(1975) 02 PAT CK 0012

In the Patna High Court

Case No : Tax Case No. 81 of 1972

Additional Commissioner of Income Tax APPELLANT

Vs

S. Surjit Singh RESPONDENT

Date of Decision : 20-02-1975

Acts Referred:
Income Tax Act, 1961 — Section 256
Limitation Act, 1963 — Article 120

Citation : (1975) 101 ITR 433

Hon'ble Judges : S.K. Choudhuri, J;Madan Mohan Prasad, J

Bench : Division Bench

Advocate : Shambu Sharan, for the Appellant; Shyameshwar Dayal, for the Respondent

Judgement

Madan Mohan Prasad, J.—This is an application for substituting the legal representative of an assessee in a reference u/s 256 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. It is said that the assessee in the present case died on 26th March, 1975, but the petitioner came to have knowledge thereof shortly before the 22nd April, 1974, when the present application for substitution was made. In the counter-affidavit filed by the proposed legal representative it has been stated that the assessee had died not on the date aforesaid, but on the 26th February, 1973.

3. The legal representative proposed to be substituted is the widow of the assessee and thus she is in a better position to know about the date of death of the assessee who happened to be her husband.

4. On her behalf it has been contended that the present application was made long after the period of ninety days allowed by Article 177 of the Limitation Act which corresponds to Article 120 of the new Limitation Act, 1963, and for that reason in view of Order XXII, Rule 4 of the Code of Civil Procedure, the case has abated as a whole. Learned counsel for the petitioner has, however, contended

that there is no question of abatement in a case of this nature for the reason that the provisions aforesaid have no application to a case of reference u/s 256 of the Act. He has relied upon several decisions in Commr. of Income Tax, U.P. and C.P. and Berar, Lucknow Vs. I.D. Varshani, , COMMISSIONER OF Income Tax, WEST BENGAL Vs. GOURISHANKAR LAL SINGHA., and Commissioner of Income Tax Vs. His Highness Maharaja Shri Sawai Man Singh of Jaipur (Deceased) represented by his Highness Maharaja Sawai Bhawani Singh of Jaipur, and a Special Bench decision of this court in the case of Maharajadhiraja of Darbhanga Vs. Commissioner of Income Tax, .

5. It appears that the uniform view taken by different High Courts, including this court, in Commissioner of Income Tax v. I.D. Varshani of the Allahabad High Court, Commissioner of Income Tax v. Gourishankar Lal Singha of the Calcutta High Court, Commissioner of Income Tax v. Maharaja Shri Sawai Man Singh of Jaipur of the Rajasthan High Court and Maharajadhiraja of Darbhanga v. Commissioner of Income Tax militates against the argument raised on behalf of the opposite party. In the Allahabad case, during the pendency of the proceeding the assessee was dead and no application for substitution was made within the time prescribed for it. It was held that in the absence of any provision in the Act or the Rules made thereunder and in the absence of any rule providing for abatement of the reference and in the absence of anything to show that Order XXII of the CPC (hereinafter referred to as "the Code") had been made applicable to a reference under the Act, the case did not abate by not substituting the legal representative within 90 days. Their Lordships further held that Articles 176 and 177 of the Limitation Act had no application to a case of reference under the Act because they deal with the representatives of a deceased plaintiff or a deceased defendant or the legal representatives of a deceased appellant or a deceased respondent. A similar view was taken in the Rajasthan case. It was held in that case that the High Court does not exercise either original or appellate jurisdiction but only an advisory or consultative jurisdiction in cases of reference u/s 66(2) (now Section 256), and, therefore, such a reference is not a civil proceeding within the meaning of Section 141 of the Code and Order XXII of the Code, therefore, has no application and as such there is no abatement of the case on the death of the assessee. Reliance was also placed on the decision of the Allahabad High Court in the case referred to above and two other cases, namely, COMMISSIONER OF Income Tax, HYDERABAD Vs. GULAM HYDERKHAN (DECEASED) AND OTHERS., of the Andhra Pradesh High Court and Commissioner of Income Tax v. Gourishankar Lal Singha of the Calcutta High Court and the decision of this court in Maharajadhiraja of Darbhanga v. Commissioner of Income Tax. Their Lordships also relied on a decision of the Supreme Court in Seth Premchand Satramdas Vs. The State of Bihar, , for the proposition that a reference u/s 21(3) of the Bihar and Orissa Sales Tax Act, 1944, which was similar to Section 66 of the Indian Income Tax Act, 1922, was a proceeding in which the High Court was neither exercising its original nor its appellate jurisdiction, but only a consultative one. Another case in which a similar view was

taken is that of the Calcutta High Court referred to above. After reviewing the decisions of the Allahabad, Andhra Pradesh and Patna High Courts which have been referred to above, the learned judges held, as in other cases, that Order XXII of the Code had no application and that there was no abatement of a case of reference under the Act on the death of an assessee and in the absence of non-substitution of his legal representatives. In the Patna case, a Special Bench of their Lordships were called upon to answer the same question as in the instant case. Courtney Terrell C.J. said that proceedings before the High Court on reference u/s 66(2) of the Act is not a suit and no question of abatement, therefore, arises. The learned Chief Justice said further that the High Court was bound to deal with a reference whether or not the assessee or his heirs appear. Das J. relied on a decision in the case of Smith v. Williams [1922] 1 KB 158 for the proposition that

"where the proceedings have once commenced, they must go forward until adjudicated upon, notwithstanding the death of the assessee after the commencement of the proceedings, and that if there be no procedure entitling the legal representative of the assessee to continue the proceedings, the court will mould a convenient form of procedure to meet the case."

6. On its basis the learned judges agreed with the learned Chief Justice.

7. An analysis of the decisions referred to above clearly brings out the following premises: (i) That the proceedings u/s 256 of the Act is not a civil proceeding as the High Court exercises an advisory or consultative jurisdiction and not either original or appellate jurisdiction, (ii) that Order XXII of the Code has no application because it relates to suits and appeals alone; and (iii) that Articles 176 and 177 (new Article 120 of the Limitation Act, 1963), applies only to suits and thus not to a reference under the Act.

8. I respectfully agree with the view that Order XXII of the Code has no application to a case of reference u/s 256 of the Act. The reason is obvious that Order XXII of the Code makes itself applicable to suits and appeals alone. And consequently in my view Articles 176 and 177 (article 120 of the Limitation Act, as it stands now) have no application to the case of a reference under the Act; I also agree with the view that the High Court does not exercise either its original or appellate jurisdiction in dealing with such cases, but merely an advisory or a consultative jurisdiction. This view is supported further by a decision of the Supreme Court in the case of Rajputana Textiles (Agencies) Ltd. Vs. The Commissioner of Income Tax, Bombay City, . Kapur J., speaking for the court, said as follows :

"This appeal is brought against the judgment of the High Court answering the question referred and, therefore, in its advisory jurisdiction. The jurisdiction which this court exercises in appeal is of the same character and, therefore, any question which was not referred to the High Court cannot be allowed to be raised at this stage."

9. I do not, however, base my conclusion on the premises that Section 141 of the Code has no application because it is not a civil proceeding within the meaning of that section. It is not necessary for me to express any opinion on that point for the purpose of disposal of the present case. As I have said neither Order XXII of the Code applies nor does Article 120 of the Limitation Act, 1963. Therefore, there can be no abatement of a case of reference.

10. I look at this case yet from another angle. Section 4(1) of the Code contains a saving clause and lays down that:

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, -by or under any other law for the time being in force."

11. The Income Tax Act contains provisions in Sections 256 to 260 in respect of references under the Act. Next, it provides in Sections 261 to 262 for appeals to the Supreme Court. Section 256 lays down how a statement of the case is to be drawn up and referred to the High Court. Section 257 provides for a similar statement of case to the Supreme Court in certain cases. Section 258 is in respect of the power of the High Court or the Supreme Court, Section 259 provides how the case is to be heard by the High Court and Section 260 lays down how the decision of the High Court or the Supreme Court is to be given. Section 261 provides for appeal to the Supreme Court and Section 262 provides for the manner in which the appeal is to be heard by that court. It will appear from the aforesaid provisions relating to the High Court that there is no procedure similar to that as laid down under Order XXII of the Code contained in this Act. For the matter of that, so far as High Courts are concerned, these provisions do not make the provisions of Order XXII of the Code applicable to cases of reference. I will do well, however, to point out that in respect of the appeal to the Supreme Court, Section 262 of the Act clearly states that the provisions of the Code relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals u/s 261 of the Act as they apply in the case of appeals from decrees of a High Court. It is significant that in respect of appeals to the Supreme Court, the Code in its relevant parts is made applicable, but in respect of reference to the High Court it is not. A reference to some of the sections of the Act will further show that there are some other provisions which make relevant provisions of the Code applicable to proceedings under the Act. Section 131 of the Act provides that the Income Tax Officer, Appellate Assistant Commissioner, Inspecting Assistant Commissioner and Commissioner shall have the same powers as are vested in a court under the Code, when trying a suit in respect of the matters relating to discovery and inspection, enforcing the attendance of any person, including any officer of a banking company and examining him on oath, compelling the production of books of account and other documents, and issuing commissions. Turning to Section 255 of the Act one finds Sub-section (6) thereof providing that the Appellate Tribunal shall, for the

purpose of discharging its functions, have all the powers which are vested in the Income Tax authorities referred to in Section 131. I have already referred to the provisions contained in Section 262 of the Act.

12. It will thus appear that there are no provisions in the Income Tax Act which provide for abatement of a case of reference on account of the death of an assessee and the non-substitution of his heirs within any particular period of time. It also appears that wherever the legislature considered it necessary to apply the relevant provisions of the Code to proceedings under the Act it has done so. Upon well-established principle of construction of statutes, it must be said that if the whole of the CPC applied to proceedings under the Income Tax Act, the legislature could not have the necessity of making certain provisions alone thereof applicable to proceedings under the Act. The conclusion is obvious that only those provisions of the Code which have been specifically made applicable to proceedings under the Act do apply.

13. There is another way of looking at this and that is, that abatement of a suit or appeal after a certain time is in the nature of penalty which is the result of non-compliance with the statutory provision of law. It results in the extinguishment of the right of a plaintiff or an appellant to prosecute the suit or appeal any further. In the absence of any such penal provision in the Income Tax Act, it would be unfair to read such a provision contained in the Code as incorporated in the Income Tax Act and thereby saddle a litigant with an obligation which a litigant, prima facie, does not suffer from. If that were to be done, it would affect a special law like the Income Tax Act and the special jurisdiction conferred thereby on the High Court. In my view, therefore, Order XXII of the Code has no application even for this reason.

14. Even if I were to assume that Section 141 of the Code has application to a proceeding in a case of reference, it lays down merely that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. I put emphasis on the words underlined. Before making the procedure provided in the Code applicable to cases of references, a court will have to take into consideration whether or not it would be justified in making those provisions applicable. As laid down in the cases mentioned above, a case of reference has to be disposed of by the High Court answering the question referred to it. If Order XXII were made applicable, the High Court would not be at all in a position to answer the question referred to it which it is bound to do. Thus, the mere death of the assessee and the non-substitution of his legal representatives would stand very much in the way of the High Court answering the question referred to it. In other words, if Order XXII of the Code were applicable the High Court''s jurisdiction would become infructuous for answering the question referred to it. In my view, therefore, the procedure prescribed under Order XXII of the Code could not be made applicable to a case of reference u/s 256 of the Act.

15. For the reasons mentioned above, I am clearly of the view that the death of

an assessee in a case of a reference u/s 256 of the Act, Order XXII of the Code has no application and, there is, thus, no abatement on account of the death of the assessee and non-substitution of the legal representative on the record. The objection made to this effect must, therefore, be overruled.

16. In the result, I allow the application and direct the legal representative named in the petition to be substituted in place of the deceased assessee.

S.K. Choudhuri, J.

17. I agree.