(1956) 03 PAT CK 0006

In the Patna High Court

Case No : Miscellaneous Judicial Case No. 504 of 1954

CHOUDHARY MD. NAZIRUL HASSAN APPELLANT

Vs

STATE OF BIHAR. RESPONDENT

Date of Decision : 27-03-1956

Acts Referred:

Bihar Agricultural Income Tax Act, 1948 — Section 28(2)

Citation : (1957) 31 ITR 385

Hon'ble Judges : Ramaswami, C.J;Raj Kishore Prasad, J

Bench : Full Bench

Judgement

RAJ KISHORE PRASAD, J. - u/s 28 (2) of the Bihar Agricultural Income Tax Act, 1948 (Bihar Act XXXII of 1948), hereinafter referred to as "the Act", the Board has drawn up a statement of the case and referred it, with its opinion thereon, to the High Court for deciding the question of law, referred by it, arising out of its order. The question formulated by the Board is in these terms :

"Is the net surplus, which the executant received during her life-time under clause (d) (ix) (b) and which the applicant is entitled to get as mutawalli for maintenance and livelihood taxable as a receipt in his capacity as a de facto beneficiary within the meaning of section 10 of the Act."

It is admitted by the parties that in the above question, formulated by the Board, there is no mention of the deed, although it is implied, and there is also a wrong reference to the clause in the deeds. After supplying the omissions, the question may be reframed as follows :

"Is the net surplus, which the executant received during her lifetime under clause (f) of paragraph 13 of the deed of wakf dated the 9th April, 1914, executed by Mst. Bibi Azimul Nisa, and which the applicant is entitled to get as mutawalli for maintenance and livelihood taxable as a receipt in his capacity as a de facto beneficiary within the meaning of section 10 of the Act."

In order to decide the above question of law, it is necessary to mention the terms of the document, which has been officially translated, and a few facts.

On the 9th April, 1914, Mst. Bibi Azimul Nisa executed a registered deed of wakf, known as wakf-alal-aulad, in accordance with the Mussalman Wakf Validating Act, 1913 (Act VI of 1913), dedicating absolutely all her properties, and divesting herself of all rights as a propertries. In the document, she appointed herself as the first mutawalli and took charge of the property as such. She further provided, under paragraph 4 of the deed, after her death the petitioner, Md. Nazirul Hassan, would be the mutawalli, and after him a line of devolution to the mutawalli-ship was also provided in the deed. She further provided in paragraph 13 of the deed, that the mutawalli should realise the entire income and pay the entire Government demand, and spend the various items of expenses, which were mentioned in clause (a) to (i) of paragraph 13. Clause (e) and (f) of paragraph 13 of the deed, which are important, are in terms :

"(e) Out of the income, after meeting the expenses incurred over the said items, it shall be the duty of the mutawalli to save Rs. 2,000 (Rupees two thousand) annually and purchase property with the same, and out of the profit accruing from that property, the mutawalli shall entitled to take 1/4th share therein after meeting the expenses, i.e., Government demands, the village expenses and costs of suit, the remaining profits thereof shall continue to be spent over giving maintenance and aid to the children (both in the male and female lines) of the mutawallis, appointed from the family, thorough the mutawalli, and so long as even one man in the family will survive the said fund shall be kept quite separate, and when in the family no one will survive, then the said property shall also be included in the wakf property, entered in this deed.

(f) After meeting all the expenses aforesaid the entire money, whatever be saved, shall belong to me, the executant, and the mutawalli appointed from the family, for my and his maintenance."

In respect of the agricultural income for the year 1355 Fasli, which was the accounting period and of which the year of assessment was 1951-52, the assessee petitioner was assessed to agricultural Income Tax amounting to Rs. 11,491-5-0 by the Agriculture Income Tax Officer, Monghyr, on the 10th April, 1951. The assessee took an objection that whatever he got from the estate, he got as a mutawalli, and not as a beneficiary, and not as a muawalli, and, since a beneficiary is taxable under the proviso to section 10 of the Act, the petitioner was liable to pay tax, and, accordingly, he assessed him. On appeal by the petitioner, the Additional Commissioner, Agricultural Income Tax, Bhagalpore, by his order dated the 20th August, 1951, reserved the order of the Agriculture Income Tax Officer, and held that whatever the assessee got was a mutawalli, and not as a beneficiary, and, as such, the petitioner was exempt from payment of any tax u/s 10 of the Act. The Agriculture Income Tax Officer held that whatever he assessee got from the estate, he gots as a beneficary and not as a mutawalli, and since a beneficiary taxable under the proviso to section 10 of the Act, the petitioner was liable ot pay tax and accordingly he asessee him. On appeal by the petitioner the additional Commissioner, Agriculture Income Tax, Bhgalpore by his order dated the 20th August, 1951 reveresed the order of the Agriculture Income Tax Officer and held that whatever the assessee got was as a mutawalli and not as a beneficiary and as such the petitioner was exempt from payment of any tax u/s 10 of the Act. Against the above order the 20th August, 1953, held that what the assessee got under paragraph 13 (e) of the deed of wakf was not assessable, but what he got under paragraph 13 (f) was assessable, because he got the surplus income, under paragraph 13 (f), as a beneficiary. The petitioner then moved the Board u/s 28 (2) of the Act, and asked it to refer several questions of law, arising out of its order, to the High Court for decision. The Board accordingly, on the 15th of July, 1954, referred the question of law mentioned above to this Court for its decision.

"Agricultural income" has been defined by section 2, clause (a), of the Act. Section 3 is the charge section, under which agriculture Income Tax shall be charged for each financial year in accordance with, and subject to the provisions of, this Act on the total agriculture income of the previous year of every person. Section 10 of the Act, on which reliance has been placed by both the parties, is in these terms :

"10. All agricultural income of Muslim trust referred to in section 3 of the Mussalman Wakf Validating Act, 1913, created before the 12th October, 1938, shall be executed from the operation of this Act :

Provided that the share of beneficiary under a trust under the aforesaid Act, of the description commonly known as wakf-alal-aulad, shall not be exempted and the tax may be realised from the mutawalli and the basis of taxation shall be the share of each beneficiary.

Explanation. - for the purposes of this section, beneficiary means the settlor, his family, children or descendants."

Under section 10 of the Act, therefore, wakf-alal-aulad, which means a dedication by the means of which the property is tied up, so that the usufruct might be utilised for the benefit of the members of the family, created before the 12th of October, 1938, is excluded from the operation of the Act. The proviso to section 10, however, provides that the share of a beneficiary under such a trust shall not be exempted, and the basis of taxation in such a case shall be the share of each beneficiary, and the tax may be realised from the mutawalli. The explanation to section 10 further provides that for the purpose of section 10, "a beneficiary means the settlor, his family, children or descendants." Section 3 (a) of the Mussalman Wakf Validating Act, 1913, also provides that it shall be lawful for any person professing the Mussalman faith to create wakf for, among other purposes, "the maintenance and support wholly or partially of his family, children or descendants."

Dr. Sultan Ahmad, appearing for the assessee, has contended that the surplus income received by the petitioner, under paragraph 13, clause (f), of the deed, was as mutawalli, and not as beneficiary, and, therefore, he would be exempt from payment of tax u/s 10 of the Act.

Mr. Lalnarain Sinha, the learned Government Advocate, appearing for the State of Bihar, has, however, contended in reply that on a true construction of paragraph 13, clause (f), of the deed, it must be held that the petitioner received the surplus money as a beneficiary; and that the petitioner is a beneficiary within the meaning of the explanation to section 10 of the Act, because he comes under the head "family."

From the document, it is quite clear that the mutawalli was entitled to take 1/4th share under paragraph 13, clause (e), of the deed, and the remaining profit was to spent over giving maintenance and aid to the children of the mutauwallis who were appointed from the family. Under paragraph 13, clause (f), of the deed, after meeting all the expenses mentioned in clause (a) to (e) of paragraph 13 of the deed, the surplus money saved was to belong to the executant and the mutawalli appointed from the family maintenance of both. It is clear, therefore, that under clause (f) of paragraph 13, the mutawalli was to get, over and above what he got under clause (e) of paragraph 13, a share also in the surplus money along with the settlor. The petitioner in the present case, therefore, had a dual capacity. He had two capacities, one as a mutawalli, and other as a beneficiary. What he received under clause (e) of paragraph 13, he received as a mutawalli, but whatever he received under clause (f) paragraph 13, he received as a beneficiary.

The word "family", as used in the explanation to section 10 of the Act, must be construed with reference to Mohammadan law, and, in particular with reference to the word "family" used in section 3 (a) of Act VI of 1913. The word "family" in the latter Act has been interpreted, in certain decisions, so as to include (1) all those persons residing in the same house as the settlor and dependent upon him for maintenance, and (2) all those connected with the settlor through a common progenitor or by ties of common lineage. (See Ismail Haji Arat v. Umar Adbulla and Another). It is not, however, confined to persons who are dependants for their maintenance on the wakif, the settlor; and as such, the son of a half-brother, the son and grandson of a paternal uncle, and the son of a half-sister, though not dependants of the wakif for their maintenance, and residing separately from him, have been held to be included in the term "family". (See Inland Ali v. Ashiq Ali). I accept these decisions as laying down the correct law.

The petitioner in the present case has stated in paragraph I of his application made u/s 28 (2) of the Act before the Board that Bibi Azimun Nissa, the executant of the deed of wakf, was his step-mother. On the deed itself. It is clear that he was treated as a member of her family by the wakif, and the petitioner was residing in the same house as the settlor and dependant upon her for maintenance. In my opinion, therefore, the assessee in the present case satisfies the above tests. I, therefore, hold that the petitioner was a "beneficiary" within the meaning of the explanation to section 10 of the Act, and, as such, he was liable to be taxed under the proviso to section 10 of the Act.

Dr. Sultan Ahmad presented another argument that the surplus income out of the trust property ceased to be "agricultural income" the moment it came into the hands of the petitioner under clause (f) of paragraph 13 of the deed and, as such, it was not liable to be taxed u/s 3 of the Act because it was not "agricultural income" within the meaning of section 2 (a) of the Act. In support of his argument, he relied on Jawad Ali Shah v. Commissioner of Income Tax, U. P. and Ajmer-Merwara, Lucknow, in which it was held that the remuneration received by the mutawalli in lieu of his services on a certain percentage basis out the money realised by him, and in his hands, could not be called "agricultural income." This case, however, has no application to the present case because the petitioner was not to get a certain percentage as remuneration under a contract for personal service calculated on the amount of profits earned by the employer upon the total profits made, but he was to get a moiety share in the entire surplus income from the agricultural land left over and saved after meeting all the expenses mentioned in the deed. In such a case, the character of the income derived from the agricultural land did not lose its character as "agricultural income."

The learned Government Advocate has submitted in reply, that the surplus income which came into the hands of the assessee or the settlor was "agricultural income" within the meaning of section 2 (a) and, therefore, it was chargeable to "agricutural income tax" u/s 3 of the Act. He has relied on Syed Muhammad Isa v. Commissioner of Income Tax, Central and United Provinces, which was approved by the Privy Council in premier Construction Co., Ltd. v. Commissioner of Income Tax, Bombay City.

In the Allahabad case, under two deeds, a person was appointed mutawalli and he was to receive both the agricutural and non-agricultural income, and, after performing the functions of his office, was allowed to appropriate the residue of the amount received in lieu of his services. The whole of the amount received by him was sought to be assessed on the ground that once the income of the agricultural properties reached the hands of the assessee in his primary character as, mutawalli, its character as "agricutural income" was exhausted, and, therefore, when the residue, after satisfying the prior trusts, was appropriated by the assessee in his secondary capacity as beneficiary, it ceased to be "agricutural income" and had, therefore, lost the protection of section 4 (3) (viii) of the Income Tax Act, 1922 (Act XI of 1922). It was held by the Special Bench that so long as the services were, and are, performed, the assessee was, and will, beneficially interested in the surplus income of that surplus under the trusts of wakf; and the "agricutural income" which he received as mutawalli did not change its character when he received the residue as beneficiary.

The Privy Council case, in which the previous decisions of the Board in Gopal Saran Narain Singh v. Commissioner of Income Tax, Bihar and Orissa, Commissioner of Income Tax, Bihar Orissa v. Maharajadhiraj of Darbhanga, Nawab Habibulla v. Commissioner of Income Tax, Bengal, and the above Allahabad case were considered, dealt with the nature of the commission of a managing agent of the company, a part of whose income was agricultural income. The assessee claimed exception from tax on the ground that his remuneration at 10 per cent. of the profits was calculated with reference to the income of the company, part if which was agricultural income. It was held that the assessee received no agricutural income as defined by the Income Tax Act, but that he received a remuneration under a contract for personal service calculated on the amount of profits earned by the employer, payable not in specie our of any item of such profits but out of any moneys of the employer available for the purpose, and that the remuneration therefore was not "agricultural income," and was not exempt from tax. Sir John Beaumont, who delivered the judgment of the Board, in the above case, observed :

"In their Lordships view the principle to be derived from a consideration of the terms of the Income Tax Act and the authorities referred to is that where an assessee receives income, not itself of a character to fall within the definition of agricultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it derived, or the method by which it is calculated. But if the income received falls within the definition of agricultural income it earns exemption, in whatever character the assessee receives it."

In the present case, under the document itself, there is no doubt that so long as the services were, and are, performed, the assessee was, and will be, beneficially interested in the surplus income of the properties, and was, and will be, a beneficiary in respect of that surplus under the trust of the wakf. I am unable to accept that the circumstance that the assessee is required to perform the services of a mutawalli by itself alters in any way, in the case, in this case, his intrinsic character as a beneficiary under the instrument of wakf. I think, therefore, that the assessee is entitled to be treated as a beneficiary, and not as a servant of the trust by contact. The position would, I think, have been quite different if the assessee had been a mere employee of the wakf by a contract deriving a salary which would be payable out of the income of the wakf properties. When the effective source in discovered and it is found that the immediate and effective source is agricultural land, the income, which directly springs, and is derived, from it, is "agricultural income," and it does not change its character subsequently, even when the income, or part thereof, changes hands. I, therefore, can see no reason why the entire income of the wakf, in its origin "agricultural income," would undergo some chance, and lose its character as "agricultural income", before it appropriated, or retained by the assessee beneficially, to which he was entitled under clause (f) of paragraph 13 of the wakf deed after keeping down the prior trusts. I hold, therefore, that the surplus income lift over, which came in the hand of the assessee under clause (f) of paragraph 13 of the wakf deed, still retained its character as "agricultural income" and was as such taxable u/s 3 of the Act.

In therefore, overrule both the contentions raised by Dr. Sultan Ahmad.

For the reasons given above, I would answer the question formulated by the Board in the affirmative, in favour of the Department and against the assessee. My answer to the question, therefore, is as follows :

The net surplus, which the executant received during the lifetime under clause (f) of paragraph 13 of the deed of wakf dated the 9th April, 1914, executed by Mst. Bibi Azimul Nissa, and which the applicant was, and is, entitled to the get, as mutawalli, "for maintenance and livelihood," was taxable as a receipt in his capacity as a de facto beneficiary within the meaning of section 10 of the Act.

The reference is therefore, disposed of accordingly.

The State of Bihar will be entitled to its costs; hearing fee Rs. 250.

RAMASWAMI, C.J. - I agree.

Reference answered accordingly.