

lead to injustice. I think even from this point of view the present is a fit case in which the Court should take judicial notice of the law, which provides for dutiable articles, as contained in the notification.

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v.
Municipal Com-
mittee, Khanna,
and another

Dua, J.

After considering the case from all its aspect, I do not find it possible to accept the recommendations of the learned Sessions Judge. I would, therefore, decline to interfere, but, would, instead affirm the conviction of the petitioner and the sentence passed on him by the learned Magistrate.

B.R.T.

INCOME-TAX CASE

Before Bhandari, C.J. and Bishan Narain; J.

COMMISSIONER OF INCOME-TAX, NEW DELHI;—
Appellant.

versus

HAMDARD DAWAKHANA,—*Respondent.*

Income-tax Case No. 1-D of 1956.

Income-tax Act (XI of 1922)—Section 66—Period of limitation—Terminus a quo—Order pronounced in Court—Whether amounts to service of notice of refusal—Section 4(3)(i)—Construction of an instrument of trust—Object of—Invalidity of a part of the trust—Whether invalidates the whole trust—Partner—Whether can create Waqf of his own share.

1959

Oct., 28th

Held, that an application under sub-section (1) of Section 66 of the Indian Income-tax Act, 1922, must be presented within sixty days and that an application under sub-section (2) must be presented within six months from the date on which the assessee or the Commissioner as the case may be is served with the notice of the refusal. When a statute requires a notice to be given, it empowers the appropriate authority to give it orally or in writing as the authority may think fit, but when it requires a notice to be

served, as in the present case, it contemplates a notice in writing. A statutory requirement that notice be served without further specific direction implies a written notice served personally on party designated. There is no service of notice within the meaning of Section 66 if the order is pronounced in open Court in the presence of the parties concerned or their counsel.

Held, that the object of construing an instrument creating a trust is to ascertain the intention and the purpose of the settlor and to effectuate that purpose in so far as it is consistent with the rules of law. The invalidity of a part of the trust does not invalidate the remainder where, as in the present case, the valid portion is independent and severable from the invalid portion. There is no provision of law which prevents a partner from ceating a *waqf* in respect of his own share.

Petition under Section 66(2) Indian Income-Tax Act, 1922, praying that the Income-tax Appellate Tribunal be required to state the case and refer it to this Court on the question of law set out in paragraph 3 of the Petition which runs as under:—

“Whether the Wakf deed dated 28th August, 1948, which (as held by the Tribunal) was inoperative so far as the intended Waqif Mohd. Sayeed was concerned, was, in the circumstances of the case and on a true construction thereof, operative as to the other executants?”

K. N. RAJ GOPAL SHASTRI and D. K. KAPUR, for Applicant.

HARDYAL HADY, J. L. BHATIA and K. L. ARORA, for Respondent.

JUDGMENT

Bhandari, C. J.

BHANDARI, C.J.—This application under section 66(2) of the Indian Income-Tax Act must, in my opinion, be dismissed on the short ground that no question of law arises which would justify

this Court in requiring the Tribunal to state a case.

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v.

Prior to the year 1948 the firm known as Hamdard Dawakhana was owned in partnership by Haji Abdul Hamid his younger brother Mohammad Sayeed and their mother Mst. Rabia Begum in the shares of seven annas, seven annas and two annas respectively.

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On the 1st January, 1948, the three partners declared in the presence of a number of respectable witnesses that three-fourths of each individual sharers in the profits of the partnership would be dedicated to a *waqf* and on the 28th August, 1948, they executed a formal deed of *waqf* by virtue of which one-eighth of the net profits of the business was to be set apart as a reserve fund and of the balance 25 per cent was to go to the three *waqifs* in the proportion of their original profit sharing ratio, namely 7: 7: 2. The balance of the net profits termed 'quami income' was to be set apart for being spent for charitable purposes. This deed was to operate retrospectively from the 1st January, 1948. On the 6th March, 1949, Haji Mohammad Sayeed was declared an evacuee with effect from January, 1948.

In the assessment for the year 1949-50, the partners claimed an exemption under the provisions of section 4(3) (i) of the Income- tax Act, but the Income-Tax Officer rejected this claim as he was of the opinion that no valid declaration of *waqf* was made on the 1st January, 1948, that although a regular deed of *waqf* was drawn up on the 28th August, 1948, Mohammad Sayeed who was one of the executants of the document was not competent to execute the deed as his property had vested in the Custodian, and that as the *waqf* created by Haji Mohammad Sayeed in respect of

Commissioner of his share in the assets of the partnership was
 Income-tax, void, the trust created by the other two *waqifs* in
 New Delhi the same instrument was also void. In this view
 v. of the case the Income-Tax Officer assessed the
 Hamdard Dawa- entire income in the hands of the firm as income
 khana of the partnership. The order of the Income-Tax
 Bhandari, C. J. Officer was upheld by the Appellate Assistant Com-
 missioner. On further appeal the appellate Tri-
 bunal held that the income during the period 1st
 January, 1948, to the 28th August, 1948, had
 admittedly been earned with the assets belonging
 to the business or organisation styled as Hamdard
 Dawakhana, and that the income of that period
 was not qualified for exemption under section 4
 (3) (i) of the Income-Tax Act. It held further
 that although Mohammad Sayeed had become an
 evacuee before August, 1948, and was not legally
 competent to transfer his share in the assets of the
 intended endowment, the other two partners were
 fully entitled to execute the deed in regard to
 their own shares and consequently that the pro-
 portionate income from those shares was exempt
 under section 4(3)(i) of the Income-Tax Act.

The Department was dissatisfied with the order of the Tribunal as it was of the opinion that the effect of the invalidity of the dedication of Mohammad Sayeed's share was to diminish the share in the income payable by the Mutwalli of Abdul Hamid and his mother and also to confer a right on Mohammad Sayeed (which in the context meant the Custodian of Evacuee Property) to a share in the income over and above the share which had belonged to him and that therefore the scheme as originally intended completely broke down and that the *waqf* deed was invalid as a whole. The Commissioner of Income-Tax accordingly required the Tribunal to refer to this Court

under section 66(1) of the Income-Tax Act the following question, namely:—

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“Whether the *waqf* deed, dated the 28th August, 1948, which as held by the Tribunal was inoperative so far as the intended *waqif* Mohammad Sayeed was concerned, was in the circumstances of the case and on a true construction thereof operative as to the other executants?”

The Tribunal dismissed this application and the Commissioner has accordingly presented an application to this Court under the provisions of sub-section (2) of section 66 of the Income-Tax Act.

The learned counsel for the assessee raises two preliminary objections, both in regard to limitation, one in respect of the application under sub-section (1) of section 66 and the other in respect of the application under sub-section (2) of the said section. It appears that the appellate order of the Tribunal was pronounced in presence of the counsel for the parties on the 5th April, 1955. A copy of this order was served on the departmental representative on the 21st April, 1955, and on the Commissioner on the 25th April, 1955. The petition under sub-section (1) was presented on the 22nd June, 1955. It is contended that the said petition was barred by time as it was presented after the expiry of more than sixty days from the date on which the order was pronounced to the counsel for the parties or from the date on which the order was served on the departmental representative.

A similar objection has been taken in regard to the application under sub-section (2). The order of the Tribunal dismissing the application under sub-section (1) was pronounced to the

Commissioner of parties on the 14th September, the notice of the
Income-tax, refusal was served on the Commissioner on 23rd
New Delhi September, 1955 and the application under sub-
Hamdard Dawakhana section (2) was presented on the 16th March, 1956.
v. It is contended that both these applications were
Bhandari, C. J. barred by time as the period of limitation in each
case commenced from the date on which the order
was pronounced by the tribunal or at any rate
on the date on which a copy thereof was served
on the Departmental representative. *Lala Har
Kishan Das v. Commissioner of Income-Tax,
Punjab* (1), has been cited in support of this
contention. In this case a Division Bench of the
Lahore High Court held that there is a service of
notice within the meaning of section 66 if the
order or decision was announced in Court in the
presence of the assessee or his representative.
With all respect to the very learned Judges who
were responsible for the above decision, I greatly
regret that I am unable to concur in the view
taken by them. The legislature directs that an
application under sub-section (1) of section 66
must be presented within sixty days and that an
application under sub-section (2) must be pre-
sented within six months from the date on which
the assessee or the Commissioner as the case may
be is served with the notice of the refusal. When
a statute requires a notice to be given, it em-
powers the appropriate authority to give it orally
or in writing as the authority may think fit, but
when it requires a notice to be served, as in the
present case, it contemplates a notice in writing.
[*The Queen v. Shurmer* (2); *Mureh v. Loosemore*
(3), *Hughes v. The Coed Talon Collier Company,
Limited* (4)]. A statutory requirement that

(1) 1934 I.T.R. 484

(2) (1886) 17 Q.B.D. 323

(3) (1906) 1 Ch. 692

(4) (1909) 1 K.B. 957

notice be served without further specific direction implies a written notice served personally on party designated. In this view of the law it seems to me that the objections which have been taken by the assessee on the ground of limitation are wholly devoid of force.

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In regard to the so-called question of law which is said to arise out of the order of the Tribunal it was argued before the Tribunal that the intention of the parties was to create a *waqf* only in case each one of the three participants was legally able to do so. As one of these three persons was not capable of making an intended transfer the *waqf* as a whole must necessarily fail. The attention of the Court was invited to a decision of the Madras High Court in a case, *Sivasami Chetti and another v. Sevugan Chetti* (1). The Tribunal held that the said decision was distinguishable for in that case certain persons had agreed to take on joint and several liabilities and the consequence of one of the parties failing to join was to shift the burden of the failing party to the remaining parties without a right of contribution from the party failing to join. In the present case, however, the three partners agreed to do something pious and for religious purposes. The fact that one of them had not the requisite capacity to convey a little or to accomplish the object which he had in view did not mean that the burden of piety of the other two had in any manner increased or if it had considerably increased the intention and willingness of being more pious cannot be attributed. In this view of the case the Tribunal were unable to accept the contention put forward on behalf of the Commissioner.

(1) I.L.R. (1902) 25 Mad, 389

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There can be no doubt in regard to the correctness of the view taken by the Tribunal. The object of construing an instrument creating a trust is to ascertain the intention and the purpose of the settler and to effectuate that purpose in so far as it is consistent with the rules of law. The invalidity of a part of the trust does not invalidate the remainder where, as in the present case, the valid portion is independent and severable from the invalid portion. I am aware of no provision of law which prevents a partner from creating a *waqf* in respect of his own share.

The Tribunal has held that the deed by which the trust was created was a genuine document, that it was intended to be acted upon, that it was actually acted upon and that the *waqf* was in fact created. I am satisfied that these findings are findings of fact and that no question of law arises out of the order of the Tribunal. Even if any question of law does incidently arise I am of the opinion that it is not important enough to justify this Court in requiring the Tribunal to state the case.

For these reasons I would uphold the order of the Tribunal and dismiss the petition with costs which I assess at Rs. 150.

BISHAN NARAIN, J.—I agree....

B.R.T.

LETTERS PATENT APPEAL

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

JAMADAR UTTAM SINGH,—Appellant.

versus

PUNJAB STATE AND OTHERS,—Respondents

Letters Patent Appeal No. 52 of 1959.

1959

Nov., 3rd

The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (L of 1948)—Section 42—Order