(1989) 08 KL CK 0042

In the High Court Of Kerala

Case No : Income-tax Reference No''s. 464 to 466 of 1985

Ajit Traders APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 24-08-1989

Acts Referred:
Income Tax Act, 1961 — Section 184

Citation : (1989) 80 CTR 201 : (1990) 181 ITR 451 : (1990) 51 TAXMAN 26

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : C.M. Devan, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

K.S. Paripoornan, J.—These references are at the instance of an assessee to Income Tax. The respondent is the Revenue. The matter relates to the assessment years 1978-79 to 1980-81. The Income Tax Appellate Tribunal (in short, "the Tribunal") has referred the following question of law for the decision of this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the trusts, which were partners in the assessee-firm, had not been validly created and that the assessee-firm was not, therefore, entitled to registration u/s 185 of the Income Tax Act, 1961 ?"

2. The assessee is a firm known" as "Messrs. Ajit Traders". It was constituted by a partnership deed dated July 1, 1976. There were five partners therein. Partners Nos. 2, 4 and 5 became partners in a representative capacity representing three trusts. There was only one beneficiary in each trust. They were all minors. The Income Tax Officer took the view that the trusts were formed as a device to avoid tax on the income of the minors which would be taxed along with their parent''s income. The Appellate Assistant Commissioner held that the trusts had not been validly created. The trusts were created by deeds executed on June 24, 1976. The Tribunal, on a review of the entire facts and the respective deeds,

came to the conclusion that the settlors had first gifted the amounts to the minors, and the gifted amounts became the property of the minors and it is only thereafter that the trusts were created. The Tribunal held that the settlors could not have constituted a trust without complying with the provisions of Section 7 of the Indian Trusts Act. It was held that the trusts constituted of the minor''s properties are invalid. In consequence, it was held that there was no valid partnership. Thereafter, at the instance of the assessee, a common question of law extracted hereinabove has been referred for the decision of this court.

3. We heard counsel. After a review of the entire facts and circumstances, the Tribunal, in paragraph 12 of its judgment dated October 26, 1984, categorically found as follows :

"Under these circumstances, we hold that the amounts were first transferred to the minors by way of gifts, that the amounts became the property of the minors and that it was only subsequently that the trusts were constituted. It is clear from Section 7 of the Indian Trusts Act that the settlor can constitute a trust only with regard to a property at his disposal and not with regard to a property which already belongs to a minor."

4. The finding of the Appellate Tribunal that the amounts were first transferred to the minors as gifts, that the amounts became the properties of the minors and that it was only subsequently that the trusts were constituted, is a finding of fact. This finding of fact is not challenged by way of framing an appropriate question. In answering the question referred to us in this perspective, we have to proceed on the basis that when the amounts were first transferred to the minors and they had become the property of the minors, and if a trust was subsequently constituted by the guardians (settlors), will it be valid in law ? Considered in the light of Section 7 of the Indian Trusts Act, our answer will be in the negative. The settlors can constitute a trust only with regard to property at their disposal. Here, the properties were not available at their disposal. It belonged to the minors. The settlors were incompetent to create a trust over the minors'' properties. So, if the trusts were invalidly constituted, the trusts could not be partners in the firm. The partnership was invalid. The Income Tax Officer was justified in holding so and in refusing registration.

5. We, therefore, answer the question referred to us in the affirmative, against the assessee and in favour of the Revenue.

6. A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.