COMMISSIONER OF WEALTH-TAX, BHOPAL

v.

ABDUL HUSSAIN MULLA MUHAMMAD ALI (DEAD) BY L.Rs.

MAY 9, 1988

[R.S. PATHAK, CJ. AND M.N. VENKATACHALIAH, J.]

Wealth Tax Act, 1957—Sections 5 and 27—Loan—Termed by assessee as 'Quaraza-e-hasana' held includible as wealth of assessee and liable to tax.

Words and Phrases: 'Quaraza-e-Hasana'—Meaning of.

The assessee—respondent had advanced a sum of Rs.4,00,000 to his partner Faizullabhai Mandlawala which sum was employed as a part of Mandlawala's capital in their partnership firm. The assessee sought to have the value of that loan excluded from his wealth on the claim that this loan was what was known to Muslim Law as 'Quaraza-e-Hasana'—a debt of good faith and goodwill carrying with it no legal obligation on the part of the debtor to repay and correspondingly, no right on the part of assessee to expect, much less enforce a repayment. This claim was supported by debtor's declaration that the sum was received by him 'without any obligation and without any rate of interest and without any consideration.'

The Wealth Tax Officer and the Appellate Assistant Commissioner found it difficult to accept this claim. The Appellate Tribunal, however, accepting the assessee's claim held that the loan partook of the character of 'Quaraza-e-Hasana' with its special incidents as known to Muslim Law; that the transaction was one of good faith and goodwill and lacked the concomitants of a legally enforceable claim for repayment and that, therefore, the amount was not a debt due to the assessee. The High Court upheld this view.

It was contended on behalf of the Revenue (1) that the Tribunal as well as the High Court erroneously accepted the hypothetical incidents of a supposedly peculiar institution of the personal law of the Muslims, any rule or tenet of Muslim Law respecting which had not having been established; (2) that both the Tribunal and the High Court, while rightly noticing that the special incidents of what was called 'Quaraza-e-Hasana' had not been established, gave the benefit of doubt as to the

A very existence of this institution of 'Quaraza-e-Hasana' to the assessee, and (3) that the reliance by the High Court on the incidents of 'Hiba-ba-shart-ul-iwaz', a form of Mussalman gift, was misplaced as this kind of gift expressly stipulated contemporaneous liability for a return.

Counsel for the assessee, sought to support the conclusions of the B High Court on an alternative and independent ground that, at all events, by entering into this transaction the parties must be held not to have intended to create a legal obligation between them and that, therefore, the debt remained a debt of honour. It was contended that an agreement would not, by itself, yield legal obligations unless it was one which could reasonably be regarded as having been made in contemplation of creating legal consequences, and that in this case the parties C must be held to have excluded the contemplation of legal consequences flowing from the transaction.

Allowing the appeal it was,

D HELD: (1) As no authoritative text nor any principle or precedent recognised in Muslim Law was cited before the High Court or this Court, establishing the nature, content and incidents of the institution of 'Quaraza-e-Hasana', it was not possible to say, one way or the other, whether Courts could recognise and act upon such a rule of Muslim Law much less afford relief to the proponent of that rule. [232G-H; 233A-B]

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(2) If the concept of 'Qard Hasan' was the same as that of 'Quaraza-e-Hasana', the obligation on the part of the debtor of the loan to repay nor the right of the creditor to repayment were excluded. The only incident appeared to be that it was 'interest-free'. [234C]

F (3) The reliance by the High Court on the concept of mussalman gift 'Hiba-ba-shart-ul-Iwaz' did not help the assessee because this kind of gift stipulated liability for return. [232E-F]

(4) The debt, though a 'passive debt' would require to be treated as due and payable to the assessee. It was not the assessee's case that the G debt was bad and irrecoverable. The debtor's declaration itself established its existence. [235B]

(5) Where, as in the instant case, the tax implications of large financial obligations were sought to be put an end to, the burden as heavy on the assessee to establish that what would otherwise be the H usual incidents of the transaction were excluded from contemplation by

the parties. Here, one partner had lent a large sum to the other to be utilized as capital in the partnership venture. The transaction was in the context of a commercial venture. The presumption therefore, was that legal obligations were intended. The onus was on the parties asserting the absence of legal obligations. The test was not subjective to the parties, but an objective one. [236E-F]

(6) The non-enforceability of debt was pleaded not as a part of what was permissible in law of contracts, but specifically as some inexorable incident of a particular tenet peculiar to and characteristic of the personal law of the Muslims. That not having been established, no appeal could be made to the principle of permissibility of exclusion of legal obligations in the law of contracts. In the instant case, the admitted existence of a debt implied an obligation to repay. No legal bar of the remedy was pleaded. What was set up, and was unsubstantiated, was the non-existence of the remedy itself. The loan would therefore become includible in the wealth of the assessee. [238C-E]

Rose and Franc Co. **v.** *J.R. Crompton and Bros. Ltd.,* **[1923] 2 K.B. 261;** *Edwards* **v.** *Skyways,* **[1964] 1 W.L.R. 340;** *Bahamas Oil Refining Co.* **v.** *Kristiansands Tankraderie A/s and Others and Shell International Marine Ltd.,* **[1978] Lloyds Law Reports 211, referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 740 to 743 of 1975.

From the Judgment and Order dated 30.8.1974 of the High Court of Madhya Pradesh in Miscellaneous Civil Case No. 352 of 1971.

B.B. Ahuja, Ms. A. Subhashini and K.C. Dua for the Appellant.

T.A. Ramachandran, Vinek Gambhir, Sanjay Sareen and S.K. Gambhir for the Respondents.

The Judgment of the Court was delivered by

VENKATACHALIAH, J. These appeals, by special leave, by the Commissioner of Wealth-tax, Bhopal, arise out of the opinion rendered by the High Court of Madhya Pradesh, Bhopal, in four-consolidated wealth-tax references under Section 27(1) of the Wealth-tax Act, 1957. They raise a short but interesting question touching the

A incidents of what is described as the 'Quaraza-e-Hasana' said to be a transaction known in and peculiar to the personal law of the muslims.

2. The matters arise out of the proceedings concerning the assessment to wealth-tax of the respondent, Abdul Hussain Mulla Mohammad Ali ('the assessee') for the four assessment-years 1957-58 B to 1960-61.

In the original-returns for the assessment year 1957-58 relevant to the valuation date 31.3.1957, the assessee filed à return of net wealth of Rs.8,57,910 which included a sum of Rs.4,00,000 representing the principal value of the loan advanced by the assessee to a certain Faizullabhai Mandlawala, Sidhpur. Both the assessee and the said C Faizullabhai Mandlawala were partners of a firm carrying on business under the name and style 'Rising Sun Flour & Oil Mills' at Ujjain. The borrower had employed this sum as part of his capital in the firm. In the revised return, filed by him, the assessee, however, sought to have the value of that loan excluded from his wealth, on the claim that this D loan was what was known to Muslim Law as 'Quaraza-e-Hasana'—a debt of good faith and goodwill carrying with it no legal obligation on the part of the debtor to repay and correspondingly, no right on the part of the assessee to expect, much less enforce a repayment. The claim for the non-inclusion of this asset in the wealth of the assessee was sought to be supported by the declaration dated 26.3.1965 fur- E nished by the debtor that the sum was received by him 'without any obligation and without any rate of interest and without any consideration'. Reliance was also placed on some extracts of the Quran said to relate to this transaction.

Both the Wealth-tax Officer and the Appellate Assistant Com- F missioner in the appeal found it difficult to accept this claim and, accordingly, brought this sum of Rs.4,00,000 to tax on the respective valuation dates.

However, the Income-tax Appellate Tribunal, Indore Bench, accepting the assessee's appeals held that the loan partook of the G character of 'Quaraza-e-Hasana' with its special incidents as known to Muslim Law; that the transaction was one of good faith and goodwill and lacked the concomitants of a legally enforceable claim for repayment and that, therefore, the amount was not a debt due to the assessee.

H 3. The High Court before which the Tribunal, at the instance of

the Revenue, stated a case and referred two questions of law for opinion upheld the view that had commended itself to the Tribunal and answered the questions against the Revenue. The two questions so referred were:

(1) "Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of Rs.4 lakhs cannot be included in the total assets of the assessee?"

(2) "Whether on the facts and in the circumstances of the case the Tribunal was justified in accepting that the amount of Rs.4 lakhs was in the nature of 'Quaraza-e -Hasana' particularly when Rs.1,21,500 out of Rs.4 lakhs has been repaid?".

4. Shri B.B. Ahuja, learned counsel for the Revenue, contended that that the Tribunal as well as the High Court fell into a serious error in their acceptance of the hypothetical incidents of a supposedly peculiar institution of the personal law of the muslims, respecting which nothing tangible by way of evidence as to the existence of such rule or tenet of muslim law was forthcoming. Learned counsel invited our particular attention to the following observations of the Tribunal:

> "The learned counsel for the assessee, Mr. Chitale, has also stated before us that he has not come across any judicial decision defining or describing the exact characteristics of the expression 'Quaraza-e-Hasana' nor has become across any discussion on this matter in any of the treaties on Mohammedan Law. We are, therefore, satisfied that on the facts and circumstances of this case, the amount of Rs.4 lakhs cannot be treated as a debt due to the assessee and the same cannot be included in the total asset of the assessee."

Learned counsel submitted that the inference drawn does not only not flow from the premise but would clearly be antithetical. If the concept of 'Quaraza-e-Hasana' and the peculiar incidents attributed to it are not established, the plea that there is a debt but yet there is no obligation to repay becomes mutually contradictory. In regard to the subsidiary or supporting reasons for the acceptance by the Tribunal to hold that there was no debt which could be said to be due and owing to the assessee, the learned counsel invited our attention to the following reasoning of the Tribunal:

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> ".....Faizullabhai in a declaration dated 26.3.1965 has stated that this amount was received by him without any obligation and without any rate of interest and without any consideration. Therefore, the question that arises for consideration is whether under this peculiar circumstance it can be said that this sum of Rs.4 lakhs which was given by the assessee to Faizullabhai prior to 1950 for which there is no document and for which there is no obligation to repay can be treated as a debt due to the assessee....."

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Learned counsel submitted that neither the circumstance that the loan was advanced prior to 1950 nor the self-serving declaration by the borrower; nor even that no repayment had been made during the accounting years or earlier would, by themselves, detract from the existence and incidents of a debt which was, otherwise, admitted. Learned counsel pointed out that, admittedly, on 24.7.1961, a sum of Rs.1,21,821 had been repaid by the borrower to the assessee.

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Learned counsel said that both the Tribunal and the High Court, while rightly noticing that the special incidents of what was called 'Quaraza-e-Hasana' had not been established, however, by excluding the sum from the wealth, gave the benefit of this doubt as to the very existence of this institution of 'Quaraza-e-Hasana' to the assessee.

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5. Referring to the reliance by the High Court on the incidents 'Hiba-ba-shart-ul-evaz' learned counsel submitted that the reasoning of the High Court based on this form of a mussalman gift was destructive of the assessee's case inasmuch as the kind of gift envisaged by 'Hiba-ba-Shart-Ul Evaz' expressly stipulated contemporaneous liability for a return.

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Shri Ramachandran, learned counsel for the assessee, sought to support the conclusion of the High Court also another independent ground that, at all events, by entering into this transaction the parties did not intend to create a legal obligations between them and that, therefore, the debt remained a debt of honour. We will presently refer

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to the possibilities of this contention in the facts of this case.

6. No authoritative texts nor any principle or precedent recognised in Muslim Law was cited before the High Court to show that a transaction of this nature and incidents is known to and recognised by the personal law of the Muslims. As no material was placed before the

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High Court, or before us, to establish the content and incidents of this

idea of what is referred to 'Quaraza-e-Husana' it is not possible to say, one way or the other, whether Courts can recognise and act upon such a rule of Muslim Law much less afford relief to the proponent of that rule. A

Indeed literature on the Principles of Islamic Banking "Unlawful gain and legitimate profit in Islamic Law" (Nibil A. Saleh, Cambridge University Press, 1986) does not appear though we do not want to be understood to have pronounced on the subject finally to support the particular incidents of the non-existence of the element of repayability attributed to this kind of loans. Learned author says that Sharia distinguishes between two types of loans: one the 'Ariya' the 'loan for use' which transfers the usufruct of the property temporarily and gratuitously while ownership of the loaned-object remains with the lender; and the second, the 'qard'. In regard to this second type of loan, the 'qard' the author says (at pages 35 and 36): B C

> "The second type of loan recognished by Sharia is the qard, which 'involves the loan of fungible commodities; that is, goods which may be estimated and replaced according to weight, measure or number. *In this case, the borrower undertakes to return the equivalent or likes of that he has received but without any premium on the property, which would, of course, be construed as interest. The most likely object of a qard loan would be currency or other standard means of exchange.*" D E
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> (emphasis supplied)

On the question whether the lender of 'Qard' is entitled to derive any advantage from it, the learned author refers to the views of the different schools namely, Hanafia, Hanbalis, Malikis, Shafi and Ibadis. (See pages 41 to 43). Again, the learned author refers to 'Qard-Hasan' as interest free loan. Explaining its incidents the author says: F

> "*Qard Hasan means an interest-free loan, which is the only loan permitted by Sharia principles.* We have seen previously that not only can interest not be charged on the lent capital, but no advantage whatsoever should be derived by the lender from the loan. Of course, each school of law has its own interpretation of what constitutes 'advantage' and that we have already seen in detail..... G
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> One may wonder how lending could be a business H

proposition once interest is abolished ....."
(emphasis supplied)

(see page 89)

The learned author also proceeds to enumerate the circumstances in which the Islamic Financial Institutions are advised to make use of 'Qard Hasan'.

7. From what is gatherable from the author's observations—of course, if the concept of 'Qard Hasan' is the same as that 'Quaraza-e-Hasana'—the obligation on the part of the debtor of the loan to repay nor the right of the creditor to repayment are excluded. The only incident appears to be that it is 'interest-free'.

However, we do not want to be understood to have pronounced on this question finally as neither side has produced nor relied upon any literature of Islamic Law on the point. The extracts of the Quran relied upon merely calls some loan a beatific loan which blesses the giver. The incidents of the transactions are not found in the passages.

8. Nor does the reliance by the High Court on the well recognised institution in Muslim Law, of Hiba-ba-Shart-ul-Iwaz' advance the case of the assessee any further. In Principles of Mohammadan Law (Mulla, 16th Edition page 165) this kind of gift is explained:

> "Where a gift is made with a stipulation (shart) for a return, it is called hibaba-shart-ul-iwaz ..... The main distinction between Hiba-bil-Iwaz as defined by older jurists and Hiba-ba-shart-ul-Iwaz is that in the former iwaz proceeds voluntarily from the donee of the gift while in the latter it is expressly stipulated for between the parties."

Referring to what distinguishes Hiba-bil-Iwaz from Hiba-ba-shart-ul-Iwaz, the learned author, Syed Ameer Ali, in 'Mahommadan Law' (4th Edition), Vol. I, p. 158 excerpting from Fatawai Alamgiri, says:

> "Iwaz or consideration was of two kinds: one which was subsequent to the contract (of gift), the other which was conditioned in it."

> "In the other kind, the consideration was expressly stipu-

> lated in the contract, and when once it was received the transaction acquired the legal character of a sale. The modern hiba-ba-shart-ul-iwaz has unquestionably sprung from the above."

Then, in the last analysis what follows as a logical consequence is that the debt, though a 'passive debt' would require to be treated as due and payable to the assessee. It was not the assessee's case that the debt was a bad and irrecoverable debt. The declaration of the debtor itself establishes its existence.

9. But, then, Shri Ramachandran, anticipating the inherent infirmity of the claim based on 'Quaraza-e-Hasana' sought to treat us to a resourceful argument that the conclusion of the High Court is, at all events, supportable on an independent ground that an agreement will not, by itself, yield legal obligations unless it is one which can reasonably be regarded as having been made between the parties in contemplation of legal consequences and that in the present case the parties had excluded the contemplation of legal consequence flowing from the transactions. This proposition is stated in 'Chitty on Contracts' (25th Edn. Volume I para 123) thus:

> "An agreement, even though it is supported by consideration, is not binding as a contract *if it was made without any intention of creating legal relations.* Of course, in the case of ordinary commercial transactions it is not normally necessary to prove that the parties in fact intended to create legal relations."
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> (emphasis supplied)

Learned counsel cited certain cases to illustrate the point. In *Rose and Frank Co.* v. *J.R. Crompton and Bros. Ltd.*, [1923] 2 K.B. 261 Scrutton, LJ, said:

> "..... Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while

A in business matters the opposite result would ordinarily follow ...."

At page 293, Atkin, LJ, said:

"..... To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."

The novelty of the clause in the contract relied upon in that case did not miss the learned Judge's notice. He observed:

"..... I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both ...."

D This contention of Shri Ramachandran was not, in this form, urged before the High Court. It was not the case of the parties that, apart altogether from the Rule of Muslim Law relied upon, they had agreed otherwise also that no legal obligation should arise.

10. The contention has, no doubt, its possibilities. But where, as E here, the tax implications of large financial obligations are sought to be put an end to, the burden is heavy on the assessee to establish that what would otherwise be the incidents of the transaction were excluded from contemplation by the parties. Here, one partner has lent a large sum to the other to be utilised as capital in the partnership venture. The transaction is in the context of a commercial venture. The pre- F sumption is that legal obligations are intended. The onus is on the parties asserting the absence of legal obligations and the test is not subjective to the parties; but is an objective one. Chitty says (para 123, supra):

"..... The onus of proving that there was no such intention 'is on the party who asserts that no legal effect is G intended, and the onus is a heavy one. *Where such evidence is adduced, the Courts normally apply an objective test.*"

(emphasis supplied)

The observations of Atkin, LJ in the case cited by counsel are also H worth recalling:

> ".....Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour* v. *Balfour*, [1919] 2 KB 571 ....."

In *Edwards* v. *Skyways*, [1964] 1 WLR 340 at 355 Megaw J said:

> "In the present case, the subject matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds—an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."

Again, in *Bahamas Oil Refining Co.* v. *Kristiansands Tankrederie A/S and Others and Shell International Marine Ltd.*, [1978] Lloyds Law Reports 211 it was said:

> "..... In deciding whether or not there was any animus contrabendi in relation to a certain transaction, or whether or not sufficient notice of a certain term was given, the law applies an objective and not a subjective test ....."

> "..... In the absence of such evidence, how can the Court assume, even if it might be relevant in law, that the master did not intend to enter into a contract ....."

11. The arguments of learned counsel proceeds on the general proposition that in addition to the existence of an agreement and the presence of consideration there is also a third contractual element in the form of intention of the parties to create legal relations. This proposition, though accepted in English Law, has not passed unchallenged. In Cheshire and Fifoot's Law of Contract, 10th Edn., it is said:

> ".....the criticism of it made by Professor Williston demands attention, not only as emanating from a distinguished American jurist, but as illuminating the whole subject now under discussion. In his opinion, the separate

A element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract ....."

B (at page 97)

Be that as it may, the point, however, to note and emphasise is that this intention not to create legal obligation is not inferable from the application of any objective text. The non-enforceability of debt was pleaded not as a part of what is permissible in law of contracts, but specifically as some inexorable incident of a particular tenet peculiar to C and characteristic of the personal law of the Muslims. That not having been established, no appeal, in our opinion, could be made to the principle of permissibility of exclusion of legal obligations in the law of contracts. We are afraid both the Tribunal and the High Court accepted, somewhat liberally perhaps, what was at best an argument of hypothetical probabilities. The admitted existence of a debt implies an D obligation to repay. No legal bar of the remedy is pleaded. What was set up, and unsubstantiated, was the non-existence of the remedy itself.

12. Accordingly, the appeals are allowed and, in reversal of the view taken by the High Court, the questions referred for opinion, are E answered in the negative and in favour of the Revenue, with the attendant implication that the loan would become includible in the wealth of the assessee for the relevant assessment years. In the circumstances of the case, we make no order as to costs.

R.S.S. Appeals allowed.