# The Commissioner Of Income-Tax, Bombay ... vs Messrs Ogale Glass Works Ltd., Ogale ... on 19 April, 1954

## Equivalent citations: 1954 AIR 429, AIR 1954 SUPREME COURT 429, 1967 MAD LW 1051

## Bench: Natwarlal H. Bhagwati, B. Jagannadhadas

PETITIONER:
THE COMMISSIONER OF INCOME-TAX, BOMBAY SOUTH, BOMBAY

Vs.

RESPONDENT:
MESSRS OGALE GLASS WORKS LTD., OGALE WADI.

DATE OF JUDGMENT:
19/04/1954

BENCH:
DAS, SUDHI RANJAN
BENCH:
DAS, SUDHI RANJAN
BHAGWATI, NATWARLAL H.
JAGANNADHADAS, B.

CITATION:
1954 AIR 429
CITATOR INFO :

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|---|---|---|
| F | 1954 SC 504 | (2) |
| R | 1957 SC 918 | (35) |
| R | 1959 SC1070 | (3,4,5) |
| F | 1959 SC1160 | (7,10,11,15,19,20) |
| D | 1959 SC1177 | (14,36) |
| APL | 1959 SC1394 | (8) |
| D | 1960 SC 266 | (14) |
| RF | 1961 SC 107 | (7,9,15,16) |
| RF | 1961 SC1633 | (11,32) |
| R | 1963 SC1484 | (9) |
| R | 1965 SC1636 | (10,11,16) |
| R | 1966 SC1466 | (7,8,10) |
| F | 1967 SC1118 | (9,17) |
| R | 1976 SC1172 | (7,9) |
| D | 1985 SC1156 | (28,36) |
| F | 1989 SC1553 | (5) |
| R | 1990 SC1451 | (5) |

ACT:
Indian Income-tax Act (XI of 1922), section 4(1)(a)-Non-

resident company-Payment of sale-proceeds to the company (assessee), by Government of India by means of cheques drawn and posted in British India- Whether income, profits and gains received by the assessee in British India within the meaning of section 4(1)(a)Indian Contract let, 1872 (Act IX of 1872), section 50, illustration (d)-Addressee requesting sender to send cheque by post-Post-office acting as agent of addressee.

HEADNOTE:

The assessee, a limited liability company, incorporated and carrying on business in an Indian State (outside British India was a non-resident company for the purposes of the Indian Income-tax Act and there of ore its liability to British Indian income-tax depended upon its receipt of income within British India. On the express request of the assessee to remit the amount of the bills by means of cheques in respect of the goods supplied by the assesses to the Government of India the latter agreed to make payments by cheques which were drawn in Delhi and received by the assessee in the Indian State.

Held, that according to the course of business usage in general the parties must have intended that cheques should be sent by post and therefore the posting of cheques in Delhi amounted to payment in Delhi to the post-office which was constituted the agent of the assesses.

Therefore on the facts of the case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4(1)(a) of the Act.

Held also, that as between the sender and the addressee it is the request of the addressee that makes the post-office the agent of the addressee and after such request the addressee cannot be heard to say that the post-office was not his agent. On the other hand if there is no such request by the addressee, express or implied, then on delivery of the letter or the cheque to the post-office by the sender, the post-office acts as the agent of the sender.

Apart from the principle of agency, section 50, illustration (d) of the Indian Contract Act (TX of 1872) lays down the well-known principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promise.

Indian Post-Office Act 1898 (Act VI of 1898), does not nullify illustration (d) to section 50 of the Indian Contract Act, or the above proposition of law.

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Gresham Life Assurance Society v. Bishop (L.R. [1902] A.C. 287 at p. 296), Commissioner of Income-tax v. Kameshwar Singh, ([1933] 1 I.T.R. 107), Raghunandan Prasad v.

Commissioner of Income-tax, (60 I.A. 133: [19331 1 I.T.R. 113), Commissioner of Income-tax v. Maheswari Saran Singh, ([1951] 19 I.T.R. 83), Stedman v. Gooch, ((1793) 1 Esp. 5), Maillard v. Duke of Argyle, ((1843) 6 M. & G. 40), Kempt v. watt. (1846) 15 M. & W. 672), Be. Rower and Haslam, (L.R. (1893) 2 Q.B. 286), Palaniappa Chetty v. Arunachalam Chetty (1911) 21 M.L.J. 432) Robinson v. Henry Reid, ((1829) 9 B. & C. 449), Anderson. Hillies, ((1852) 21 L.J.C.P. (N.S.) 150), Kodarmal v. Sagormal, ((1907) 9 Bom. L.R. 901 at p. 911), Felix Hadley & Co. v. Hadley, (L.R. (1898) 2 Ch. D. 680), Rhokana Corporation v. Inland Revenue Commissioners, (L.R. (1938) A.C. 380 at p. 399), Commissioner of Excess Profits Tax, West Bengal v. Jeewanlal Ltd., ([1951] 20 I.T.R. 39 at p. 47), Chainrup Sampatram v. C.I.T., West Beagal ([1951] 20 I.T.R. 484 at pp. 493, 496), Allahabad Bank Ltd., v. C.I.T. West Bengal), ([1952] 21 I.T.R. 169), Mohanlal Biralal v. C.I. T., C.P. & Berar, ([1952] 22 I.T.R. 448)' Hira Mills Ltd., Cawnpore v. Income-tax Officer, Cawnpore, ([1946] 14 I.T.R. 417), Madanlal Dharnidharka v. Commissioner of Income-tax, Bombay City, ([19481 16 I.T.R. 227 at p. 232), Commissioner of Income-tax, Delhi v. Punjab National Bank Ltd. ([1952] 21 I.T.R. 526), Norman v. Rickets, ((1886) 3 T.L.R. 182), Thairlwal v. The Great Northern Railway Co., (L.R. [1910] 2 K.B. 509), Badische Anilin Und Soda Fabrik v. Basle Chemical Works, (L.R. [1898] A.C. 200), Comber v. Leyland, (L.R. [1898] A.C. 524), Mitchell Henry v. Norwhich Union Life Insurance Society Ltd. (L.R. (1918) 2 K.B. 67), Thorappa v. Umedmalji, ((1923) 25 Bom. L.R. 604), (Ex-parte Cote L.R. (1873) 9 Ch. App. 27), The Indian Cotton Company Ltd. v. Hari Poonjoo, (I.L.R. (1937) Bom. 763) referred to.

JUDGMENT:

CIVIL APPELLATE, JUrISDICTION : Civil Appeal No. 19 of 1953.

Appeal from the Judgment and Order dated the 17th day of September, 1951, of the High Court of Judicature at Bombay (Chagla C.J. and Tendolkar J.) in Income-tax Reference No. 19 of 1949. -

M. C. Setalvad, Attorney-General for India and C. K. Daphtary, Solicitor-General for India (Porus A. Mehta, with them) for the appellant.

B. J. Kolah, Y. D. Pandit and Rajinder Narain for respondents.

1954. April 19. The Judgment of the Court was delivered by DAS J.-This appeal arises out of proceedings for the assessment to income-tax of the respondent Messrs. Ogale Glass Works Ltd., (hereinafter referred to as "the assessee") for the five assessment years 1941-42 to 1945-46.

The assessee is a limited liability company incorporated and carrying on business in Aundh which in those days was an Indian State outside British India. It was accordingly a non-resident company for the purposes of the Indian Income- tax Act.

The assessee manufactures lanterns and other glassware at its works in Aundh State. In the relevant accounting years the assessee secured some contracts for the supply of lanterns and other glassware to the Government of India. The price of the goods supplied under the contracts were paid by cheques drawn on the Reserve Bank of India, Bombay. The cheques used to be received by the assessee in Aundh and cashed through its bank at Bombay as hereinafter stated. The assessee being a non-resident company its liability to British Indian income-tax depended upon its receipt of income within British India. In the course of proceedings for the assessment of the assessee to income-tax for the five years mentioned above, the assessee contended that its profits on the sales accrued and were received in the Aundh State where it received payment by the receipt of the cheques. The Income-tax Officer and, on appeal, the Appellate Assistant Commissioner held that the assessee received income, profits or gains in British India inasmuch as the cheques were drawn on a bank in Bombay and had been cashed in Bombay and accordingly taxed the assessee under section 4(1)(a) of the Indian Income-tax Act. On appeal by the assessee the Income-tax Appellate Tribunal upheld the assessment.

Being aggrieved by the order of 'the Tribunal the assessee applied for a reference of the case to the High Court for the determination of the question of law which arose out of the Tribunal's order and the Tribunal agreeing that a question of law did arise out of its order referred the following question to the High Court along with a statement of the case:

> " whether on the facts of the case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4(1)(a) of the Act."

At the hearing of the reference by the High Court learned advocate for the assessee contended, inter alia, that the cheques were received by the assessee in full satisfaction of the debt due to it by the Government of India and that the debt of the Government of India had been discharged by the acceptance of the cheques by the assessee in Aundh. The High Court felt that in order to determine this contention it would be necessary for the Tribunal to find certain further facts and accordingly the High Court remanded the reference back to the Tribunal with a request to submit a supplementary statement of the case on the lines indicated in the order dated the 15th September, 1949. The Tribunal submitted a supplementary statement of the case on the 8th June, 1951.

In the supplementary statement of the case reference is made to clause 15 of the conditions of the contract governing supplies made by the assessee to the Government of India. The system of payment under that clause was that 90% of the price of each consignment would be paid on proof of dispatch of the stores from a Railway Station or port in India after inspection and the balance of 10% would be paid on receipt of the consignment in good condition. That clause also provided "Unless otherwise agreed between the parties, payment for the delivery of the stores will be made on submission of bills in the prescribed form in accordance with instructions given in the Acceptance of

Tender by cheque on a Government Treasury in India or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business."

The assessee used to submit bills in prescribed form and on the form used to write:

> Kindly remit the amount by a cheque in our favour on any bank in Bombay."
>
> After the submission of the bills the assessee used to receive from the Government cheques drawn on the Bombay branch of the Reserve Bank of India along with a memo stating.-
>
> The undersigned has the honour to forward here. with cheque No. dated the bills noted below ":-
>
> Then followed a tabular statement setting out the number, date and amount of, the cheques. On the top of the memo there was a direction that it-
>
> " be immediately returned to the Controller of, Supply Accounts with the acknowledgement form on the reverse duly signed and stamped when necessary."
>
> The acknowledgement form was thus expressed: " The undersigned has the honour to acknowledge cheque No. dated- for Rs. in payment of the bills noted in the first column in the reverse."
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> After receipt of 'the cheques the assessee used to indorse it in favour of Aundh Bank Ltd., Ogale Wadi Branch which in its turn used to endorse them in favour of the Bombay Provincial Co-operative Bank Ltd., Bombay. The last named bank cleared the cheques through the Clearing ' House in Bombay. The supplementary statement Of the case further records that the Aundh Bank Ltd., used to credit the asses- see's account on the very day the cheques were received from the assessee with the amount of the cheque less the collection charges and that the assessee used to credit the account of the Supply Department and make corresponding debits to the bank's account and the bank charges account. A case was sought to be made by the learned advocate for the assessee before the Tribunal that the cheques used to be discounted by the Aundh Bank Ltd., presumably implying thereby that the assessee actually got payment in cash in Aundh. %This case was repelled by the Tribunal which held that the bank only allowed the assessee to draw money on the security of the cheques but did not discount them. Our attention has been drawn to the following passage in paragraph 8 of the supplementary statement of the case: "By merely issuing a cheque to the assessee no payment as such was made by the Government. The payment was only made when the Government's account in the books of the bank was debited."
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> Paragraph 9 of the supplementary statement of the case thus summarises the Tribunal's findings:

9. On the above facts our findings are:

(1) Under the agreement with the Government of India the assessee had undertaken to receive the payment by cheque drawn on a bank in India.

(2) The assessee company made a specific request to the Government to make payment of the sale proceeds by cheque drawn on a bank in Bombay.

(3) When the assessee received the cheque, it did not receive the sale proceeds; it received the sale proceeds subject to the encashment of the cheque. (4) The assessee's bankers allowed the assesses to draw money against the security of the cheque on the very day the cheque was sent for collection to the bank. (5) The assessee's bankers realised the payment of the cheque from the Reserve Bank of India, Bombay,, as agents of the assessee. For rendering this service the bank charged the usual commission charged for collecting an outstation cheque.

(6) The sale proceeds were received in Bombay. (7) The cheque was encashed on behalf of the assessee at Bombay.

(8) The profits on the sales made to the Government of India were received by the assesssee in cash in Bombay."

The supplementary statement of the case concludes with the remark that both parties agreed to the correctness of the facts.

The main argument advanced before us, as before the High Court, by the learned advocate for the asses? see is that the assessee received payment for the goods supplied by it when it received the cheques at Aundh. In other words the assessee accepted the cheques in full satisfaction and in discharge of its claim against the Government under the contracts. The conclusion pressed upon us is that as the cheques were received at Aundh the payment was received there and consequently the assessee which is a non-resident company did not receive any income, profits or gains in British India within -the meaning of section 4(1)(a) of the Indian Income- tax Act and the referred question should be answered in the negative.

The contention put forward by the Revenue is twofold. In the first place it is urged that the question whether the assessee accepted the cheques unconditionally and in full satisfaction of its claims under the contracts is concluded by the Tribunal's findings of facts. This contention is not wholly without force. The passage from paragraph 8 of the supplementary statement of the case and sub-paragraphs 3, 6 and 8 of paragraph 9 do tend to suggest that in the view of the Tribunal no 'payment was made by the Government by merely issuing the cheques, that when the assessee received the cheques it did not receive the sale proceeds, that it received the sale proceeds subject to the encashment of the cheques, that the bank collected the cheques in Bombay as the agent of the assessee and that the sale proceeds were, therefore, received in cash in Bombay. But in view of the language used in the supplementary statement of the case there is ample scope for the view that the

portion% referred to above do not amount to findings of fact by the Tribunal but, on the contrary, are only inferences drawn by it from facts found by it. Indeed the High Court was of the opinion that the Tribunal had not in terms come to a finding of fact that the assessee accepted the cheques in complete discharge of its claim for the price of goods supplied by it but on a consideration of the facts actually found by the Tribunal the High Court came to the conclusion that the necessary inference to be drawn from those facts was that there was an arrangement between the assessee and the Government from which it could be said that the acceptance by the assessee of the cheques from the Government resulted in an uncon- ditional discharge of the debt. In the circumstances we have to examine the facts found by the Tribunal which have a bearing on this point.

The assessee contends that on the facts found by the Tribunal it must be held that it received the cheques in full and unconditional discharge of its claims for the price of goods sold and delivered by it to, the Government and not conditionally subject to realisation. That a, sum of money may be received in more ways than one cannot be doubted. It may be received by the transfer of coins or currency notes or a negotiable instrument which represents and produces cash and is treated as such by businessmen. (See per Lord Lindley in Gresham Life Assurance Society v. Bishop (2)). Reference in this connection may also be made to the decisions in Commissioner of Income-tax v. Kameshwar Singh (2), Raghunandan prasad v. Commissioner of Income-tax (3) and Commissioner of Income-tax v. Maheswari Saran Singh (4). Learned Solicitor-General does not dispute this proposition but he argues that, in the absence of any agreement, express or implied, to the contrary, a payment by a negotiable instrument is always understood to be conditional. He refers us to Benjamin on Sale, 8th Edition, page 787, in support of the proposition that the, intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods Stedman v. Gooch (5), and Maillard v. Duke of Argyle (6) or "in discharge" Kemp v. Watt (7), or "in settlement" of the price Re Rower and Haslam (8). In addition to the above English cases referred to in Benjamin on Sale the learned Solicitor-General also relies on the case of Palaniappa Chetty v. Arunachalam Chetty (9) where it was held by the Madras High Court that the execution of a formal receipt for the amount covered by the bill of exchange or hundi was not sufficient to rebut the general presumption that the delivery of a bill of exchange or a hundi for a debt operated only as a conditional discharge of the debt' He insists that on the facts of this case there is nothing from which an agreement may be implied that the cheques were given and received unconditionally in full discharge of the original contractual liability of the Government for the price of the goods supplied by the (1) L.R. [1902] A.C. 287 at P. 296.(6) (1843) 6 M. & G. 40. (2) [1933] I I.T.R. I07.(7) (1846) 15 M. &W. 672. (3) 60 I.A. 133;[1933] I.T.R. 113.(8) L.R. [1893] 2 Q.B.

286. (4) [1951] 19 I.T.R. 83.(9) (1911) 21 M.L.J. 432. (5) (1793) 1 ESP- 5.

assessee. Sri Kolah, on the other hand, relied on the following facts in answer to the contentions of the learned Solicitor-General:

> (i) that there was an arrangement by the contract itself, for payment by cheque (clause 15),

(ii) that in the bills submitted by him the assessee expressly asked for payment by cheque,

(iii) that the Government sent cheques in payment of the bills,

(iv) that on receipt of the cheques the assessee returned the acknowledgement form duly signed and stamped as a formal receipt,

(v) that the drawer of the cheques was the Government of India and the drawee was the Reserve Bank of India for whose solvency there could be no apprehension at all in the mind of the assessee.

Sri Kolah contends that the cumulative effect of these facts is clearly enough to establish that the cheques ;were received unconditionally as payment. Learned Solicitor- General points out that the assessee's request to pay the amount of the bills by cheques carries the matter no further, for the undertaking to pay by cheque was already there. The -point of the request was that the cheques should be issued on some bank in Bombay. The insistence on a stamped receipt in advance of payment was, says the Solicitor-General, in keeping with the usual practice of Government departments. Therefore,we have in this case,according to the learned Solicitor-General, nothing more than a term in the contract for payment by cheques and the status of the drawer and drawee of the cheques. These two circumstances, so submits the Solicitor-General are not sufficient to establish the fact of the acceptance of the cheques as unconditional discharge. He contends that, in the absence of an express agreement, it is only when the creditor elects to take a bill or cheque having it in his power to obtain payment in cash, that is to say, takes a bill or cheque by choice or preference instead of cash that an agreement may be implied that he took it as an unconditional and absolute payment of the debt: Robinson v. Henry Reid (1) and Anderson v. Hillies (2). Such cases must be rare, for the creditor is not ordinarily likely to give up the advantage of having a double remedy namely one on the bill or cheque and the other, on dishonour of the bill or cheque, on the original cause of action. He points out that in this case there is no finding of any special agreement in this behalf and, therefore, submits the learned Solicitor-General, the assessee must be taken to have received the cheques conditionally, i.e., subject to realisation. The learned Solicitor-General concludes that, in the circumstances, no payment was received by the mere receipt of the cheques and that payment was received only when the cheques were cashed in Bombay and that such receipts in Bombay became immediately assessable to British Indian tax under section 4(1)(a). The High Court repelled this line of argument and held that the assessee received payment on the dates the cheques were delivered to it. We find ourselves substantially in agreement with this conclusion. It is to be remembered that there are four modes in which a contract may be discharged, namely (1) by agreement, (2) by performance, (3) by being excused by law from performing it and (4) by breach. In this case clause 15 of the contract provides how the payment of the price is to be made. In short the contract itself, by that clause, prescribes the manner and the time for performance by the Government of its part of the contract and as the Government made the payments in the prescribed manner, i.e., by cheques, it fulfilled its engagement and such payment would under section 50 of the Indian Contract Act, operate as a discharge of the contract. It should also be remembered that the assessee sent his formal stamped receipts only after the receipt of the cheques and not along with

the bills submitted by it. Therefore, the receipts cannot be regarded as having been sent in advance. The status of the drawer and the drawee of the cheques is also a material consideration. Finally there is no suggestion that any of the cheques was dishonoured on presentation. We, therefore, agree with Sri Kolah that (1) (1829) 9 B. & C. 449. (2) (1852) 21 L.J.C.P. (N. S.)

150. the several facts relied on by him and alluded to above, taken cumulatively, must lead us to the conclusion that the cheques were received in complete discharge of the claim for the price of the goods.

Learned Solicitor-General, however, contends, on the' authority of the decision in Kodarmal v. Sagormal (1), that the request by the creditor to send a cheque does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time. Even if we accept his contention that the facts referred to above are not sufficient to raise the implication that the cheques were accepted as payment and even if the sending of the cheques in terms of clause 15 or at the special request of the assessee did not operate as an unconditional discharge of the Government's liability even then the assessee's position will be no better. When it is said that a payment by negotiable instrument is a conditional payment what is meant is that such payment is subject to a condition subsequent that if the negotiable instrument is dishonoured on present- ation the creditor may consider it as waste paper and resort to his original demand: Stedman v. Gooch (2). It is said in Benjamin on Sale, 8th Edition, page 788:-

> The payment takes effect from the delivery of the bill, but is defeated by the happening of the condition, i.e., non- payment at maturity."
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> In Byles on Bills, 20th Edition, page 23, the position is summarised pithily as follows:' A cheque, unless dishonoured, is payment." To the same effect are the passages to be found in Hart on Banking, 4th Edition, Volume I, page 342. In Felix Hadley & Co. v. Hadley (3), Byrne J. expressed the same idea in the following passage in his judgment at page 682:
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> " In this case I think what took place amounted to a conditional payment of the debt; the condition (1) (1907) 9 Bom. L.R. 903 at p. 911. (3) L. R. (I 898) 2 Ch. D. 680.
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> (2) (1793) 1 ESP. 5.

being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view, then I think the position is exactly as if an agreement had been expressly made that the bill or cheque should operate as payment unless defeated by dishonour or by not being met; and I think that that agreement is implied from giving and taking the cheques and bills in question." The following observations of Lord Maugham in Bhokana Corporation v. Inland Revenue, Commissioners (1) are also apposite:

> " Apart from the express terms of section 33, sub-section 1, a similar conclusion might be founded on the well known common law rules as to the effect of the sending

> of a cheque in payment of a debt, and in the fact that though the payment is subject to the condition subsequent that the cheque must be met on presentation, the date of payment, if the cheque is duly met, is the date when the cheque was posted."

In the case before us none of the cheques has been dishonoured on presentation and payment cannot, therefore, be said to have been defeated by the happening of the condition subsequent, namely dishonour by non-payment and that being so there can be no question, therefore, that the assessee did not receive payment by the receipt of the cheques. The position, therefore, is that in one view of the matter there was, in the circumstances of this case, an implied agreement under which the cheques were accepted unconditionally as payment and on another view, even if the cheques were taken conditionally, the cheques not having been dishonoured but having been cashed, the payment related 2back to the dates of the receipt of the cheques and in law the dates of payments were the dates of the delivery of the cheques On the footing, then, that the assessee received payment as soon as the cheques were delivered to it the question still remains as to when and where the assessee received such payment. The (1) L. R. [1938] A.C 380 at p. 399.

answer is obvious, says the assessee, namely that it received Payment in Aundh where the cheques were delivered to it. The learned Solicitor-General, however, contests that argument. According to. him the cheques were delivered to the assessee as soon as they were posted. The rejoinder of the assessee is two-fold. In the first place it is said that this is an entirely new ,question of law which was never raised or argued before the Tribunal and was not dealt with by it and, therefore, cannot be said to arise out of the Tribunal's Order and consequently the Court has no jurisdiction, while exercising its advisory jurisdiction under section 66 of the Indian Income-tax Act, to permit such anew question of law to be raised at this stage. Learned Counsel for the assessee relies on the cases Of Commissioner Excess Profits Tax, West Bengal v. Jeewanlal Ltd. Chainrup Sampatram v. C. I. T., West Bengal (2), Alla- habad Bank Ltd. v. C..I. T. West Bengal (3), Mohanlal Hiralal v. C. I. T., C. P. & Berar (4), and Hira Mills Ltd., Cawnpore v. Income-tax Officer, Cawnpore(5), while the learned Solicitor-General refers us to the decisions in Madanlal Dharnidharka v. Commissioner of Income-tax, Bombay City(6), and Commissioner of Income-tax, Delhi v. Punjab National Bank Ltd. (7). In the view we have taken it is not necessary for us, on this occasion, to express any opinion on the larger question as to the scope, meaning and import of the words "any question of law arising out of" the Tribunal's order on the interpretation of which there exists a wide divergence of judicial opinion. It should be noted that this is not a base where the Tribunal having refused to refer a question of law an application was made to the High Court to, exercise its jurisdiction under sub-section (2) of section 66. Here the Tribunal in exercise of its powers under sub-section (1) of that section did refer a question of law to the High Court. Nobody at any time contended (1) [1951] 20 I.T.R. 39 at P. 47.

(2) [1951] 20 I.T.R- 484 at PP. 493, 496.

(3) [1952] 21 I.T.R. 169.

(4) [1952] 22 I.T.R. 448.

(5) [1946], 14 I.T.R. 417.

(6) [1948] 16 I.T.R. 227 at P. 232.

(7) [1952] 21 I.T.R. 526.

and even now it is not suggested before us that the question of law referred to the High Court did not arise out of the Tribunal's order or had not been properly referred to the High Court. A question of law arising out of its order having thus been properly referred by the Tribunal under sub-section (1) the High Court had to deal with and answer it in exercise of its jurisdiction under sub-section (5). In support of its contention that the question should be answered in the affirmative the Revenue advanced the argument, based on certain facts, that the cheques had been accepted only. conditionally and, therefore, there was no payment until the cheques had been cashed and the cheques having been cashed in Bombay the payment must be regarded as having been received in Bombay. That argument did not find favour with the High Court and that being the position the Revenue sought to raise before the High Court, as it does before us, an alternative argument, also based on facts, that the cheques having, at the request of the assessee, been posted at Delhi, the mere posting of the cheques in such circumstances operated as payment in Delhi. Here no new question of law is sought to be raised. The question of law still is, whether on the facts of this case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4(1)(a) of the Act. The argument is that as the cheques were posted at Delhi at the request of the assessee payment was received by it in British India. It is said that although the language in which the question has been framed is wide enough to include this branch of the argument, the question should, nevertheless, be read as circumscribed by the facts on which the Tribunal's decision was made and should not be regarded as at large. This suggestion means that the question must be read as limited only to those facts on which alone reliance was placed in support of the argument actually advanced before the Tribunal and on which then Tribunal's decision was founded, leaving out all other facts appearing on the record and even referred to in the Tribunal's order and the statements of the case. There is no warrant for such suggestion.

The language of the question clearly indicates that the question of law has to be determined " on the facts of this case." To accede to the contention of the assessee, will Involve the undue cutting down of the scope of the question by altering its language. Seeing that the High Court permitted this argument to be advanced before them we are not prepared to shut it out.

Sri Kolah then contends that the requisite facts, on which this branch of the argument may be based, are not to be found in the order of the Tribunal and the statements of the case and, therefore, this argument should not be entertained. There would have been considerable force in this contention if the facts necessary to support the new argument advanced by the Revenue were not on the record. But such is not the cases here as will be presently shown. The High Court conceded that if t he assessee had requested the Government to send the cheques by post then it would have made the post-office its agent and in that event the posting of the cheques by the Government at Delhi would have been delivery of the cheques to the assessee in Delhi. The High Court, however, held that there

was no finding by the Tribunal that it point of fact the assessee had ever requested the Government to send the cheques by post and that that being the position it could not be said that the cheques had been delivered to the assessee in Delhi. In our opinion, for reasons to be presently stated, this part of the decision of the High Court cannot be supported on facts and its conclusion cannot be sustained in law. Turning to the order of the Tribunal we find the following passages:

> " All payments for the goods supplied were made by cheques drawn by the Government department at Delhi on the Reserve Bank of India, Bombay Branch. The cheques were received by the assessee Company in its office in Aundh State."

The finding of fact recorded in the first statement of the case also comprises the following (inter alia):

> " These cheques were received by the assessee Company at its office in Aundh State by post,"

The finding of fact in paragraph 3 of the Supplementary Statement of the case is thus recorded:

> " 3. The assessee company used to submit the bills and on the form of the bill it used to write "Kindly remit the amount by a cheque in our favour on any bank in Bombay. The question for our consideration is as to what, on the legal principles laid down in judicial decisions, these findings of fact amount to.
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> In Norman v. Rickets(1), the creditor carrying on business as milliner in Bond Street wrote to one of the customers who resided in Suffolk saying the favour of a cheque within a week will oblige." The customer upon such request sent a cheque for the amount by post. The cheque was stolen in the transit and was paid by the Bank to the thief. It will be noted that there was no express request to send the cheque by the post, but nevertheless it was held that the sending of the cheque by post was payment. On appeal the Court of Appeal upheld the trial Court and observed:
>
> " An express request to send through the post was not necessary. If what the plaintiffs said amounted to a request to send the cheque by the post, then there was payment. To answer that question the existing circumstances must be looked at. A milliner in London wrote to a lady in Suffolk asking for a cheque. Did that letter reasonably lead the lady to suppose, and did she suppose that she might send the cheque by post? She could not suppose that she was to send a messenger with it or come up to London herself. The only reasonable and proper meaning to be attached to it, whatever Madame phillipe might have intended was that she was to send the cheque by post. She, therefore, reasonably believed that she was invited to send her cheque by post, and she did what she was asked to do. Consequently what she did amounted to payment."

In Thairlwal v. The Great Northern Railway Co.,(2) the directors by their report recommended (a) the declaration of dividend at certain rates, and (b) the (1) (1886) 3 T.L.R. 182.

(2) L.R. (1910) 2 K.B, 509.

despatch of dividend warrants by post. At the half yearly general meeting the shareholders passed a resolution that dividends be declared at certain altered rates but said nothing about sending the same by post. Dividend warrants were sent to a stock-holder by post but it was lost in the post. Bray J., held that in the circumstances there was a request by the stock-holder to the company to pay the amount due to him by means of a warrant sent by post. The case of Badische Anilin Und Soda Fabrik v. Basle Chemical Works(1), was concerned with a Swiss seller who was asked to send the goods by post to England which he did. The goods were, manufactured according to an invention protected by an English Patent. The question was as to who brought the goods to England so as to be liable to an action for infringement. It was held that the post-office was the agent of the English buyer and, therefore, the Swiss seller could not be sued. After stating that the seller had sent the goods in pursuance of the order from the buyer to a particular named carrier namely the post-office which, is after all only a carrier of parcels like any other carrier Lord Halsbury at p. 204 said:

> It is not necessary that the carrier should have been named. If, according to the ordinary course of delivery, the carrier would be the person who would receive it, that would be just as good, for the purpose of the argument, as if the carrier had been actually named; but we have not to consider that question here, because the carrier is named. Then, for what reason am I to depart from the well-known and recog- nised principle of law that, under these circumstances, when goods are delivered by the order of the buyer to a named' carrier, from that moment the goods vest in the buyer ?"
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> The decision in Comber v. Leyland(2), is very important for our purpose in that it explains the meaning and implication of the word " remit " which is the word used by the assessee when it requested the Government Department to " remit " the amount by cheque. There (1) L.R. [1898] A.C. 200.
>
> (2) L.R. [1898] A.C. 524.

was in that case no express reference to the post-office at all. Said Lord Herschell, at p. 530:

> "I cannot doubt that the word "remit " there means this and nothing beyond this-that the bank post bills, when obtained in favour of the plaintiffs, should be sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased. I think it is impossible on these words to maintain that there was an obligation and a liability incumbent upon him until those bank post bills had reached the hands of the plaintiffs in England.

> In Mitchell Henry v. Norwich Union Life Insurance Society Ltd.(1), the defendants sent a written notice. to the plaintiff stating that the sum of pound 48-5-8d which would shortly become due should be paid at their office and asking the plaintiff " when remitting " to return the notice. There was no express request to send the amount by post. Bailhache J. held that by the use of the word" remitting"

the defendants had impliedly authorised the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum in Treasury notes by post. Apart from the impropriety of sending a large amount in Treasury notes by post, this case does support the view that the request by the creditor " to remit " the amount due, without more, is tantamount to a request to send the amount by post. This decision was upheld by the Court of Appeal. On the other hand if there be no express or implied request by the creditor to send the amount by post the mere posting of a hundi duly endorsed in favour of the addressee does not operate as delivery of the hundi to the addressee so as to pass the title in the hundi to the addressee, for the post- office in such circumstances does not become the agent of the addressee. The case of Thorappa v. Umedmalji (2) is an instance on this point. In the case of ex parte Cote (3) also there was no request by the addressee to (1) L.R. [1918] 2 K.B. 67.

(2) (1923) 25 Bom. L.R. 604.

(3) L.R. (I873) 9 Ch. App. 27.

send the bills by post. The result of the various judicial decisions are summarised in Benjamin on Sale, 8th Edition, pp. 769-77 1, and in Chalmer's Bills of Exchange, 12th Edition, pp. 51-52.

A good deal of stress is laid by Sri Kolah on what he says is the basic difference between the postal regulations in England and those in India and he insists that the English decisions laying down the effect of sending cheques by post should not be rigidly 'followed here. He points out that in England the sender of the cheques has no right to reclaim the same after it is posted, and that, accordingly, immediately upon the posting of the cheques the post office becomes irrevocably the agent of the addressee and that, therefore, the delivery of the cheque to the post-office is, in English law, delivery to the addressee. But that, Sri Kolah maintains, is not the position under the Indian Post Office Act, 1898. We have been taken through the different sections of that Act and the rules made thereunder and Sri Kolah contends that under the Indian law the sender has the right to reclaim the letter until it is actually delivered to the addressee and, therefore, until that time the post- office remains the agent of the sender and consequently the posting of a cheque cannot in India be regarded as delivery of the cheque to the addressee. We may, however, point out that this right of the sender, on which so much stress and importance are laid by the learned advocate, is by no means an absolute right, for it is left entirely to the authorities to decide whether a letter once posted should be returned to the sender. This very narrow and qualified right can hardly be regarded as bringing about a position so different from that prevailing in England as to make the English decisions wholly inapplicable. It may also be mentioned that in spite of such contention the English decisions have been adopted by the Courts in India, e.g., Thorappa v. Umedmalji (supra) and the Indian Cotton Company Ltd. v. Hari Poonjoo (1). It is, however, not necessary to pursue this line of reasoning any further for the

principles underlying the English decisions are clearly consonant with the provisions of (1) I.L,R. 1937 Bom. 763.

the Indian law. There can be no doubt that as between the sender and the addressee it is the request of the 'addressee that the cheque be sent by post that makes the post-office the agent of the, addressee. After 'such request the addressee cannot be heard to say that the post-office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque 'Under the Post-Office Act, 1898, the post-office was his agent, when in fact there was no such reclamation. Of course if there be no such request, express or implied, then the delivery of the letter or the cheque to the. post-office is delivery to the agent of the sender himself. Apart from this principle of agency there is another principle which makes the delivery of the cheque to the post-office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance (see section 50 of the Indian Contract Act and illustration (d) thereto). Sri Kolah points out that when the Indian Contract Act, 1872, was passed, the Indian Post-Office Act, 1866, was in force. He has taken us through the relevant provisions of that old Act and he points out that those provisions were quite different from those of the present Act. According to him illustration (d) to section 50 of the Indian Contract Act must, after the passing of the Act of 1898, be taken to have become inappropriate, obsolete and incorrect. We do not think, that there is any basic difference between the two Acts in respect of the matter under discussion. It. does not appear to us that the Act of 1898 enlarges the right of the sender to reclaim the postal article to sub an extent as to nullify illustration (d) or otherwise to affect the well known general principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or, sanctioned by the promisee.

Applying the above principles to the facts found by the Tribunal the position appears to be this. The engagement of the Government was to make payment by cheques. The cheques were drawn in Delhi and received by the assessee in Aundh by post. According to the course of business usage in general to which, as part of the surrounding circumstances, attention has to be paid under the authorities cited above, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for trans- mission of such articles and according to the Tribunal's findings they -were in fact received by the assessee by post. Apart from the implication of an agreement arising from such business usage the assessee expressly. requested the Government to "remit " the amounts of the bills by cheques. This, on the authorities cited above, clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It can scarcely be suggested with-any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India. This posting in Delhi, in law, amounted to payment in Delhi. In this view of the matter the referred question should, with respect, have been answered by the High Court in the affirmative. We, therefore, allow the appeal and answer the question accordingly. In view of the fact that the appellant has failed in the main argument but has succeeded on a new one we think no order should be made as to costs except that each party should bear and pay his or its own costs before us as well as before the High Court.

Appeal allowed.