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(1962) 05 CAL CK 0018

In the Calcutta High Court

Case No : Income-tax Reference No. 41 of 1958

A. RAZZAK — APPELLANT

Vs

COMMISSIONER Income Tax, WEST BENGAL. — RESPONDENT

Date of Decision : 18-05-1962

Acts Referred:
Income Tax Act, 1922 — Section 11(1), 33B, 41(1), 66(1)

Citation : (1963) 48 ITR 276

Hon'ble Judges : Laik, J;G.K. Mitter, J

Bench : Full Bench

Judgement

LAIK J. - This is a reference u/s 66(1) of the Indian Income Tax Act, 1922, for the determination of the following two questions :

"(1) Whether, on the facts and in the circumstances of this case, the provisions of section 33B of the Act were rightly applied by the Commissioner of Income Tax ?

(2) Whether, on the facts and circumstances of this case, the profits and gains of the business carried on by the assessee as trustee were assessable u/s 10(1) of the Indian Income Tax Act in the hands of the trustee as an individual carrying on business; or whether the provisions of section 41 of the Indian Income Tax Act were applicable in the facts and circumstances of this case and the assessment should be made upon an association of persons of which the said Abdul Razzak was the trustee ?"

The facts are :

On March 20, 1937, one Baborally Sardar executed a deed of trust for maintenance of his sons and carried on the business as a trustee at Hogg Market, Calcutta, which is the subject-matter of the present reference. The said business was intended to be and actually carried on for the benefit of the assessee himself and his other three brothers in equal shares. On March 15, 1941, the said Baborally appointed the assessee as a new trustee in pursuance

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of the terms of the said deed of 1937. Baborally died in June, 1941.

We are concerned here with the three assessment years, viz., the years 1951-52, 1952-53 and 1953-54.

The Income Tax Officer assessed the income under the provisions of section 23(3) read with section 41 of the Income Tax Act dividing the income into four equal shares, viz., of the assessee and of his three brothers, as stated above, for the purpose of taxation. The Commissioner cancelled the order of the Income Tax Officer under the provisions of section 33B of the Income Tax Act and directed that a fresh assessment should be made on the assessee in the status of an individual, inter alia, holding that the tax should be payable by the assessee under the provisions of section 10(1) of the Act relying on the observations of Saifudin Alimohamed and Another Vs. Commissioner of Income Tax, Bombay City, . Appeals taken by the assessee before the Tribunal having failed, the instant reference was made. The same question of law arises in all the three assessment years and in the three applications for reference.

We are told by Mr. Sen, appearing on behalf of the assessee, and not denied by Mr. Meyer, appearing on behalf of the revenue, that for all the years prior to and as well as after the instant three years of assessment, the determination of the assessment was u/s 41 and not u/s 10(1) of the Act in respect of the same business, but in my view on the principles laid down by their Lordships of the Supreme Court in Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar, ; affirming those in the case of Karnani Industrial Bank Ltd. Vs. Commr. of Income Tax, West Bengal, , and also on the principles laid down in another decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs. C Parakh and Co. (India) Ltd., , the said determination would not operate as estoppel or res judicata.

So far as the first question is concerned, Mr. Sen, in his usual fairness, concedes that the said question, i.e., as to the application of section 33B of the Act should be answered in the affirmative and against his client, the assessee.

But he strenuously argued the second question, viz. [[1956] Commissioner of Income Tax, Bombay Vs. C Parakh and Co. (India) Ltd., ; Commissioner of Income Tax, Bombay Vs. C Parakh and Co. (India) Ltd., , that the provisions of section 41 are applicable to the facts of the present case and not the provisions of section 10(1) of the Act.

Mr. Sen develops his argument by saying that the provisions of section 10(1) are generally controlled by the special provisions contained in section 41 of the Act. He contends that the measure of the liability of the assessee as a trustee is the liability of each beneficiary and the assessment should be made at the individual rates of tax applicable separately to the total income of each beneficiary. He strongly relies on the decision of this court, viz., Official Trustee of THE OFFICIAL TRUSTEE OF WEST BENGAL Vs. COMMISSIONER OF Income Tax, WEST BENGAL., .

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Mr. Meyer on behalf of the revenue says that the special provision in section 41 of the Act might have applied but as, according to him, the Supreme Court ruled in the case of W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, ; W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, .] to the effect that the trustee is the owner of the property and holds the same "for the benefit" of the beneficiaries and not "on their behalf", the word trustee, wherever appearing in the said section 41, should be deemed to be non est, that is to say, goes out of the said section. According to him, a trustee in section 41 cannot, on the basis of the said Supreme Court decision, receive the income "on behalf of" the beneficiaries. In other words, when a trustee is the owner of the property, i.e., business, in the instant case, then the income out of the same must be his and he should be assessed as such.

To appreciate the argument of Mr. Meyer and the effect of the said Supreme Court decision the provisions of section 41 of the Income Tax Act are set out below :

"Section 41. (1) In the case of income, profits, or gains chargeable under this Act which the Courts of Wards, the Administrator-General, the official trustee or any receiver or manager (including any person whatever his designation, who in fact manages property on behalf of another) appointed by or under any order of a court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including the trustee or trustees under any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, official trustee, receiver or manager or trustee or trustees, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly :

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons :

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.

(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein

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referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains."

The Supreme Court in the said decision of W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, :] did not consider the above provisions of section 41 of the Income Tax Act, but considered only section 11(1) of the U.P. Agricultural Income Tax Act, 1948, which runs as follows :

"Where any person holds land, from which agricultural income is derived, as a common manager appointed under any law for the time being in force or under any agreement or as receiver, administrator or the like on behalf of persons jointly interested in such land or in the agricultural income derived therefrom, the aggregate of the sums payable as agricultural Income Tax by each person on the agricultural income derived from such land and received by him, shall be assessed on such common manager, receiver, administrator or the like, and he shall be deemed to be the assessee in respect of the agricultural Income Tax so payable by each such person and shall be liable to pay the same."

In dealing with the said section of the U.P. Act their Lordships of the Supreme Court (Bhagwati, S.K. Das and Gajendragadkar JJ.) considered the expression, "trust" and "trustee" and referred to both English and Indian laws and ruled that the legal estate is vested in the trustee who held it "for the benefit of" the beneficiaries and not "on their behalf", because the said two expressions are not synonymous and conveyed different meanings.

In my view, the language of section 11(1) of the U.P. Act and section 41 of the Income Tax Act are really different and the following points of difference arise :

(a) The word "trustee" is not there in section 11(1) of the U.P. Act.

(b) The words "in the like manner and to the same amount would be leviable", etc., appearing in section 41 of the Income Tax Act are absent in section 11(1) of the U.P. Act.

(c) Section 11(1) of the U.P. Act contains a deeming provision making a person holding the land, etc., an assessee which is not the case in section 41 of the Income Tax Act.

(d) Section 11(1) dealt primarily with the person holding the "land" and thereafter deals with income arising therefrom but section 41 deals with purely income.

(e) In section 11(1), there is a specific provision that the persons must have a joint interest on the land with the persons on whose behalf he holds, which is not the case in section 41 of the Income Tax Act.

(f) Provisions of sub-section (2) of section 41 are totally absent in section 11(1) of the U.P. Act.

(g) Facts in the instant case and those in the reported decision of the Supreme

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Court also materially differ.

It is also my opinion that in the aforesaid case of W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, , it was definitely held that the trustees, the appellants before the Supreme Court, who were the legal owners of the trust estate, did not hold the land from which agricultural income was derived "on behalf of" the annuitants. Their Lordships of the Supreme Court were considering in the said case as to whether the conditions in section 11(1) of the U.P. Act were fulfilled or not and in that context made the observations as to the position of the trustee and the general definition of trust but section 41 of the Income Tax Act was not specifically dealt with by their Lordships. The observations made by their Lordships in the said reported decision were in a different context and I rely on the very observations of Bhagwati J. in the very same reported decision at page 480, who delivered the judgment of the Supreme Court in dealing with another observation of Sir John Romilly M.R. in Lister v. Pickford [(1865) 55 E.R. 757.] to the following effect :

"What the court was considering there was the question of limitation and adverse possession and these observations were made in that context."

Mr. Sen also relied on a decision of this court in Birendra Kumar Datta Vs. Commissioner of Income Tax, Calcutta, , where the case of Holdsworth [[1958] W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, was explained. Bachawat J., in delivering the judgment on behalf of the court, observed as follows :

"In my judgment the ratio of that decision has no application to the present case. It should be borne in mind that section 41 of the India Income Tax Act by its express language distinctly applies to the case of a trustee whereas there were no express words to that effect in section 11(1) of the U.P. Agricultural Income Tax Act, 1948. The language used in section 41 of the Indian Income Tax Act is very different from that used in section 11 of the U.P. Agricultural Income Tax Act, 1948. Though a trustee may not hold trust properties on behalf of the beneficiaries, he may be entitled to receive the income of the trust properties in his representative character as a trustee on behalf of the beneficiaries."

Mr. Meyer contended that the above observation made by his Lordship, Bachawat J., to the effect that, though the trustee might not hold the properties on behalf of the beneficiaries, still he might be entitled to receive the income of the trust properties in his representative character as a trustee on behalf of the beneficiaries, is an observation difficult to follow and cannot be reconciled.

We need not express any opinion as to whether that is so or not, but for the purpose of this case it is sufficient when we say that the principles and the ratio enunciated in the said decision of the Supreme Court are not applicable to the facts of the present case.

In another decision of the Supreme Court, Commissioner of Income Tax, Kerala

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and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, . their Lordships in dealing with a question as to whether the first proviso to section 41(1) of the Indian Income Tax Act, 1922, applied to the facts of the said case and as to whether the mutawalli was assessable on the income of the properties at the maximum rate, Subba Rao J., who delivered the judgment on behalf of the court (Gajendragadkar, Subba Rao and Hidayatullah JJ.), held at page 177 :

"Therefore, the words on behalf of any person in section 41 of the Act can only mean on behalf of the beneficiaries and not on behalf of the Almighty."

Their Lordships further held that :

"..... section 41(1) of the Act provides for a vicarious assessment in order to facilitate the levy and collection of Income Tax from a trustee in respect of income of the beneficiaries. In express terms it equates the mutawalli of a wakf to a trustee."

In a still more recent judgment of the Supreme Court in the case of The Commissioner of Income Tax Bombay Vs. Manilal Dhanji, Bombay, : their Lordships of the Supreme Court dealt with the provisions of section 41 of the Indian Income Tax Act. The facts in the said case were that the assessee created a trust in favour of himself, his wife and brother. The scheme of the trust deed was that a certain sum was set apart by the assessee and it was provided that the interest on that amount should be accumulated and added to the corpus and a minor daughter of the assessee was to receive the income from the corpus by the addition of interest when she would attain the age of 18. The taxing authorities included the income derived from the said trust fund in the total income of the assessee purporting to act u/s 16(3)(b) of the Income Tax Act. The trustees were to hold the trust fund and to pay the net interest and income thereof to the assessee "for the maintenance of himself and his wife and for the maintenance, education and benefit of all his children till his death". The Appellate Tribunal, on an appeal by the assessee, did not accept the contention to the effect that the assessee received the amount in trust for himself and his wife and children and it was open to the department to proceed under the first proviso to section 41(1) of the Income Tax Act and recover tax on a separate assessment made on the assessee as a trustee in respect of the said sum at the maximum rate, because the individual shares of the beneficiaries on whose behalf the money was receivable were indeterminate and not known. On a reference, the High Court accepted the contention of the assessee against which the department took the appeal to the Supreme Court.

We are not concerned here with the other main questions that were decided by their Lordships of the Supreme Court in the said decision, but it would be profitable to quote below the observations of their Lordships on section 41 of the Income Tax Act with which we are concerned in the instant case. S.K. Das J., who delivered the judgment on behalf of the court (S.K. Das, Hidayatullah and

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Shah JJ.), states as follows in the penultimate paragraph of the judgment :

"Under section 41 of the Income Tax Act it was open to the department either to tax the trustees of the trust deed or to tax those on whose behalf the trustees had received the amount. The true position of the assessee in this case was that he was a trustee and not the sole beneficiary under the trust deed. He held the income of the trust for himself, his wife and his children... In respect of the sum of Rs. 14,170 the assessee was a trustee, within the meaning of section 41 of the Income Tax Act, appointed under a trust declared by a duly executed instrument in writing and as such trustee he had the right to contend that his assessment in respect of the money received by him not as a beneficiary but as a trustee could only be made under the first proviso to section 41(1)."

Mr. Meyers argument goes contrary to the observations made above in the said two later decisions of the Supreme Court in Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, : and The Commissioner of Income Tax Bombay Vs. Manilal Dhanji, Bombay, :

It is to be remembered that both the expressions "trustee" and "on behalf of" appear in the Income Tax Act of 1922, though the Indian Trusts Act is of the year 1882.

In the instant case the shares of persons on whose behalf the income is received by the assessee are determinate and the assessment on the assessee will be a separate assessment for each of the persons on whose behalf the income is received.

Therefore :

Question No. 1 is not pressed and needs no answer.

Question No. 2 - First part is answered in the negative and the second part is answered in the affirmative, that is to say, the answer is that the provisions of section 41, Income Tax Act, were applicable in the facts and circumstances of the case and the assessment should be made as a separate assessment for each of the persons on whose behalf the income is received.

There will be no order for costs in this reference.

G.K. MITTER J. - I agree.

Order accordingly.

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