
(1992) 10 BOM CK 0007

In the Bombay High Court

Case No : Income-tax Reference No. 138 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Central Bank Executor and Trustee Co. Ltd.

RESPONDENT

Date of Decision : 23-10-1992

Acts Referred:

Income Tax Act, 1961 — Section 24, 24(1), 27

Citation : (1993) 203 ITR 666

Hon'ble Judges : Sujata V. Manohar, J;B.N. Srikrishna, J

Bench : Division Bench

Advocate : G.S. Jetly, for the Appellant; P.J. Pardiwala, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—The assessee is the Central Bank Executor and Trustee Co. Ltd., acting as such for late Mrs. Serenebai J. Mody. The deceased Serenebai J. Mody, prior to her death, was the owner of a property known as Cecil Court. Upon her death, estate duty proceedings were initiated and completed against the executor of the assessee as the executor of the estate of the deceased, leading to the demand for the payment of estate duty. For paying the estate duty, the assessee raised an overdraft with the bank on the security of the house property by creating a charge on it for the repayment of the loan as well as interest. On the loan so borrowed, interest became payable for the assessment years 1969-70, 1970-71 and 1971-72 amounting to Rs. 39,741, Rs. 33,473 and Rs. 34,000, respectively.

2. The assessee, in its assessment for these three years, claimed deduction of these amounts from the income for the house property u/s 24(1)(iv) of the Income Tax Act, 1961. The Tribunal has allowed this deduction. Hence, the following question of law is referred to us at the instance of the Revenue u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the interest claimed by the assessee for each of the accounting periods relevant to the assessment

years 1969-70, 1970-71 and 1971-72 was an allowable revenue deduction u/s 24(1)(iv) of the Income Tax Act, 1961, in computing the income of the assessee from property for each of these years ?"

3. In respect of income from house property, certain deductions are allowed u/s 24(1)(iv) of the Income Tax Act, 1961. The material portion of section 24(1)(iv) is as follows :

"24(1) Income chargeable under the head "Income from house property" shall..... be computed after making the following deductions, namely :-

(iv) where the property is subject to an annual charge (not being a charge created by the assessee voluntarily or a capital charge), the amount of such charge."

4. Section 27(iv) defines an "annual charge" while section 27(v) defines a "capital charge". In the present case, both the repayment of the loan as well as of interest are charged on the property in question. There is no dispute that the charge for the payment of interest is an annual charge. We have, however, to consider whether this charge for payment of interest is created by the assessee voluntarily. If it is created by the assessee voluntarily, it will not qualify for deduction; otherwise, it will qualify for deduction.

5. What is meant by a charge which is created by the assessee voluntarily ? The word "voluntarily" is normally used in contradistinction to the word "involuntarily". "Involuntarily" implies being compelled to do something. Therefore, a charge which is created, for example, by operation of law or by a decree of a court cannot be considered as a charge created either by the assessee or created voluntarily. Similarly, where the property in the possession of the assessee is already subject to a charge, the assessee cannot be said to have created such a charge voluntarily. In the case of Clive Buildings (Calcutta) Ltd. Vs. Commissioner of Income Tax, , the Calcutta High Court was required to consider the same provision under the Income Tax Act, 1961. Analysing section 24(1)(iv), the Calcutta High Court said that an annual charge which would qualify for deduction u/s 24(1)(iv) should be a charge which is not created by operation of law or under a decree passed by the court or by some other means not attributable to the volition of the assessee.

6. The Andhra Pradesh High Court has, however, given a somewhat different meaning to a voluntary charge in the case of Commissioner of Income Tax Vs. Rajah Dhanrajgiriji, . In the case before the Andhra Pradesh High Court, the assessee had raised certain loans for the purpose of constructing two houses. In respect of one of the houses, a suit was filed by the creditor which was decreed and property was brought to sale in execution of the decree. Before the sale took place, a settlement was arrived at between the assessee and the creditor as a result of which a charge was created on the property in respect of payment of loan. The court was required to consider whether the charge was created voluntarily. The court said that the mortgage in respect of one of the properties

was created under the pressure of a court sale while in respect of the other property, since the creditor demanded additional security, the assessee was obliged to create an equitable mortgage. Therefore, it cannot be said that the charge was created by the assessee "voluntarily". The Andhra Pradesh High Court said that the word "voluntarily" cannot be understood as having a meaning opposite to the words "by operation of law". If that had been the intention of Parliament, it would have used the words "by act of parties", which is the expression generally understood as the opposite of the words "by operation of law". Here the expression used is "voluntarily", which must be understood as distinct from, and as opposed to, the expression "involuntarily". The word "involuntarily" means "without there being any option" that is to say, under an enforceable obligation. Therefore, where a person creates an annual charge to meet an existing, genuine, legal or contractual obligation, it would not be a case of creating a charge voluntarily.

7. The Andhra Pradesh High Court appears to have taken the view that a charge to be voluntary, must be without compulsion. But what is compulsion ? If a charge is created by force or undue influence, it can be voided. What then is a charge which is valid in law and yet involuntary in case of the assessee being "compelled" to create it ? Obviously, it will have to be something less than by force or under undue influence. Hence the Andhra Pradesh High Court referred to pressure of creditors, pressure of circumstances, etc. In our view, this does not appear to be a correct criterion for distinguishing an "involuntary" charge from a voluntary charge. Obviously a charge is created because the person creating it is required, by pressure of circumstances, to do so. Normally, a charge is not created just for no compelling reason. Every charge does not thereby become involuntary. In the case of Commissioner of Income Tax Vs. Smt. Indramani Devi Singhania, , the Allahabad High Court said that a mortgage which was created, though its creation was absolutely necessary in the interest of business, cannot be called for that reason an involuntary transaction (at page 126) : "No one mortgages his property except when he is in need - of whatever kind; on that account, it cannot be said to be an involuntary transaction."

8. The assessee, therefore, submitted that the word "voluntary" is used in section 24(1)(iv) in the sense of a charge being without consideration, e.g., one uses the phrase "voluntary worker" in contradistinction to a paid worker. Mr. Pardiwala, who has argued the matter very persuasively, has drawn our attention to the definition of the term "voluntary" in Black's Law Dictionary, Sixth edition, at page 1575. The term "voluntary" is defined as "unconstrained by interference; enameled by another's influence;... Resulting from free choice, without compulsion or solicitation.... Without valuable consideration; gratuitous, as a voluntary conveyance". He submits that the term "voluntary" in the context of section 24(1)(iv) should be interpreted as "without valuable consideration". If a charge is created without valuable consideration, it should be treated as a voluntary charge. But then, what is a charge without consideration ? A charge is created to secure payment of money which the creator of the charge is under a

legal obligation to repay. Section 100 of the Transfer of Property Act, 1882, which defines a charge, states, "Where immovable property of one person is by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property". The "consideration" for the charge is money borrowed. To secure its repayment, a charge is created. In this sense, the existence of an obligation to pay money to another which is "consideration" for a charge, is a necessary ingredient of every charge. Therefore, every charge will be for a consideration. There can be no voluntary charge. Mr. Pardiwala, however, submitted that there can be a voluntary charge in the sense of a charge without consideration, e.g., if the assessee wanted, of his own volition, to pay an annual amount to a relative or a friend, and created a charge on his property, this would be a voluntary charge. But even in this illustration, what is undertaken voluntarily is payment of money. To ensure this payment, a charge is created. Therefore, the "consideration" for the charge remains "securing payment of money to another". The charge is not, therefore, without "consideration". It is this "consideration", namely, payment of money, which is undertaken voluntarily. Section 24(1)(iv), however, requires that the charge itself should be voluntary and not the "consideration" for the charge. Therefore, his interpretation also does not help the assessee.

9. In our view, therefore, a charge which is (1) either not created by the assessee or (2) which is not created by the assessee voluntarily in the sense that it is created or thrust upon the assessee either by operation of law or by a decree of a court or by the act of his predecessor in title or by reason of the property coming into his hands with an existing or overriding charge will have to be treated as an involuntary charge for the purpose of section 24(1)(iv).

10. In this context, we may usefully refer briefly to the history of section 24(1)(iv). The section in the present form has been introduced with effect from April 1, 1962, by the Income Tax Act, 1961. Section 24(iii) provided a deduction in the following terms :

"24. (iii) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge."

11. Clause (iv) then provided as follows :

"(iv) where the property is subject to annual charge, not being a capital charge, the amount of such charge."

12. Sub-clause (iii) was deleted from April 1, 1969, and sub-clause (iv) was amended to introduce the concept of the charge not being a voluntary charge created by the assessee.

13. In the case of COMMISSIONER OF Income Tax, WEST BENGAL Vs. STATE BANK OF INDIA., , the Calcutta High Court considered the provision of section 9(1)(iv) of the Indian Income Tax Act, 1922, which was similar to section 24(1)

(iv) prior to its amendment. One of the arguments urged before the Calcutta High Court was that the charge which was contemplated by section 9(1)(iv) could not be a charge voluntarily created. The section, as it stood, did not contain the phrase "charge voluntarily created", but it was submitted that the charge which the section had in view was a charge imposed on the property by some force other than the will of the assessee and that it could not possibly be a charge created by the assessee himself out of his own free will. The Calcutta High Court said that though the argument was an attractive one, the language employed by the Legislature did not admit of such a limited construction. The court also referred to the decision of this High Court in the case of PRINCE KHANDERAO GAEKWAR OF BARODA Vs. COMMISSIONER OF Income Tax, BOMBAY CITY., , and said that all that the Bombay High Court decided in that case was that there should be a valid and legally enforceable charge and not also that it should be a compulsory charge. It is true that, in the above case, the Bombay High Court did make some observations as to whether the charge in that case which was created to secure an annual payment to the mother of the assessee was to be considered as a voluntary charge. But it ultimately decided the question on the language of the section as it then stood.

14. The discussion contained in these and similar decisions relating to voluntary charges may have been the background in which section 24(1)(iv) was amended to add the words "not being a charge created by the assessee voluntarily". The language of section 24(1)(iv) incorporates the concept of a charge being voluntarily created by the assessee as against a charge which comes into being by operation of law or by virtue of an order of the court or by the act of parties other than the assessee such as when the assessee gets a property already subject to a charge. Only those annual charges which are not created by the assessee voluntarily in this sense, are capable of being deducted from the income from house property.

15. In the premises, the question which is referred to us is answered in the negative and in favour of the Revenue.

16. In the circumstances of the case, there will be no order as to costs.