director General asked the appellant to report himself for duty to the Indian Research Fund Association. The appellant then made certain representations in November, 1944, and January, 1945, in which he submitted that the post which he held was a permanent post in the regular

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establishment of the Director General, Indian Medical Service, and that he should be treated on reversion to the parent office, as a senior assistant who was entitled to all increments and promotions available to a permanent member of the regular establishment of the Director General, Indian Medical Service. To these representations, the appellant received the following reply :—

"In reply to a recent communication from the Secretary, I.R.F.A., the Government of India, E. H. & L. Department, affirmed that Mr. Nohiria Ram was governed by the orders contained in their letters No. F. 9-22/39-H, dated the 8th August, 1939, and No. F. 37-13/41-H, dated the 27th November, 1941. These orders clearly state—

(1) that the substantive post of Mr. Nohiria Ram is attached to this office for the work of the I.R.F.A. ;

(2) that it is outside the regular cadre of this office ;

(3) that Mr. Nohiria Ram should not be absorbed in the regular cadre of this office on the occurrence of a vacancy in that cadre ; and

(4) that the post should continue to be retained outside this cadre until Mr. Nohiria Ram retires.

Mr. Nohiria Ram was confirmed in the above post only after he had accepted in writing the condition that he would have no claim to a post on the regular establishment of this office. This condition was imposed as he is an "unqualified clerk."

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The appellant was, however, dissatisfied with this order and continued to make further representations, and ultimately on December 17, 1945, he expressed his inability to work in the office of the Indian Research Fund Association, which he characterised as a "private body". It appears that the appellant was then suspended with effect from December 14, 1945, the date on which he was to have joined his duty in the post of a clerk attached to the office of the Director General, Indian Medical Service, for work of the Indian Research Fund Association. A charge-sheet was served on the appellant on January 10, 1946, to the effect that on the expiry of his leave for ten days, he had refused to return to duty to his substantive post of clerk attached to the office of the Director General, Indian Medical Service, for work of the Indian Research Fund Association. The appellant submitted a written statement and made certain further representations. On September 5, 1946, the orders of suspension etc., were modified, and the following order was passed :

> "Mr. Nohiria Ram is informed that in modification of the existing orders on the subject the Government of India have decided that while continuing to hold the extra cadre post which was originally sanctioned for the work of the I.R.F.A. he will in future be employed on the ordinary work of this office. He will continue to be subject to the existing disqualifications, namely, that he will have no claim to appointment as a routine division clerk in the Secretariat or its attached offices or to inclusion in the regular cadre of the ministerial establishment of this office.

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In accordance with the above decision, Mr. Nohiria Ram is directed to report himself for duty to Captain J. M. Richardson, D.A.D.G. (P), in this office at Simla immediately. He will be posted in the Indian Medical Review Section."

In pursuance of the aforesaid order, the appellant joined at Simla and on March 30 1948, he instituted a suit against the Union of India asking for a declaration that he was in the service of the Union of India as a member of the permanent regular ministerial establishment of the office of the Director General, Indian Medical Service. He also claimed certain other reliefs which were, however, given up. The suit was decreed by the learned Subordinate Judge of Delhi on March 10, 1951. The Union of India filed an appeal, being First Appeal No. 190 of 1951. This appeal was allowed by the Punjab High Court by its judgment dated October 30, 1953. The result was that the appellant's suit was dismissed. The appellant asked the Punjab High Court for a certificate for leave to appeal to this Court. That application was refused. The appellant then moved this Court and obtained special leave, and Civil Appeal No. 116 of 1957 has been filed in pursuance of the special leave granted by this Court and is directed against the judgment and decree of the Punjab High Court dated October 30, 1953, in First Appeal No. 190 of 1951.

Civil Appeal No. 117 of 1957 continues the story of the appellant's alleged grievances after he had obtained his decree from the learned Subordinate Judge of Delhi. We have stated before that against that decree the Union of India filed an appeal on July 24, 1951. During the pendency of that appeal, the appellant moved the Punjab High Court by means of a petition under Article 226 of

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the Constitution for the issue of a writ directing the Director General, Health Services, New Delhi, to disburse immediately the pay and allowances to which the appellant said he was entitled for the month of November, 1952. What happened was this. In October, 1952, the appellant was working in the Public Health Section I, and on October 3, 1952, he proceeded on leave on average pay till October 11, 1952. On his return from leave on October 13, 1952, he submitted a joining report and asked for posting orders. He was asked to work in the Public Health Section I from where he had gone on leave. He refused to do so, and asked for an interview with the Director General. This was refused, and the appellant was told that unless he resumed duty in the Public Health Section I, he would be deemd to have been absent from office without permission. The appellant still continued in the recalcitrant attitude which he had adopted, presumably in the belief that after the decree in his favour he was entitled to all promotions and increments available to a permanent member of the regular establishment. He came to office, but instead of going to the Public Health Section I, he occupied the seat meant for the record sorter in the General Section. In other words, since October 13, 1952, the appellant did no work. He was paid his salary till the end of October, 1952, but payment was withheld for November, 1952. On December 20, 1952, the appellant filed his petition under Article 226. On the same date on which the appeal of the Union of India was allowed, the application under Article 226 was also dismissed by the Punjab High Court on the ground that the appellant was guilty of disobedience and insubordinate conduct and was not entitled to any relief. Against this order the appellant has filed Civil Appeal 117 of 1957, after having obtained special leave from this Court.

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The crucial question for decision in these two appeals is if the appellant held a post in the permanent and regular ministerial establishment of the office of the Director General, Indian Medical Service, New Delhi. The High Court has held that the post in which the appellant was made permanent was no doubt a post attached to the office of the Director General for the purpose of the work of the Indian Research Fund Association, but it was a post outside the regular cadre of the office of the Director General, and this was made clear to the appellant from the very beginning. The High Court found that the appellant knew and had accepted the condition on which he was appointed ; and the grievance he made after a lapse of about 14 years was unsubstantial and fanciful.

Learned counsel for the appellant has contested the correctness of the aforesaid findings. It is not disputed that the appellant did know the condition which the Public Service Commission had imposed in approving of the appointment of the appellant on May 16, 1930, The argument before us is (1) that on a true construction of the relevant rules and Government orders governing the conditions of the appellant's service, the appellant on his confirmation with effect from April 1, 1930, became a permanent member of the regular establishment of the office of the Director General, Indian Medical Service, and (2) that the Public Service Commission had no authority to impose any condition in derogation of those rules and orders.

Let us now examine the rules and orders on which the appellant relies. Fundamental Rule 9(4) explains what is meant by a cadre ; it means in effect the strength of an establishment or service (later amended to include a part of a service) sanctioned as a separate unit. The establishment

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we are concerned with in the present case is the establishment of the office of the Director General, Indian Medical Service. The total sanctioned strength of that establishment was 30. In their letter of February 26, 1930, the Government of India conveyed sanction to the appointment of an *additional clerk* to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the post plus leave and pensionary contributions would be recovered from the Association. The question is if this additional post was a permanent increase of the regular cadre or was a post outside the cadre. In 1934 the Accountant-General, Central Revenues, raised the question and enquired of the Director General, Indian Medical Service, how the pay of 31 persons was shown in his establishment as against the sanctioned strength of 30 only. The Director General, Indian Medical Service, replied that the number 31 included the post of the additional clerk, though the post was *not* included in the sanctioned strength of his office. In 1935 the Director General, Indian Medical Service, wrote to Government and said : "In practice the post has since been considered outside the regular cadre of my office." The Director General, Indian Medical Service, then added :—

> "I consider that F. R. 127 is the only rule under which additions to a regular establishment can be made for the performance of the work of private bodies. As this rule does not seem to contemplate the constitution of two separate establishments in one and the same office I am of opinion that the two posts in question should be regarded as additions to the strength of my office and as such they must remain under my administrative control"

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To this letter the Government of India replied to the effect that though the post was under the administrative control of the Director General, Indian Medical Service, it was a post outside the regular establishment and the incumbents of this post as also of another similar post should be absorbed in the regular establishment when vacancies occurred in future. This order was partially modified in 1939 when it was said: "The Government of India have decided that the post of clerk attached to your office for the work of the Indian Research Fund Association, which is outside the regular cadre of your office, should not be absorbed in that cadre on the occurrence of a vacancy. It should continue to be retained outside the cadre as at present until Mr. Nohiria Ram remains on deputation to a post under the Indian Research Fund Association and the Association should continue to pay the leave and pension contributions to Government on account of the latter post. In the event of Mr. Nohiria Ram's reversion to his substantive post the Association will, as originally stipulated in this Department letter No. 467-H, dated 26th February, 1930, be required to pay the average cost of the post plus leave and pension contributions. The post will be abolished on retirement of Mr. Nohiria Ram from service."

It is quite clear from the aforesaid orders that the post to which the appellant was appointed permanently in 1930, was a post outside the cadre of the regular establishment of the Director General, Indian Medical Service. Indeed, on April 2, 1935, the Home Department (as it was then called) ruled on a reference made to it that "the strength of the ministerial staff of the Director General, Indian Medical Service, was exclusive of the two posts the cost of which was recovered from the Indian Research Fund Association."

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The sheet anchor of the case of the appellant as presented by his learned counsel is Fundamental Rule 127 in Section III, Chapter XII, read with rules 24 and 44 of the Civil Services (Classification, Control and Appeal) Rules, 1930. The case so presented is this : it is argued that under the Classification, Control and Appeal Rules the Governor-General-in-Council was alone competent to constitute a cadre by declaring the sanctioned strength of the establishment of the Director General, Indian Medical Service, and Fundamental Rule 127 lays down how the recovery of the cost is to be made when an addition is made to a regular establishment for the benefit of private persons or bodies, and the argument proceeds to state that as the post in which the appellant was permanently appointed in 1930 was not constituted into a separate cadre, that post must be held to be an addition to the regular establishment of the Director General, Indian Medical Service, and, therefore, an integral part of the same cadre. We are unable to accept this argument as correct. It is true that the additional post in which the appellant was made permanent was not constituted into a separate cadre ; the obvious reason was that it was an additional post *outside the regular cadre*. None of the rules to which learned counsel has drawn our attention prevents the appropriate authority from creating an additional post outside the regular cadre of a particular office, to which the post may be attached for purposes of administrative control. F. R. 127 on which learned counsel has placed so much reliance is in these terms :

> F. R. 127. "When an addition is made to a regular establishment on the condition that its cost, or a definite portion of its cost, shall be recovered from the persons for whose benefit the additional

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establishment is created recoveries shall be made under the following rules :—

(a) The amount to be recovered shall be the gross sanctioned cost of the service, or of the portion of the service, as the case may be and shall not vary with the actual expenditure of any month.

(b) The cost of the service shall include contributions at such rates as may be laid down under Rule 116 and the contributions shall be calculated on the sanctioned rates of pay of the members of the establishment.

(c) A local Government may reduce the amount of recoveries or may entirely forego them."

The Rule corresponds to Article 783 in Chapter XLI of the Civil Service Regulations, and lays down the principles in accordance with which the cost, or a definite portion of the cost, of the additional post shall be recovered. It does not decide the question if the post is part of the cadre or not; that depends on the decision of the appropriate authority, and we know that in the present case the appropriate authority had decided from the very beginning that the additional post which the appellant held was outside the regular establishment of the Director General, Indian Medical Service.

It has been next argued that under the relevant Rules members of the regular establishment alone could be sent on foreign service and as admittedly Government sanctioned the transfer of the appellant to foreign service with effect from

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April 10, 1931, the appellant must be held to be a member of the regular establishment of the Director General, Indian Medical Service. In our opinion, this argument is also equally fallacious. The Rules relating to 'Foreign Service' are to be found in Section III, Chapter XII and the particular Rules to which our attention has been drawn are Fundamental Rules 111 and 113. In so far as it is relevant for our purpose, Fundamental Rule 111 says that a transfer to foreign service is not admissible unless the Government servant transferred holds a lien on a permanent post ; Fundamental Rule 113 says that a Government servant transferred to foreign service shall remain in the cadre or cadres in which he was included in a substantive or officiating capacity immediately before his transfer and may be given such substantive or officiating promotion in those cadres as the authority competent to order promotion may decide. In the present case, the appellant held a lien on the additional post in which he was confirmed ; therefore, his transfer on foreign service was admissible under Fundamental Rule 111. He did not, however, belong to a cadre immediately before his transfer, and Fundamental Rule 113 had no application in his case.

Lastly, it has been argued that the Public Service Commission had no authority to impose a condition that the appellant would not have any claim to appointment as a Routine Division Clerk in the Secretariat or its attached Offices. In one of his representations the appellant said that he signed the note which drew his attention to the condition on "the understanding that it had no value whatsoever, being contrary to the rules and Government orders". The contention of the appellant is that the Public Service Commission which was constituted in 1926 and functioned under the rules published in the Home

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Department notification No. F. 178/14/24 Ests., dated October 14, 1928, dealt with the recruitment of class I and class II officers of the Civil Services in India, and the rules then in force did not provide for the discharge of any function by the Public Service Commission in respect of the recruitment to and control of the subordinate service to which the appellant belonged. This contention was accepted by the learned Subordinate Judge. The High Court, on appeal, held that the appointment of the appellant was governed by the instructions laid down in an office memorandum of the Government of India in the Home Department dated December 8, 1928, paragraph VIII whereof stated—

> "Special cases.—To meet cases where a candidate, though not possessing the prescribed educational qualification, has acquitted himself satisfactorily in examinations of a higher or equivalent standard, or has acquired great experience of Government service outside the ministerial staff or possesses special qualifications for a particular class of work, the Public Service Commission are empowered (a) to admit to the examination persons possessing educational qualifications other than those prescribed, and (b) to exempt from the examination or to admit to a particular Division persons who by reason of their previous record can in their opinion properly be exempted or admitted as the case may be. In the case of persons already in Government service such action will be taken only on the recommendation of the Department concerned. In view of the discretion vested in the Commission by this provision, it will no longer be

open to Departments to recruit independently for their offices or subordinate offices men with special or technical qualifications. Before making any such appointment they will be required to secure the Public Service Commission's concurrence."

The case of the appellant, who had not passed the qualifying examination held previously by the Staff Selection Board whose place the Public Service Commission took in 1926, was presumably referred to the Public Service Commission under the aforesaid paragraph. Learned counsel for the appellant has contended that even the instructions contained therein do not justify the imposition of a condition by the Public Service Commission, and the only powers the Public Service Commission could exercise were those mentioned in (a) and (b) thereof.

We think that it is unnecessary to examine the validity of these contentions on the present occasion. Assuming but without deciding that it was not necessary to refer the case of the appellant to the Public Service Commission or that the Public Service Commission could not impose any condition on the appointment of the appellant, the fact still remains that the appropriate authority which sanctioned the additional post made it quite clear that the post was outside the regular cadre and the Director General, Indian Medical Service, said that the post had been treated in practice as being outside the regular establishment, though attached to his office for purposes of administrative control. That being the position, it matters little what powers the Public Service Commission had with regard to the case of the appellant referred to it.

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We must make it clear, however, that we do not express dissent—it being unnecessary for us to do so—from the view expressed by the High Court that in giving concurrence to the appointment of the appellant, it was open to the Public Service Commission to give a conditional concurrence.

This brings us to a close of the case of the appellant in Civil Appeal 116. Only a few words are necessary to dispose of Civil Appeal 117. That appeal requires no serious exegesis of any recondite service rule or obscure departmental order. In view of the finding that the appellant was not a member of the regular establishment of the Director General, Indian Medical Service, he was not entitled to claim seniority in that office. It is true that the appellant obtained a decree from the learned Subordinate Judge ; it was, however, a declaratory decree only, as the appellant did not press for the other reliefs as to increment, promotion, etc. Even the declaratory decree was put in jeopardy when respondent No. 1 appealed from it. In these circumstances, how could the appellant refuse to do the work given to him ? We have referred to the circumstances in which the appellant refused to do work in the Public Health Section to which he was allotted ; he did not work from October 13, 1952, and got no pay from November, 1952. The appellant has to thank himself for the predicament in which he is placed. All that we can say is that if he had shown patience, good sense and moderation, he could have avoided a great part of the trouble he brought on himself.

In the result, both appeals fail and are dismissed with costs ; as the appeals were heard together there will be one hearing fee to be shared by the respondents in the two appeals.

B.R.T.

SUPREME COURT.

Before Bhuvaneshwar Prasad Sinha and J. L. Kapur, JJ.

THE AGGARWAL CHAMBER OF COMMERCE, LTD.—*Appellants.*

versus

M/s. GANPAT RAI HIRA LAL —*Respondents.*

Civil Appeal No. 79 of 1954.

1957

Nov., 11th

Income-tax Act (XI of 1922)—Sections 18, 40 and 42—Agent for a non-resident—Whether entitled to deduct income-tax payable on profits earned by the non-resident—Non-resident, whether entitled to object to such deduction on the ground that his total income was not assessable—Section 17—Scope of—Indian Contract Act (IX of 1872)—Section 194—Agent appointing sub-agent—Principal accepting transactions and receiving profits—Relation between the principal and the sub-agent—Nature of—Indian Companies Act (VII of 1913)—Section 186—Liability of a non-resident contributory to tax paid by his agent in British India—Whether depends on his total world income being assessable.

Held, that an agent in India doing business on behalf of his non-resident principal is entitled to deduct the income-tax payable on the profits earned and the non-resident principal cannot be allowed to challange the amount on the ground that his total world income was not taxable and he was entitled to his profit without deductions. That is a question which has to be agitated by the non-resident assessee at the time of his assessment. Those persons who are bound under the Act to make deduction at the time of payment of any income, profits or gains are not concerned with the ultimate result of the assessment. The scheme of the Act is that deductions are required to be made out of "salaries", "interest on securities" and other heads of "income, profits and gains" and adjustments are made finally at the time of assessment. Whether in the ultimate result the amount of tax deducted or any lesser or bigger amount would be payable as income-tax in accordance with the law in force would not affect the rights, liabilities and powers of a person under section 18 or of the agent under sections 40(2) and 42(1).

Held, that section 17 of the Income-tax Act, does not deal with or affect the rights and liabilities of persons required under the Act to make deductions of income-tax from sums payable to non-residents or the consequences of failure to make such deductions.

Held, that where a sub-agent was employed by the agent for the business of the principal who accepted the transactions entered into as also the amount of the profits accruing on those transactions, the sub-agent becomes an agent of the principal for that part of the business of the agency as was entrusted to him and "privity of contract arises between the principal and the substitute."

Held, that before fixing the liability of a contributory to tax paid by an agent in British India for and on behalf of the non-resident contributory, it is not necessary to establish his liability to pay tax on his total world income.

Case-law discussed.

Appeal from the Judgment and Order, dated the 10th March, 1953, of the former PEPSU High Court in Letters Patent Appeal No. 493 of Samvat 2005, arising out of the Judgment and Order, dated the 18th January, 1949, of the said High Court in E.As. Nos. 78—96 of Samvat 2001.

For the Appellants: Mr. Naunit Lal, Advocate.
For the Respondents: Mr. Mohan Behari Lal, Advocate.

JUDGMENT

The Judgment of the Court was delivered by

Kapur, J

KAPUR, J.—This is an appeal brought pursuant to a certificate under Article 133(1)(c) of the Constitution from the judgment and order of the Division Bench of the erstwhile Pepsu High Court pronounced on March 10, 1953, modifying in appeal the order of the Liquidation Judge.

The facts are fully recited in the judgments of the courts below and comparatively a brief recital will be sufficient for the purpose of this judgment. The appellant company was incorporated

in 1934 under the Companies Act of the erstwhile Patiala State. It carried on the business of commission agency for dealing in forward transactions in various kinds of grain and other commodities. The respondent—firm Ganpat Rai Hira Lal of Narnaul—besides being a share-holder of the appellant company had dealings with it and entered into several forward transactions of sale and purchase of grain and other commodities. The appellant, acting as a commission agent of the respondent and its other constituents entered into several transactions of forward delivery at Hapur with Firm Pyarelal Musaddi Lal, who were carrying on commission agency business at Hapur (and will hereinafter be termed the Hapur firm). The total profits of the transactions entered into by the appellant with the Hapur firm was Rs. 48,250 on which the Hapur firm paid Rs. 14,730-8-0 as income-tax. The profits accruing on the transactions entered into on behalf of the respondent amounted to Rs. 29,275-2-6 on which the proportionate income-tax claimed to have been paid was Rs. 9,314-13-4. On May 20, 1943, the appellant was ordered to be wound up and Udmi Ram Aggarwal, a pleader of the old Patiala High Court was appointed its liquidator. The list of contributories was settled on October 21, 1943, and the respondent was placed on that list. Though this matter was challenged in the appeal before the High Court it is no longer in controversy between the parties.

The Official Liquidator on March 18, 1944, applied under section 186 of the Patiala Companies Act, for a payment order for Rs. 12,204-12-3 against the respondent and in support of his claim he filed, with this application, copies of the respondent's account in the books of the appellant showing how the amount claimed was due from the

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respondent. This amount included the sum of Rs. 9,476-13-0, on account of income-tax paid by the Hapur firm for and on behalf of the respondent on the profits of the forward transactions at Hapur and the commission of the Hapur firm The respondent raised several objections and pleaded *inter alia* that the Hapur firm with whom the appellant had entered into forward transactions had no right to demand any income-tax from the appellant as no profit had accrued to the appellant which was acting as a commission agent and "was only entitled to the commission". It was also pleaded that as on the total number of transactions entered into between the respondent and the appellant there was a loss, the respondent was not liable to pay any income-tax and that the respondent had no taxable income in the year under dispute or in any other year. On May 23, 1944, the respondent filed an application in which it was submitted that the Hapur firm, who were agents of the appellant at Hapur, had retained Rs. 14,730-8-0, "which was in trust with them under section 42 of the Income-tax Act" and prayed that the Official Liquidator be directed to apply to the Income-tax authorities for a refund of the amount retained and paid by the Hapur firm, as no tax was really due on the transactions entered into by the appellant with the Hapur firm and none was payable by the respondent.

After evidence was led by both parties the payment order was made by the learned Liquidation Judge on January 18, 1949, for a sum of Rs. 8,191-0-9 which included a sum of Rs. 6,867-9-6 the proportionate amount of income-tax due on the profits accruing on the respondent's transactions. Against this order the respondent took an appeal to the Division Bench and canvassed two points : (1) that the respondent could not be settled

on the list of contributories and (2) that it was not liable for the amount retained for payment of income-tax from out of profits on the transactions entered into on its behalf by the appellant with the Hapur firm and subsequently paid by the latter. The court negatived the former contention and held that the respondent had rightly been settled on the list of contributories and upheld the latter contention and held, following a judgment of the Judicial Committee of the Ijlas-khas of Patiala in *Panna Lal Mohar Singh* v. *Aggarwal Chamber* (1), that the Official Liquidator of the appellant was not entitled to claim the amount of income-tax paid by the Hapur firm. The Judicial Committee Ijlas-khas had held :

> "Before the liability of the contributory can be fixed it must be shown that his income was such on which income was assessable.....It is not denied that the contributory was carrying on other transactions in India as it stood before partition through other persons. It was, therefore, his entire income that was to be taken into consideration to assess his liability to income-tax."

The appellant then applied for a certificate to appeal under Article 133 (1)(c) which was granted in the following terms :—

> "The first question is whether a decision given by one Judge of the Judicial Committee can be regarded in law as a decision of the Committee. The second is whether the principle laid down by the learned Judge of the Judicial Committee that the Aggarwal Chamber of Commerce was not entitled to recover

(1) C.A. 60 of 2005 S.

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from its clients the proportionate share of the income-tax paid by it unless it was shown that the total amount of income of the clients was assessable to income-tax, was sound.

Accordingly we allow the petition and grant the certificate."

The first point has not been canvassed before us and in the view that we have taken it would be unnecessary to go into that matter. The sole point for decision is whether the respondent is liable for income-tax, which has been paid by the Hapur firm on the transactions, which were entered into by the appellant with the Hapur firm for and on behalf of the respondent ? There is no finding by the High Court that the respondent had entered into any forward transactions in British India or at Hapur with any firm other than the Hapur firm and this matter was not agitated before us, nor is there any finding as to the total world income of the respondent and there is no material on the record from which it could be determined.

The appellant is a non-resident company and the respondent is a non-resident, residing at Narnaul in what was the Indian State of Patiala. The appellant entered into forward transactions on behalf of the respondent at Hapur in which there was a considerable amount of profit. The High Court has found that the Hapur firm paid Rs. 6,867-9-0 on account of income-tax which was payable on the profits made on the transactions entered into with the Hapur firm for and on behalf of the respondent. The respondent challenged its liability to pay income-tax on the ground that it was liable :

"only on his total earnings during the year under assessment and since, as is clear

even from the books of the respondent, he had suffered heavy losses in his business at Narnaul, his total income was not assessable to any income-tax."

The learned Liquidation Judge held the respondent liable for the amount of the income-tax by applying section 69 of the Contract Act. The Division Bench on appeal disallowed this item on the ground that it had not been shown that the "total earnings" of the respondent were taxable under the Act. Neither of the courts below have discussed the relevant provisions of the Act, not even section 42 which was mentioned by the respondent in his application of May 23, 1944, nor have they given a finding as to the jural relationship of the Hapur firm with the respondent. The agency of the Hapur firm was not seriously disputed before us nor repudiated. The case seems to have proceeded on the basis of this agency in the courts below. The Hapur firm was employed by the appellant for forward transaction business of the respondent who has accepted the transactions entered into as also the amount of the profit accruing on those transactions and is only disputing the amount of income-tax deducted, retained and paid on those profits. Under the law the Hapur firm would be an agent of the respondent for that part of the business of the agency as was entrusted to it and "privity of contract arises between the principal and the substitute". Section 194 of the Contract Act ; *De Bussche* v. *Alt* (1).

It is now necessary to refer to the relevant provisions of the Income-tax Act in force in the assessment year 1942-43 (hereinafter termed the Act). It is not clear as to what was the signification of the words "total earnings" used by the High

(1) (1878) 8 Ch. D. 286, 311

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Court because it is not used in the Income-Tax Act which uses two expressions ; "total income" and "total world income" in subsection 15 of section 2 of the Act. The definition of "total income" comprises two things (i) the total amount of income, profits and gains referred to in section 4(1), and (ii) computation in the manner laid down in the Income-Tax Act. "Total world income" includes all income, profits and gains wherever accruing or arising except income to which under the provisions of section 4(3) the Act does not apply.

Thus in the case of the respondent who is a "non-resident" "total income" would comprise income, profits and gains received or accrued in British-India or deemed to be received or to accrue in British-India. Section 17 of the Act which was relied upon by the respondent's counsel occurs in Chapter III dealing with "Taxable income". It provides for the determination of tax payable in certain special cases of which the case of a non-resident is one. It provided :

> "Where a person is not resident in British India and is a British subject as defined in section 27 of the British Nationality and Status Aliens Act, 1914 (4 and 5 Geo. V. Ch. 17) or a subject of a State in India or Burma, or a native of a Tribal Area, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income....."

Section 17 does not deal with or affect the rights and liabilities of persons required under the Act

to make deductions of income-tax from sums payable to non-residents or the consequences of failure to make such deductions.

The very next Chapter (Chapter IV) deals with deductions which the Act requires to be made in regard to different heads of income. Section 18 provides for deduction at the source. Subsection 3A of this section was as under :—

> S. 18(3A) "Any person responsible for paying to a person not resident in British India any interest not being "interest on securities", or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income tax at the maximum rate."

The proviso to this subsection made provision for payment of moneys without deduction if there was a certificate of the Income-Tax Officer to that effect. Under section 18(7) of the Act a person making the deduction was required to pay the amounts so deducted to the Income-tax authorities. In default of such deduction such person became an assessee in respect of the tax.

Chapter V of the Act deals with "Liability in Special Cases" which includes agents. Section 40(2) dealing with the case of trustees or agents of a person non-resident in British-India provided:

> S. 40(2) "Where the trustee or agent of any person not resident in British-India and not being a minor, lunatic or idiot (such person being hereinafter in this subsection referred to as a beneficiary) is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of

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such beneficiary of, any income, profits or gains chargeable under this Act, the tax, if not levied on the beneficiary direct, may be levied upon and recovered from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly."

Thus under this section which is essentially a machinery and an enabling section the tax to be realised from a non-resident could be levied upon the agent in the same manner as it could have been leviable upon and recoverable from a non-resident. Section 42(1) of the Act provided :

"All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemd to be, for all the purposes of this Act, the assessee in respect of such income."

In proviso 2 to this subsection any such agent who apprehended that he might be taxed as such agent

could retain out of any money payable to such non-resident a sum equal to the estimated liability under the subsection and in the event of any disagreement between the non-resident and such agent a certificate could be obtained from the Income-tax Officer as to the amount to be retained which shows that the Act had a provision for the determination of the question. As was observed by Viscount Cave in *Williams* v. *Singer* (1):—

> "The fact is that, if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found."

See also *Archer Shee* v. *Baker* (2), *Executors of Estate of Dubash* v. *Commissioner of Income-tax* (3).

This has rightly been stated to be the underlying principle of the deductions under sections 40, 41 and 42. Section 48 of the Act deals with Refunds and if the respondent thought that it was not liable to the payment of any tax it could apply to the Income-tax Officer for refund.

Thus the Hapur firm being an agent could be held liable under sections 40(2) and 42(1) of the Act as an assessee for income-tax on the profits made on the respondent's transactions at Hapur

(1) (1920) 7 T.C. 387, 411 (H.L.)
(2) (1927) 11 T.C. 749, 770 (H.L.)
(3) (1951) 19 I.T.R. 182, 189 (S.C.)

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and was, therefore, entitled under the proviso to section 42(1) to retain the estimated amount of income-tax payable on the amount of the respondent's profits which in this case was deducted, retained and actually paid. This fact has not been challenged before us. The ground on which this liability is attacked is that the total world income of the respondent was not taxable and, therefore, on the profits made on the Hapur transactions, the British Indian Tax authorities could not levy any tax. This contention disregards the provisions of and liability arising under sections 40(2) and 42(1) and the proviso thereto. It also is contrary to the principle of taxing statutes that the profits are "taxed where they are found." In this case they were in the hands of the Hapur firm which was in receipt and control of the income. The agent at Hapur, having lawfully and properly paid the tax under the Act that amount has been rightly deducted from the profits accruing on the Hapur transactions.

The judgment of the Judicial Committee of the Ijlas-i-khas on which the High Court has based its decision suffers from the infirmity that it ignores both the provisions of and principle underlying sections 40(2) and 42(1) of the Act and the proviso thereto relating to the liability of an agent under the Act and the law of Agency relating to employing of sub-agents by agents. If the Hapur firm rightly paid the tax on the profits, the respondent cannot be allowed to challenge the amount on the ground that his total world income was not taxable and he was entitled to his profits without deductions. That is a question which has to be agitated by the non-resident assessee at the time of his assessment. Those persons who are bound under the Act to make deduction at the time of payment of any income, profits or gains are not

concerned with the ultimate result of the assessment. The scheme of the Act is that deductions are required to be made out of "salaries", "interest on securities" and other heads of "income, profits and gains" and adjustments are made finally at the time of assessment. Whether in the ultimate result the amount of tax deducted or any lesser or bigger amount would be payable as income-tax in accordance with the law in force would not affect the rights, liabilities and powers of a person under section 18 or of the agent under sections 40(2) and 42(1). As to what would be the effect and result of the application of section 17 if and when any appropriate proceedings are taken is not a matter which arises in this appeal between the appellant and the respondent nor can that matter be adjudicated upon in these proceedings. That is a matter which would be entirely between the respondent and the Income-tax authorities seized of the assessment.

Our attention was drawn to two cases (1) *Commissioner of Income-tax* v. *Currimbhoy Ebrahim and Sons* (1). In that case the assessee company had been treated as an agent of the Nizam of Hyderabad who had lent to the assessee company a sum of Rs. 50 lakhs. The assessee company had paid in the assessment year a sum of Rs. 3 lakhs on account of interest and it was held that the interest earned by the Nizam did not accrue or arise to the Nizam through or from any business connection with the assessee company in British India or from any property within British India and, therefore, section 42 was not applicable. No question of "business connection" was raised in the court below and the argument there proceeded on the basis that the respondent was not liable for this amount on account of

(1) (1935) 3 I.T.R. 395 (P.C.)

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income-tax because the "entire income" was not assessable to income-tax. The argument of isolated transactions based on the *Anglo-French Textile Co., Ltd.* v. *Commissioner of Income-tax, Madras* (1), is not available to the respondent nor was the foundation for any such argument laid in the courts below or raised in the statement of the case filed by the respondent in this court. Another case on which reliance was placed is *Greenwood* v. *F. L. Smidth and Company* (2). That was a case of a Danish firm resident in Copenhagan. It manufactured and dealt with cement-making machinery which it exported to other countries. It had an office in London in charge of a qualified engineer who received enquiries for machinery such as the firm could supply, sent to Denmark particulars of the work which the machinery was required to do and when the machinery was supplied he was available to give English purchaser the benefit of his experience in erecting it. The contracts between the firm and their customers were made in Copenhagan and the goods were shipped F.O.B. Copenhagan. It was held in that case that the firm did not exercise a trade within the United Kingdom within the meaning of Sch. D of section 2 of the Income-Tax Act, 1853, and was, therefore, not assessable to income-tax. This decision is not relevant to the case now before us as the facts were different and the decision was under a different statute.

In our opinion the Judicial Committee of Ijlas-i-khas was in error in holding that before fixing the liability of a contributory to tax paid by an agent in British India for and on behalf of the non-resident contributory, his liability to pay tax on his "entire income" really total world income

(1) (1953) S.C.R. 454
(2) (1922) 1 A.C. 417

had to be established. Therefore, the finding of the High Court that the Liquidator cannot claim from the respondent the amount of tax paid by the Hapur firm on transactions entered into by the appellant for and on behalf of the respondent unless it was shown that his total world income was taxable is unsustainable. As between the parties the tax paid by the agent had to be taken into account irrespective of the ultimate result of the assessment on the non-resident.

In the result this appeal is allowed and the judgment and order of the Division Bench of the Pepsu High Court set aside and the order of the learned Liquidation Judge restored but in the circumstances of this case the parties will bear their own costs in this court and in the courts below.

B.R.T.

CRIMINAL MISCELLANEOUS.

Before Bhandari, C. J. and Khosla, J.

PIARA SINGH —*Petitioner.*

versus

THE STATE AND S. PARTAP SINGH KAIRON, CHIEF MINISTER, PUNJAB,—*Respondents*

Criminal Miscellaneous No. 496 of 1957.

1957

Nov., 11th

Contempt of Court—Application for issue of rule—Affidavits, whether necessary—Affidavits—Contents of—Contempt of Courts Act (XXXII of 1952)—Section 3—"Court", meaning of—Exercise of Judicial power—Determination of—Tests to be applied—Code of Criminal Procedure (V of 1898)—Section 176—Magistrate holding enquiry under, whether a Court—Such enquiry, whether judicial.

Held, that when a contempt is committed in the presence of the Court, it is within the competence of the Court to act on what it sees and hears and on that evidence alone to punish the offender without trial or issue and without other proof than its actual knowledge of what occurred.