

Marianne
Mandl
v.
Stefan Mandl

Falshaw, J.

produced by the petitioner and the respondent has not appeared in this Court to contest the confirmation of the decree *nisi* although he has been personally served with notice of the proceedings.

The only point on which I feel any difficulty at all is the question of domicile of parties who are admittedly Austrians by birth and were in fact married at Vienna in Austria in October, 1936. The petitioner's case is that they were forced to flee from Austria as political refugees in 1939 when the country was seized by the Nazis and since then they had been living in India and resided together last at Delhi where the respondent began misbehaving and turned the petitioner out. Since then she has been living in Bombay and is in employment and she has stated that she has no intention or wish to return to her native country. The respondent also appears to have settled in India since at present he is employed at Sindri (Bihar) by the Coke Ovan Construction Company and service has been effected on him there. In the circumstances, I would accept the finding of the lower Court that the parties are domiciled in India and confirm the decree *nisi* for the dissolution of the petitioner's marriage with the respondent with costs.

DULAT, J. I agree.

BISHAN NARAIN, J. I agree.

Dulat, J.
Bishan
Narain, J.

CIVIL REFERENCE

Before Bhandari, C. J. and Falshaw, J.

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

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—

Respondent.

Civil Reference No. 17 of 1953

May, 12th

Income-tax Act (XI of 1922)—Sections 7, 10—Assessee's father, Treasurer of Bank—On father's death assessee succeeding him as treasurer—Salary and other emoluments

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received as Treasurer—Whether assessable as Salary or as “Profits and gains of business”—Income, whether of Undivided Hindu Family—Master and servant—Employer and Independent Contractor—Relationship between—Test of .

The Central Bank of India appointed the assessee as Treasurer of 17 branches of the Bank, in place of his deceased father, on a salary of Rs. 1,750 per mensem. He was to be responsible as Treasurer of all these branches and was to employ all members of the Cash Department Staff on salaries laid down in Bank's Grade Scheme. If he was not able to obtain the requisite number of hands at such salaries he was to pay the excess from his own pocket and if he was unable to provide the requisite number within a specified period the Bank was at liberty to engage them and their excess salaries were to be debitable to his account. He had full power to supervise the activities of the staff employed by him, to transfer them from one place to another and to terminate their services, but he had no power to transfer any person who was not approved by the Bank and was under an obligation to dismiss any person on being required so to do by the Bank. He was responsible for the good behaviour of these persons and had to indemnify the Bank against any loss or damage sustained by it. The income-tax authorities assessed the income earned by the assessee in 1950-51, under the head “profits and gains of business” and added it to the income of the undivided Hindu family of which he was the *karta*.

Held, that the relationship between a master and servant and an employer and independent contractor can be tested by the existence or absence of a right of control over the person employed. If the latter is under the control of another and bound to obey the orders issued by him, he is a servant. If, on the other hand, he is not under the control of another except as to result of his work, he is an independent contractor.

Held further, that judged in the light of this test the relationship between the Bank and the assessee was that of an employer and an independent contractor, that the emoluments received by him were assessable under the head “profits and gains of business”, and not under the head “salary” and that as he had merely inherited the family business these emoluments were the income of the undivided Hindu family of which he was the *karta*.

Case referred by the Appellate Tribunal consisting of M/s. K. N. Rajagopal Sastri, Judicial Member and A. L. Sahgal, Accountant Member, referring the following two questions for decision by this Court under the provisions of subsection (1) of section 66:—

“(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 Shil Chandra, the salary and other emoluments received by Shil Chandra as Treasurer of the said Bank are assessable under the head ‘salary’ or under the head ‘Profits and gains of business’? and

(2) Whether in the facts and circumstances of the case Shil Chandra’s emoluments as Treasurer of the Central Bank of India, Limited, were rightly assessed in the hands of the Hindu undivided family of which he is the Karta?”

H. J. UMRIGAR and RAMESHWER NATH, for Appellant.

A. N. KIRPAL and D. K. KAPUR, for Respondent.

JUDGMENT.

Bhandari, C.J. BHANDARI, C. J. This is a reference under sub-section (1) of section 66 of the Indian Income Tax Act.

One Adishwar Lal, Treasurer of the Central Bank of India Limited, died on the 16th April, 1950, leaving behind him a son by the name of Shil Chandra and a considerable amount of movable and immovable property. Shil Chandra succeeded his father as Treasurer of the Bank and earned an income of Rs. 23,286 during the year 1950-51. The income-tax authorities assessed this income under the head ‘Profits and gains of business’ and added to it the income of the Hindu undivided family of which Shil Chandra is the karta. The order of the income-tax authorities was upheld by the Tribunal in appeal. The Tribunal has now

referred the following two questions to this Court under the provisions of sub-section (1) of section 66—

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“(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 Shil Chandra, the salary and other emoluments received by Shil Chandra as Treasurer of the said Bank are assessable under the head ‘Salary’ or under the head ‘Profits and gains of business’? and

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(2) Whether in the facts and circumstances of the case Shil Chandra’s emoluments as Treasurer of the Central Bank of India Limited were rightly assessed in the hands of the Hindu undivided family of which he is the *karta* ?”

The answer to the question whether the remuneration received by the assessee is assessable under the head “Salary” or under the head “Profits and gains of business” must turn on the decision of the question whether the assessee was, during the period to which the return relates, a servant of the Bank or an independent contractor. A servant is a person subject to the command of his master as to the manner in which he shall do his work *Yewens v. Noakes* (1), *Goolbai v. Pastonji* (2). An independent contractor, on the other hand, is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as the result of the work. (Words and Phrases, second series, 1034). It will be seen, therefore, that whereas a servant must carry out the orders of his master not only in what is to be done but how it is to be

(1) (1880) L.R. 6 Q.B.D. 532

(2) A.I.R. 1935 Bom. 333

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done, an independent contractor has the right to complete the work assigned to him in accordance with the terms of his contract but is subject to no control in the details of its doing. No comprehensive or all-embracing test has so far been devised for determining whether a particular person is or is not an independent contractor, although a number of well-recognised rules have been formulated which may assist the Court in arriving at the correct conclusion. Broadly stated, the relationship between a master and servant and an employer and independent contractor can be tested by the existence or absence of a right of control over the person employed. If the latter is under the control of another and bound to obey the orders issued to him, he is a servant. If, on the other hand, he is not under the control of another except as to the result of his work, he is an independent contractor. Although every case must be decided on its own facts, the Courts have laid down a number of tests for the purpose of determining whether a person is an independent contractor. These tests though not necessarily conclusive of this status, are:—

- (1) that he is engaged in a private business of his own and is at liberty to work for any one he wishes ;
- (2) that it is not necessary for him to perform the work himself and that he can employ servants of his own for completing the task assigned to him ;
- (3) that he has the power to appoint and remove the servants employed by him ;
- (4) that he can supervise the work and activities of his servants ;

- (5) that he pays the wages of his servants from his own pocket ;
- (6) that he is required to provide labour, material and appliances for the work ;
- (7) that he is in control of the premises in which work is being done ;
- (8) that he has a right to control the details of the work ;
- (9) that he is paid by job ; and
- (10) that initially he is responsible for providing funds for the work.

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If no financial responsibility devolves on him and if all materials used in the work and all wages paid to the employees are provided by the person for whom work is being done, the relationship would probably be that of master and servant.

The written instrument which embodies the contract between the Bank and Shil Chandra furnishes excellent evidence as to the nature of the relationship which subsists between them. It was executed on the 19th September, 1950. According to this document, Shil Chandra was deemed to be appointed Treasurer of the Bank with effect from the 16th April 1950 of as many as seventeen branches, sub offices and pay offices of the Bank. He was to be responsible as Treasurer of these several offices and was to employ all cashiers, potdars, peons, godown-keepers and such other persons as were necessary for the efficient working of the said offices. He had full control over the members

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on the staff and was at liberty to dismiss or transfer any of them, but he had no power to transfer any person who was not approved of by the Bank and was under an obligation to dismiss any person engaged by him on being required so to do by the Bank. He was to engage members of the cash department staff on the salaries laid down in the Bank's Grade Scheme but if he was not able to obtain them at such salaries, he was to *pay the excess from his pocket*. If he was unable to provide the requisite number of persons needed by the Bank within a specified period, the Bank was at liberty to engage the requisite number of hands whose excess salaries, if any, under the Bank's Grade Scheme were to be *debitable to his account*. He was to be responsible for all receipts and payments of money, for the correctness and genuineness of all *hundies* and cheques bearing vernacular signatures and endorsements for the safe custody of all bullion, cash, and negotiable instruments, and for such other work as is customarily done by cashiers and shroffs of banks. He *was to be responsible for the good behaviour of the persons employed by him* and was to make good to the Bank any loss or damage sustained by it. The Bank was at liberty without notice to terminate his employment if he was adjudicated an insolvent or was convicted of an offence involving moral turpitude or if he failed to comply with any of the terms of his agreement. The agreement could also be terminated by either party by three months' notice in writing. Shil Chandra was entitled to receive a salary of Rs. 1750 per mensem for carrying out the duties entrusted to him and to receive in addition, by way of guarantee commission, certain sums of money for *guaranteeing the conduct* of the persons employed by him. Every member of the staff employed by him was entitled to receive directly from the Bank such salary as the Bank had agreed at the time of employment.

Shil Chandra deposited securities of the aggregate value of Rs. 70,000 and title deeds of property in Chandni Chowk, Delhi, with the Bank, by way of security, for the good conduct and behaviour of himself, of his representative and of the members of the staff and for the protection of the Bank against loss or damage.

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There are several terms and conditions in the agreement which tend strongly to establish the status of Shil Chandra as an independent contractor. He was appointed Treasurer for as many as seventeen branches located in three different States, but there is not an iota of evidence to justify the conclusion that he was required to do any work himself. The terms of the contract required him only to appoint a representative and as many members of the cash department staff as were required by him. The fact that he was not bound to execute in person the work that he has undertaken to do strongly supports the assertion that he was an independent contractor, for an independent contractor is required only to produce certain specified results by any means which he thinks fit to employ.

According to the terms of the contract, Shil Chandra had full power to appoint his representative and all members of the cash department staff. He could supervise their activities, could transfer them from one place to another and could terminate their services. This circumstance appears to indicate that he was an independent contractor. It is true that the Bank had reserved to itself the right of requiring that he shall not engage or transfer any member of the cash department staff who had not been approved of by the Bank and of demanding the dismissal of any member of the staff who had been engaged by him, but

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reservations of this kind cannot, in my opinion, affect the independence of the contract. It has been held repeatedly that the right of an employer to demand the discharge or dismissal of servants of the contractor guilty of carelessness or incompetence or disobedience is not sufficient to make the contractor or his men servants of the employer. In *Readie v. London and N.W.R. Company* (1), the Court observed as follows :—

“The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant.”

The same principle was applied in two cases from the United States. In *Harris v. Mac Namara* (2), the Court observed that the fact that the discharge is to be accomplished through a request to the immediate employer of the workman instead of by the direct act of the principal himself, rather repels than creates the inference that the principal possesses the right to discharge. In *Eris v. Caulkins* (3), the Court said—

“In this we may observe that the statement that the City had a general power over the men employed by the contractor is too broad, for the contract is that he shall dismiss from his employment incompetent or unfaithful employees.

(1) (1849) 4 Exch. 244

(2) (1872) 97 Ala. 181

(3) (1877) 85 Pa. 247

Here-in the fact of his superior and independent control over the workmen is recognised ; for, if the City retained this power, why contract with Grant for the doing of that which it could, at any time, do itself."

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A similar conclusion flows from the stipulation that Shil Chandra was under an obligation to engage and employ his representative and the other members of the cash department staff. A stipulation of this kind which required the contractor to furnish all the labour required for the performance of the work affords strong evidence of the fact that the person employed is an independent contractor, *Knight v. Fox* (1), *Bobbey v. Crosbie* (2), *Barnes v. Evans* (3).

Another term of the contract declared that besides the salary payable to the Treasurer, the Bank will pay directly to each member of the cash department staff such salary as the Bank may agree at the time of appointment. This term, it is contended, negatives the existence of the relationship of employer and independent contractor between the Bank and the Treasurer. This contention appears to me to be wholly devoid of force. The Bank had entered into an agreement with Shil Chandra and was required to pay him for the service rendered by him. This remuneration could either take the shape of a lump sum payment to Shil Chandra who could disburse the salaries to the employees or it could take the shape of direct payments to Shil Chandra, his representative and the other members of the cash department staff. No explanation has been offered as to the reasons

(1) (1850) 5 Exch. 721
(2) (1915) L.J.K.B.N.S. 856
(3) 7 B.W.C.C. 24

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which impelled the parties to agree that the employees should be paid directly by the Bank. It is possible that Shil Chandra did not have sufficient funds with him for making the payments to the men he had employed or that the Bank wanted to be quite certain that the salaries were paid promptly and that the work did not suffer. It is equally possible, that the arrangement was for convenience only. One of the terms of the contract declares that if Shil Chandra was unable to obtain the members of his staff on the salaries laid down by the Bank, he was to pay the excess from his pocket. Another term provided that if he was unable to provide the requisite number of persons within a specified period, the Bank had full power to engage the requisite number of hands whose excess salaries if any were to be "debitable to his account." These conditions make it quite clear that any payments which were being made by the Bank towards the salaries of the cash department staff were being made on account of Shil Chandra.

The contract in the present case contains a provision that Shil Chandra shall be wholly and solely responsible for the acts and omissions of his representative and of every member of the cash department staff and imposes an obligation on him to indemnify the Bank against any loss or damage sustained by it. It is extremely unusual for a servant to assume such onerous responsibilities in respect of the conduct of his subordinates. This provision appears to indicate that Shil Chandra was engaged on the footing of an independent contractor, *Allen v. Hayward*, (1), *Hardaker v. Idle District Council* (2).

There are certain other circumstances which possess merely indirect and inferential significance and which tend to support the conclusion

(1) (1845) 7 Q.B. 960

(2) (1896) 1 Q.B. 335

that Shil Chandra was an independent contractor. It is common ground that Shil Chandra succeeded his father as Treasurer on the 16th April 1950 even though he had no special qualifications for filling this particular post. He succeeded because his father was an independent contractor and he merely inherited the family business. It is significant that both Adishwar Lal and his son, Shil Chandra, returned their income as Treasurer under the head "Business". Adishwar Lal went to the length of claiming deductions in respect of interest paid by him to cashiers on their security deposits with the Treasurer — a claim permissible under section 10 but not under section 7.

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There is nothing in the terms of the agreement to indicate that Shil Chandra was a whole-time servant of the Bank or that he was not at liberty to work for another employer. He could conceivably work as Treasurer of more than one Bank and could in addition carry on business of his own.

A careful consideration of all the facts and circumstances of this case leaves no doubt in my mind that the relationship between the Bank and Shil Chandra was that of an employer and an independent contractor. In *re Ambala Sarabhai* (1), the occupation of Agents and Treasurers of a Bank was treated as business which could be carried on by a firm. Similarly, in *re. Doraiswami Iyar and Company* (2), it was observed that persons acting as "Agents, Secretaries and Treasurers" as the assessee in that case were not servants of a Company.

There can be little doubt that Shil Chandra's emoluments as Treasurer of the Bank were rightly assessed as the income of the Hindu undivided

(1) (1923) 25 B.L.R. 1225

(2) (1920) 1 L.T.C. 93

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family of which he is *karta*. He did not obtain this appointment on account of any personal qualifications; he obtained it (a) because his father Adishwar Lal was Treasurer of the Bank before him, and (b) because he furnished a substantial security for the good conduct and behaviour of the Treasurer, the representative and the other members of the cash department staff. These securities were admittedly the property of the joint Hindu family of which Shil Chandra was a member and were liable to be appropriated by the Bank for making good the losses, if any, which were caused by the negligence or carelessness of the Treasurer or his servants. The Tribunal has expressed the view, with which I find myself in agreement, that there cannot be a plainer case of risk or detriment to the family property. Our attention has been invited to certain authorities in which it has been held that the sums payable to a person on account of director's fees cannot be regarded as the income of the joint Hindu family even though the person concerned became qualified to become a director only because the shares of the joint Hindu family were placed at his disposal. These authorities are not relevant to the decision of this case, for the joint family property in those cases was not put in jeopardy for the purpose of earning the remuneration of the directors. In the present case, Shil Chandra deposited valuable securities with the Bank which could have been completely lost to the joint Hindu family. It cannot be said, therefore, that the income derived by Shil Chandra was derived without detriment to the family property.

For these reasons, I would declare (1) that the emoluments received by Shil Chandra as Treasurer of the Bank are assessable under the head "Profits and gains of business" and (2) that Shil Chandra's

emoluments as Treasurer were rightly assessed in M/s. Pyar
the hands of the Hindu undivided family of which Lal-Adishwar
he is the *karta*. Lal

FALSHAW, J. I agree.

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REVISIONAL CIVIL.

Before Bhandari, C. J.

INCOME-TAX OFFICER, ROHTAK,—*Petitioner*.

Bhandari, C.J.

versus

SHRIMATI JANKI DEVI AND UNION OF INDIA,—
Respondents.

Civil Revision No. 204 of 1954.

*Fatal Accidents Act (XIII of 1855)—Power of Court to
Income-tax Act (XI of 1922)—Section 54—Case under
require Income-tax Officer to give evidence as to whether
certain person was or was not assessed to Income-tax.*

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Held, that a Court is not at liberty to require an
Income-tax Officer to give evidence as to whether a person
was or was not assessed to income-tax unless the provisions
of any law for the time being in force require that this
fact should be established. No statutory obligation has
been imposed on a defendant in a case under the Fatal
Accidents Act to establish that the person who lost his
life in the accident was or was not assessed to income-tax.
Therefore, it was not within the competence of the Senior
Sub-Judge to summon the Income-tax Officer and to en-
quire from him, whether the deceased was or was not
assessed to income-tax.

*Petition under section 44 of Act IX of 1919, and
Article 227 of the Constitution of India, for revision of the
order of Shree Rameshwar Dial, Senior Sub-Judge,
Gurgaon, dated the 26th May, 1954, ordering the petitioner
to give evidence on 23rd June, 1954.*

S. M. SIKRI, Advocate-General and H. R. MAHAJAN, for
the Petitioner.

D. N. AGGARWAL and N. L. SALOOJA, for the Respon-
dents.