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to any other law for the time being in force, provided there is no express provision to the contrary in the Banking Act. If, as we hold, unamended s. 10 of the Banking Act expressly prohibits the employment of any person by a bank whose remuneration takes the form of a share in the profits of the company, then s. 2 of the Banking Act is of no help and cannot permit something which is expressly prohibited by s. 10.

For the reasons given above, we allow these seven appeals to the extent already indicated, namely, (1) the reference of 1952 is not now pending for determining the question of bonus for the relevant years in respect of particular banks and (2) section 10 of the Banking Act prior to the amendment of 1956 prohibits the grant of industrial bonus to bank employees when such bonus is remuneration which takes the form of a share in the profits of the banking company. In the circumstances of these cases and in view of the long drawn out nature of the dispute, we make no direction as to costs.

Appeals allowed in part.

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SHRI JAGDISH MILLS LTD.

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY
 NORTH, KUTCH AND SAURASHTRA,
 AHMEDABAD

(S. R. DAS, C. J., N. H. BHAGWATI, and
 M. HIDAYATULLAH, JJ.)

Income-tax—Assessee company manufacturing and supplying goods from outside British India—Stipulation for payment by cheque—Cheques remitted by post from British India—Post Office, if an agent of the assessee—Income, if received in taxable territories—Indian Income-tax Act (XI of 1922), s. 4(1)(a).

The appellant company, carrying on business in manufacturing and selling textiles at Baroda, received in the assessment years 1942-43 and 1943-44 payments in cheques from the Government of India for the supply of such goods on bills submitted, as agreed upon in prescribed printed forms which provided that the Government should pay the amount due to the appellant by cheque. The appellant, however, did not request or write to the Government indicating in what way the payment by cheque was

to be made. The Government sent the cheques from Delhi by post to the appellant at Baroda and it received and accepted them in Baroda in full and unconditional satisfaction of its claim and cashed them through its bank accounts in Bombay and Ahmedabad. The question was whether the amounts of the cheques were income, profits and gains received by the appellant in the taxable territories and were as such liable to tax under s. 4(1)(a) of the Indian Income-tax Act. The Income-tax Officer held that the amounts were received in British India as the cheques were drawn on banks in British India and the Appellate Assistant Commissioner on appeal affirmed his order. The Income-tax Appellate Tribunal on appeal held that even though the appellant did not ask the Government to send the cheques by post, there was an implied request to do so and following the decision of this Court in *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* [1955] 1 S.C.R. 185, held that the amounts of the cheques were received in the taxable territories and as such the appellant was liable to tax under s. 4(1)(a) of the Act. Hence these appeals by special leave. The question for decision was whether in the facts and circumstances of the case the stipulation that payments should be made by cheques implied a request by the appellant to the Government to send the cheques by post so as to constitute the Post Office its agent for receiving such payments.

Held, that regard being had to the general course of business usage which was followed in this case, there could be no doubt that the parties intended that the cheques should be sent by post which was the normal agency for transmission of such articles and, consequently, there was an implied request by the appellant to the Government to send the cheques by post so as to constitute the Post Office its agent for the purpose of receiving those payments.

Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd. [1955] 1 S.C.R. 185 and *Norman v. Rickets*, (1886) 3 T.L.R. 182, applied.

Pennington v. Crossley and Sons (Limited), [1879] 13 T.L.R. 513, considered.

Thorappa v. Umedmalji (1923) 25 Bom. L.R. 604 and *Ex parte Cote In re Deveza*, (1873) L.R. 9 Ch. 27, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 681 and 682 of 1957.

Appeals by special leave from the order dated August 2, 1954, of the Income-tax Appellate Tribunal of India, Bombay Bench 'A' in Income-tax Appeals Nos. 3756 of 1948-49 and 2161 of 1950-51.

R. J. Kolah and *I. N. Shroff*, for the appellants.

H. N. Sanyal, Additional Solicitor-General of India,
K.N. Rajagopal Sastri and *D. Gupta*, for the respondent.

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1959. May 12. The Judgment of the Court was delivered by

BHAGWATI J.—These two appeals with special leave under Art. 136 of the Constitution are directed against the order of the Income-tax Appellate Tribunal of India, Bombay Bench “A” (hereinafter referred to as “the Tribunal”) dated August 3, 1954, in Income-tax Appeals Nos. 3756 of 1948-49 and 2161 of 1950-51 whereby the Tribunal held that the amounts of cheques of Rs. 1,98,643 and Rs. 4,96,365 for the assessment years 1943-44 and 1944-45 were received by the appellant from the Government in the taxable territories and were as such liable to tax under s. 4(1)(a) of the Indian Income Tax Act (XI of 1922) (hereinafter referred to as “the Act”).

At all material times the appellant was a public joint stock company incorporated under the then Baroda State Companies Act and having its registered office at Baroda. The appellant was the owner of a textile mill and carried on business in manufacturing and selling textiles at Baroda.

In the accounting years 1942 and 1943 tenders were invited by the Government of India for some of the articles manufactured by the appellant and the appellant submitted its tenders to the Government of India which accepted the tenders and placed orders for supply of goods manufactured by the appellant. These orders were accepted by the appellant at Baroda and the deliveries of the goods manufactured by the appellant and sold by it to the Government of India were pursuant to the said orders to be and were in fact effected F. O. B. Baroda. In fact so far as the manufacture and sale of the goods supplied to the Government of India were concerned, as also the deliveries thereof, everything took place at Baroda, outside the then British India.

According to the conditions of the contracts governing the supplies made by the appellant to the Government, the system of payment was, that unless otherwise agreed upon between the parties, payment for delivery of the goods would be made on submission of the bills in the prescribed form in accordance with

the instructions given in the acceptance of the tender by a cheque on a Government Treasury or a Branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The appellant after effecting deliveries of the goods, submitted bills in the prescribed printed form which contained the sentence that "Government should pay the amount due to the appellant by cheque" but the appellant did not request or write to the Government, in what way the payment by cheque was to be made by Government to the appellant. After submission of the bills the appellant received at Baroda, in payment of its bills cheques through post from the Government drawn on a Government Treasury or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The said cheques were received at Baroda by the appellant from the Government, along with a memo stating:—

"The undersigned has the honour to forward herewith cheque No. dated in payment of the bills noted below."

then followed a tabular statement setting out the number, amount and date of the bills. On the top of the memo there was a direction that "it be immediately returned to the Controller of Supplies Accounts, with the acknowledgment form on the reverse duly signed and stamped." The acknowledgment form was expressed as follows:—

"The undersigned has the honour to acknowledge cheque No. dated for Rs. in payment of the bills noted in the first column on the reverse."

The payments made by cheques were accepted by the appellant unconditionally and in full satisfaction of its claim for goods supplied to the Government. On receipt of such cheques, the appellant endorsed the same and sent them either to Bombay or Ahmedabad in the Banking account of the appellant at such places.

By his orders dated September 20, 1945, and March 16, 1943, for the assessment years 1942-43 (account year being calendar year 1941) and 1943-44 (account year being calendar year 1942) the Income-tax Officer

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held that the sums of Rs. 1,98,643 and Rs. 4,96,365 being the amounts of the cheques received by the appellant for the goods supplied to the Government of India amounted to receipt of income, profits and gains in British India during the said accounting years inasmuch as the said cheques were drawn on banks in British India and were liable to tax.

On appeal to the Appellate Assistant Commissioner from the said orders of the Income-tax Officer, the Appellate Assistant Commissioner confirmed the orders of the Income-tax Officer and dismissed the appeals.

From the said decision of the Appellate Assistant Commissioner the Appellant appealed to the Income-tax Appellate Tribunal who, after two remand orders on various points in the case which have no relevance to the question involved in these appeals, finally by its order dated August 3, 1954, held that even though the appellant did not write to the Government saying that the cheques be sent by post, there was an implied request to the Government to send the cheques by post, observing that where a person in Baroda writes to another in Delhi to send the money due to him by a cheque there is an implied request to send the cheque by post. The appellant could not have intended that the cheques would be sent otherwise than by post and it was not the case of the appellant that the cheques received from the Government were delivered by hand on behalf of the Government to the Appellant at Baroda and following the decision of this Court in *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.*⁽¹⁾, the Tribunal held that the amounts of the cheques referred to above were received by the appellant in the taxable territories and as such the appellant was liable to tax under s. 4(1)(a) of the Act.

On December 20, 1954, the appellant applied for special leave to appeal against the said order of the Tribunal under Art. 136 of the Constitution which leave was granted by this Court by its order dated April 15, 1955. By a further order dated September 19, 1955, both the appeals were consolidated for the purposes of printing of the record and for filing of the

(1) [1955] 1 S.C.R. 185.

petitions of appeal and the statements of case therein. These appeals have now come up for hearing and final disposal before us.

On the facts narrated above it is clear that the mode of payment agreed upon between the appellant and the Government of India, as specified in Cl. 21 in the printed form of tender, was that the payments for the delivery of the goods were to be by cheques drawn on a Government Treasury or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The appellant used to submit the bills in the prescribed printed form which mentioned that the Government should pay the amounts due to the appellant by cheque. In payment of these bills the appellant used to receive at Baroda cheques drawn by the Government as aforesaid along with a memo of acknowledgment which stated that the cheques mentioned therein were forwarded in payment of the bills noted in the tabular statement setting out the amount, number and date of the bills. The acknowledgment form on the reverse was thereafter duly signed and stamped by the appellant acknowledging the receipt of the cheques in payment of the said bills and was despatched by the appellant to the Government. These payments by cheques were accepted by the appellant unconditionally and in full satisfaction of its claims for the goods supplied to the Government.

The case of the Revenue in the first instance was that even though these cheques were received by the appellant in Baroda they were sent by the appellant after duly endorsing the same either to Bombay or Ahmedabad in the banking accounts of the appellant at such places and these cheques were cashed and the proceeds thereof were received by the appellant in either Bombay or Ahmedabad and accordingly the income, profits and gains were received by the appellant within the taxable territories. This contention was really of no avail to the Revenue because on the particular facts of the present case it was common ground that the payments made by cheques were accepted by the appellant unconditionally and in full satisfaction of its claims for goods supplied to the

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Government and therefore if the cheques be held to have been received by the appellant in Baroda the income, profits and gains were also received in Baroda which was outside the taxable territories. Even if the receipts of the cheques at Baroda be treated as a conditional payment of the appellant's claims for the goods supplied to the Government, the position was no better, for the simple reason that the cheques not having been dishonoured but having been duly cashed the payments related back to the dates of the receipts of the cheques and in law the dates of payments were the dates of the delivery of the cheques which was certainly in Baroda—out side the taxable territories. In either event, it could not be urged by the Revenue that the income, profits and gains were received by the appellant at any place other than Baroda (*Vide the Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (1), *ibid* at 196). The position which was, however, taken up by the Revenue subsequently was that the cheques were posted by the Government in Delhi at the implied request of the appellant and therefore the payments must be held to have been received by the appellant at Delhi, the Post Office being thus constituted the agent of the appellant for the purposes of receiving the same. Learned Counsel for the appellant contested this position by urging that the only thing mentioned by the appellant was that the payment for the goods supplied by the appellant to the Government was to be by cheques and there was no request either express or implied emanating from the appellant for the despatch of these cheques by post with the result that if the Government chose to send these cheques by post from Delhi it was not in pursuance of any request express or implied made by the appellant in that behalf but it was so done by the Government on its own initiative thus constituting the Post Office the agent of the Government and there was no receipt of the monies by the appellant until the cheques reached their destination at Baroda. The case of the *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (1), which was relied upon by Revenue was sought

(1) [1955] 1 S.C.R. 185.

to be distinguished on the ground that in that case the assessee had written on the bill form the words "Kindly remit the amount by a cheque in our favour on any bank in Bombay" which was an express request conveyed to the Government by the assessee to send the cheque by post thus constituting the Post Office the agent of the assessee. No such words having been used by the appellant in this case the only consequence of the provision contained in the bill form that the payment be made by cheque was that the Government was authorised or entitled to make the payment by cheque; but how to reach those cheques to the appellant was left to the sweet will and discretion of the Government and if the Government chose to send those cheques by post there was no request, express or implied, emanating from the appellant to send the cheques by post so as to constitute the Post Office the agent of the appellant for the purposes of receiving the same.

It is true that in the *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (1), the words "kindly remit the amount by a cheque in our favour on any bank in Bombay" were specifically used by the assessee and these words were construed to be an express request by the assessee to the Government to send the cheques by post.

The various authorities which were discussed, viz., *Thairlwall v. The Great Northern Railway Co.* (2); *Badische Anilin Und Soda Fabrik v. The Basle Chemical Works* *Bind Schedler* (3); *Comber v. Layland* (4) and *Mitchell-Henry v. Norwich Union Life Insurance Society* (5), were also cases where the expressions used were construed as words of express request constituting the Post Office the agent of the party receiving the money or the goods and went to support the case made by the Revenue that the post office was constituted the agent of the assessee for the purposes of receiving the cheques when they were posted by the Government in Delhi. Where, however, no such express words were used and the matter rested merely in the stipulation that the payment would be made by cheques, would the mere

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(1) [1955] 1 S.C.R. 185.

(2) [1910] 2 K.B. 509.

(3) [1898] A.C. 200.

(4) [1898] A.C. 524.

(5) [1918] 2 K.B. 67.

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posting of the cheques in Delhi be enough to constitute the Post Office the agent of the appellant so that the income, profits and gains may be said to have been received by the appellant within the taxable territories?

If there was nothing more, the position in law is that the Post Office would not become the agent of the addressee and the mere posting of the cheque would not operate as delivery of the cheque to the addressee so as to pass the title in the cheque to the addressee. (Vide *Thorappa v. Umedmalji* ⁽¹⁾ and the case of *Ex-parte Cote In re Daveza* ⁽²⁾).

Where, however, on the facts and circumstances of the case an implied request by the creditor to send the cheque by post can be spelt out, the Post Office would be constituted the agent of the addressee for the purposes of receiving such payment. The authority in support of this proposition is to be found in *Norman v. Ricketts* ⁽³⁾. In that case Madame Phillippe, one of the plaintiffs, carried on business as a milliner in Bond-street, and one of her customers was the defendant, Mrs. Ricketts. Between March 1884, and March, 1885, goods were supplied by Madame Phillippe to Mrs. Ricketts to the amount of £ 142. Mrs. Ricketts lived in Suffolk, and at the end of March, 1885, Madame Phillippe wrote to her in Suffolk saying, "the favour of a cheque within a week will oblige". Mrs. Ricketts accordingly, on April 6, sent Madame Phillippe a cheque for the amount by post. The cheque was an open cheque payable to the order of Madame Phillippe. The cheque was stolen in the transit, and Madame Phillippe never received it, but it was paid by Mrs. Ricketts' bankers to the thief. Madame Phillippe then commenced this action to recover the amount, and Mr. Baron Huddleston who tried the case without a jury, held [(1885) 2 T.L.R. (607)] that the sending of the cheque was payment and gave judgment for the defendant. The plaintiffs appealed and the appeal was dismissed by the Court of Appeal consisting of Lord Esher, M. R., Lindley and Lopes, L. JJ. The Master of the Rolls said that if a debtor had to pay his creditor

(1) (1923) 25 Bom. L.R. 604.

(2) (1873) L.R. 9 Ch. 27.

(3) (1886) 3 T.L.R. 182.

money, as a general rule the debtor must come and pay his creditor. But if the creditor asked him to pay in a particular way, the debtor might do so. If asked to pay through the post, the putting the letter in the post with the money was a sufficient. The only question here was whether the plaintiffs asked the defendant in effect to send the money through the post. 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 Phillippe 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 to the appellant. The Lords Justices concurred with this judgment.

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Resting itself upon the observations in this case this Court observed in *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* ⁽¹⁾ at p. 295 :—

“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 transmission of such articles and according to the Tribunal's findings they were in fact received by the assessee by post.”

Learned Counsel for the appellant particularly drew our attention to the case of *Pennington v. Crossley and Sons (Limited)* ⁽²⁾ a decision of the Court of Appeal consisting of Lord Esher, M.R., A.L. Smith and Rigby, L. J.J., where *Norman v. Ricketts* ⁽³⁾ was distinguished. In that case the plaintiff sold on December 10,

(1) [1955] 1 S.C.R. 185.

(2) [1897] 13 T.L.R. 513.

(3) (1886) 3 T.L.R. 182.

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1896 the goods in question to the defendants and on the same date an invoice was sent to the defendants under which the defendants were entitled to discount if the payment was made within 14 days. Upon December 24 the defendants posted a cross cheque made payable to the plaintiff or his order; and with the cheque was sent a form of receipt for signature by the plaintiff. The envelope containing the cheque was properly addressed to the plaintiff, but was not registered. There was no express request to send the cheque by post. The cheque was never received by the plaintiff but was cashed by a stranger on the strength of a forged endorsement of the plaintiff's name thereupon. On an action to recover the price of the goods sold and delivered the defendants contended that the posting of the cheque amounting in law to payment, and gave evidence that for about 20 years before this transaction payments for goods in question, as between the plaintiff and the defendants were always made by cheque sent by post in the form of receipt given above. The learned Judge held that the course of business showed that the parties had agreed that the payment should be made by cheque, and that the posting of the cheque amounted to payment, and accordingly gave judgment for the defendants. The Court of Appeal reversed this decision. The Master of the Rolls in his judgment distinguished the case of *Norman v. Ricketts* ⁽¹⁾, stating that in that case there was what amounted to a request to send a cheque by post and the Court held that the posting of the cheque was payment. There was no such request here. The course of business between the plaintiff and the defendants was not taken to mean that there was a request to the defendants to send the cheque by post and that the plaintiffs would run the risk of the cheques miscarrying in the transit. The defendants sent to the plaintiff cheques by post on the various sales, together with a form of receipt to be signed by him independently of any arrangement. There was nothing in the circumstances to warrant the conclusion that putting the cheque in the post was to be taken as the delivery of the cheque to the plaintiff, the only facts

(1) (1886) 3 T.L.R. 182

being that the defendants always sent cheques by post and that when the plaintiff received them he sent back the receipt duly signed.

This case does not militate against the ratio of the decision in *Norman v. Ricketts* ⁽¹⁾, but really confirms the same. If on the facts and circumstances of that case the Court of Appeal had been able to find any request, express or implied, to send the cheques by post the decision would certainly have been confirmed but in so far as there was nothing in the circumstances of the case from which such an inference could be raised the Court of Appeal observed:—

“It would be most monstrous to infer from those circumstances a request to send a cheque by post and that the plaintiff would consider that he had received it as soon as it was posted.”

The other Lord Justices delivered judgment to the same effect and the appeal was allowed.

The above ratio is really determinative of the question before us. The stipulation in the contract between the appellant and the Government was that the payment would be made by cheques. The Government of India was located in Delhi and the cheques would be necessarily drawn by it from Delhi. Could it be imagined that in the normal course of affairs the cheques thus drawn in Delhi would be sent by a messenger to Baroda so that they may be delivered to the appellant in Baroda? Or that the officer concerned would come to Baroda himself and hand the same over to the appellant in Baroda? The only reasonable and proper way of dealing with the situation was that the payment would be made by cheques which the Government would send to the appellant at Baroda by post. According to the course of business usage in general which appears to have been followed in this case, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles. If that were so, there was imported by necessary implication an implied request by the appellant to send the cheques by post from Delhi thus constituting the Post Office its agent for the purposes of receiving those payments.

(1) (1886) 3 T.L.R. 182.

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Learned Counsel for the appellant further drew our attention to certain provisions of the Post Office Act, 1898 and the postal regulations framed thereunder and tried to argue that the Post Office was really the agent of the Government and the Government could recall the cheques at any time before they actually reached the appellant at Baroda. All these provisions were discussed by this Court in the *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (1), and it was held that these provisions did not help the assessee. The position as it obtains was thus summarised at p. 204:—

“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.”

In our opinion the principle which has been enunciated by us in the *Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd.* (1), is applicable to the facts of the present case, even though the words “to remit the amount by cheque” have not been specifically used herein. Non-user of those words does not make any difference to the position and it is not possible to distinguish the present case from that case merely on this ground.

We are, therefore, of opinion, that the Income-tax Appellate Tribunal was right in the conclusion to which it came and these appeals must accordingly be dismissed with costs, one set between the two appeals.

Appeals dismissed.