

(1977) 05 OHC CK 0008

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 1761, 1762, 1764, 1765, 1766 and 1767 of 1975

Ajit Kumar Sur

APPELLANT

Vs

Commissioner of Income Tax and Others

RESPONDENT

Date of Decision : 10-05-1977

Acts Referred:

Income Tax Act, 1961 — Section 171

Citation : (1977) 44 CLT 297 : (1977) 110 ITR 114

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; Standing Counsel, for the Respondent

Judgement

R.N. Misra, J.—These are six applications by a common petitioner for quashing of the consolidated order passed by the Commissioner of Income Tax, Orissa, Bhubaneswar, in six applications of the petitioner u/s 264(1) of the Income Tax Act of 1961 (hereafter referred to as "the Act") registered as Income Tax Revisions Nos. 66 to 71 of 1974-75. The relevant assessment years are 1965-66, 1966-67, 1967-68, 1970-71, 1971-72 and 1972-73. The assessee, an individual, is a Hindu, governed by the Dayabhaga school of law. He has interest in certain immovable properties located at Cuttack and Angul and in his returns for these years, he disclosed one-third share of the income from these properties and the disclosed income from these sources was included in the respective assessments. The assessee preferred appeals against each of the assessments but had not raised a ground challenging the inclusion of the one-third share income of rent from the aforesaid property in his assessments for these years and the appellate authority did not deal with the question also. Against the consolidated decision of the appellate authority, the petitioner carried six revisions as already noted to the Commissioner of Income Tax and claimed that the inclusion of the one-third share income from the said property in the respective assessments of the petitioner as an individual was unjustified and illegal.

2. According to the petitioner, the Hindu joint family of which the petitioner is a member is the owner of the properties in question and income earned from the properties belonged to the Hindu undivided family which under the Income Tax law was a unit for assessment. There was no provision for adding the income of the Hindu undivided family in the hands of an individual constituting a family. Before the Commissioner, the following genealogy was placed.

Tarini	Sur	(died 1923)	_____									
							Sarat	Hema	Satish	Suren	(died 1931)	
(died 1934)	(died 1954)	(died 1963)									_____	
Ramchandra	_____		Satyabadi							(died in Mruganka		
Purnanka Sasanka		Akhoya Ajit 1965)			_____		_____					
Samdarshan	Sudarsan		Priyadarshan									
			_____						Sisir	Mihir	Samir	

Belarani Binapani

3. It was claimed that the properties at Cuttack had been purchased during 1914 and 1919 while the property at Angul had been acquired in the year 1927. Though the petitioner is governed by the Dayabhaga school, under the personal law of the petitioner, there can be a Hindu undivided family and as properties had been acquired by such a family and that family still continued to be undivided, income from such property should have been assessed in the hands of the Hindu undivided family which was the owner of the property and no part of the Hindu undivided family income could be assessed in the hands of an individual member thereof.

4. The Commissioner of Income Tax found that the petitioner was governed by the Dayabhaga school of Hindu law, the petitioner's father and his two uncles were co-owners of the properties, always having defined and ascertained shares therein, and there was no evidence that they had come to live jointly by their own volition ; there was no evidence that the heirs of these three acquirers of properties had decided to constitute themselves into a Hindu undivided family; it was found as a fact that while the petitioner stays at Cuttack, his brother and cousins reside at different places in Calcutta and the various members of the family are engaged in different income earning activities and are obviously living in separate, messes ; the petitioner had failed to establish by cogent evidence that the properties continued to be owned by a Hindu undivided family and, in the absence of any partition in terms of Section 171 of the Act, income of the Hindu undivided family property was not assessable in the hands of an individual member thereof. Accordingly, he rejected the revision petitions.

5. Section 2(7) of the Act defines "assessee" to mean :

".....a person by whom any tax or any other sum of money is payable under this Act.....".

and "person" has been defined in Clause (31) to include, inter alia, an individual and a Hindu undivided family. There can be no dispute that if factually a Hindu

undivided family exists, income earned by the family, until a partition is recorded as provided in Section 171, has to be assessed as such and there is no option available to the revenue to assess the individual coparceners in respect of their respective shares in the family income on the analogy of individual members of an association of persons. The presumption regarding a Hindu undivided family available under the Mitakshara school of Hindu law ordinarily would not extend to a Dayabhaga family in the same manner, though there are certain authorities to say that there is some presumption. We may refer to a Bench decision of the Calcutta High Court in the case of Charandasi Debi and Others Vs. Kanai Lal Moitra and Others, , where it has been observed :

"The normal state of every Hindu family is joint, presumably joint in food, worship and estate and, until the contrary is proved, the presumption is that the family continues joint. The presumption is stronger in the case of brothers than in the case of cousins. A joint Hindu family under the Dayabhaga, like a Mitakshara family, is: normally joint in food, worship and estate. Under the Dayabhaga law there cannot be a joint family consisting of the father and the sons ; so long as the father is alive he is the master. But after the death of the father, the test to see whether the sons constituted a joint Hindu family is whether they were joint in food, worship and estate. But the simple fact that the brothers lived in separate portions of the same ancestral house after their father's death cannot necessarily lead to the inference that they were members of a joint Hindu family. Other circumstances have got to be looked into in this connection." (Quoted from the head-note).

6. Admittedly, the family as alleged by the petitioner now consists of sons and grandsons of the persons who had acquired the property. Burden lay on the petitioner to establish by cogent evidence that in mess, estate and worship, the sons and grandsons of the acquiring members of the family had continued joint and during the relevant period, the Hindu undivided family existed owning the property. Indisputably, the enquiry on such a score has got to be factual and whether the petitioner, on whom the burden lay, had established the fact as alleged by him and had thus discharged the burden, was one of fact and no question of law is involved in the matter. The Commissioner's enquiry has covered the normal tests indicated by the Calcutta High Court in the decision referred to above and on taking a sum total view of the materials he has come to the conclusion that no Hindu undivided family was in existence at the relevant time. The jurisdiction in a certiorari proceeding is admittedly not appellate and it is not for this court to re-appreciate the evidence and disturb the finding of fact.

7. There is one more feature which cannot be lost sight of. The petitioner in all these years offered his share of rent to be assessed to tax by including the same in his returns. No revised return was filed on the footing that a mistake had occurred and the income of the Hindu undivided family which had been incorporated in the returns should be permitted to be deleted. As already noted, in the appeals carried by the assessee to the Appellate Assistant Commissioner,

no specific ground on this score had been taken and we may assume, as the Appellate Assistant Commissioner has not dealt with this point, that it was also not pointedly canvassed. In the petitions before this court, the following assertion has been made by the petitioner :

"That the petitioner preferred appeals u/s 246 of the Income Tax Act, 1961, before the Appellate Assistant Commissioner of Income Tax, Special "A" Range, Cuttack, against the said assessments challenging certain items of income adopted by the Income Tax Officer on mere surmises only and though specifically no ground was taken in the grounds of appeal challenging the property of 1/3rd share income of rent returned as an item of assessment but in course of argument of the appeals it was canvassed before the Appellate Assistant Commissioner of Income Tax regarding the correctness of assessment of 1/3rd share income of rent notwithstanding the fact that the petitioner voluntarily offered the said item of income for assessment under the head " House property".

That the learned Appellate Assistant Commissioner of Income Tax, Special " A " Range, Cuttack, by his order dated November 17, 1973, without going into the question regarding includibility of 1/3rd share income of house property decided the appeals on other grounds."

8. Petitioner has nowhere indicated that he was personally present when the matter was heard and was aware of such a ground having been canvassed at the hearing. In the revision applications, we do not find any categorical assertion that the appellate authority had missed a vital point argued in support of the appeals. In the circumstances, we are prepared to accept learned standing counsel's contention that the question was for the first time mooted before the Commissioner.

9. Mr. Mohanty for the petitioner strongly relied upon four authorities in support of his stand that notwithstanding the fact that the petitioner had included in his returns the share income from house property, it was still open to him to dispute its includibility in appeal and revision and the decisions are, a Bench decision of the Oudh Chief Court in the case of Rani Anand Kunwar v. Commissioner of Income Tax [1940] 8 ITR 126 (Oudh Chief Court), a Full Bench decision of the Madhya Pradesh High Court in the case of SARUPLCHAND AND HUKUMCHAND Vs. UNION OF INDIA AND ANOTHER., , a Bench decision of the Calcutta High Court in the case of COMMISSIONER OF Income Tax Vs. ASIT KUMAR GHOSH., and a decision of the Supreme Court in the case of The Bihar State Co-operative Bank Ltd. Vs. The Commissioner of Income Tax, .

10. In the Oudh case [1940] 8 ITR 126, the facts were these. The assessee was paid a sum of Rs. 30,700 as maintenance allowance by the talukdar of the Oel Estate during the year 1933-34, and an amount of Rs. 36,000 for the year 1934-35. The assessee was the grandmother of the talukdar. The names of the guzaradars of the estate were intimated to the revenue by the talukdar by a

letter dated 26th August, 1935. The Income Tax Officer by his letter dated 2nd September, 1935, enquired if the guzaradars, including the assessee, were members of a joint Hindu family with the talukdar or not, upon which the Raja replied in the negative. Thereafter, the Income Tax Officer issued notices calling upon the assessee to furnish returns of her income for the years mentioned above and the assessee in compliance with the notices submitted her returns. The Income Tax Officer accepted the returns and raised demands. The assessee challenged her liability on the ground that the same was not liable to Income Tax at all, because the assessee was a member of the joint Hindu family. The question for consideration was whether, having filed the returns, the assessee was entitled to challenge the assessment ? The court held, keeping the circumstances in which the returns were filed in view, that the appeals were entertainable. This certainly would be no authority for the present question.

11. The Full Bench of the Madhya Pradesh High Court SARUPLCHAND AND HUKUMCHAND Vs. UNION OF INDIA AND ANOTHER., was considering a case where the question as to whether the Income Tax Officer of Indore had power to assess an assessee was in dispute and the court found that as the objection to the place of assessment was not specifically raised, the matter must be taken to have been concluded. This too does not support the assessee's stand.

12. The Calcutta decision reported in COMMISSIONER OF Income Tax Vs. ASIT KUMAR GHOSH., was considering the applicability of the principle of estoppel. The assessee, as the sole residuary legatee under a will, brought a suit against the executors and had been appointed as receiver by the court. He had been put in possession of the estate, but as the administration of the estate by the executors had not been completed and the assessment proceeding against them for the assessment year 1944-45 was still pending, the High Court gave the assessee the liberty, to apply for substitution in legal proceedings pending against the estate. On the application of the assessee, he was substituted for the executors by the Income Tax Officer and assessment was completed. The question for consideration was whether the substitution of the assessee pursuant to the order of the High Court validated the assessment on him ? The court found that under the Income Tax Act he could not be an assessee and, therefore, his substitution pursuant to the orders of the High Court in the civil litigation could not stand as a bar to the challenge of he being an assessee. The facts are peculiar and would not apply to the present case. The Supreme Court decision relied upon by the assessee reported in The Bihar State Co-operative Bank Ltd. Vs. The Commissioner of Income Tax, dealt with a case where the assessee, a co-operative bank, showed certain interests received by it as income from other sources and the Income Tax Officer assessed the same to tax as such. The assessee-bank appealed on the footing that the interest was exempt under notification of the Central Board of Revenue and, therefore, could not have been assessed. The court found that interest from the deposits arose from the business of the bank and were, therefore, exempt and inclusion of the same in the return did not stand in the way of disputing the taxability thereof. Here

again, the question arose in a very different setting.

13. In the present case, the question for consideration is as to whether the property from which rent has been earned belonged to a Hindu undivided family or belonged to different co-owners. The assessee must be assumed to have known the true state of affairs and when he offered one-third of the rental income to be assessed in his hands, it must flow from his conduct that the property did not belong to a Hindu undivided family and had, therefore, been rightly offered to be assessed as income in his hands. It is not the assessee's case that there was a mistake and in fact, if it were so, the assessee would certainly have taken steps for revising the return for each of these years. When the dispute is as to whether the assessee had discharged the burden of establishing that the Hindu undivided family owning the property was in existence, the assessee's conduct in offering one-third of the rental income to be assessed in his own hands certainly goes a long way to negative the assessee's contention.

14. A number of other authorities had been cited before us, but on the analysis we have presented above, we are satisfied that the matter should be concluded against the assessee-petitioner without reference to those other authorities. Each of the writ applications accordingly fails and is dismissed. We make no order as to costs.

Das J.

15. I agree.