
(1987) 01 BOM CK 0019

In the Bombay High Court

Case No : Income-tax Reference No. 80 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Mohinidevi Mohunta

RESPONDENT

Date of Decision : 29-01-1987

Acts Referred:

Hindu Succession Act, 1956 — Section 8
Income Tax Act, 1961 — Section 5

Citation : (1988) 171 ITR 557

Hon'ble Judges : V.A. Mohta, J; S.P. Bharucha, J

Bench : Division Bench

Judgement

S.P. Bharucha, J.—This reference at the instance of the Revenue arises the following question :

"Whether, on the facts and in the circumstances of the case, the hare income of the assessee from the firm, M/s. K. G. Mohunta and Bros., is not the income of the assessee alone but was to be shared by three persons, namely, the assessee and her two minor sons ?"

2. We are concerned with the assessment year 1974-75. The assessee's the husband was a partner in a firm called M/s. K. G. Mohunta and Bros. when he died, he left the assessee, three sons and a daughter. The assessee was made a partner of the reconstituted firm under a deed dated October 29, 1970, with Geetadevi Mohunta and Rajmohan Mohunta as the her partners. The deed recited that on account of the demise of the assessee's husband, the original firm stood dissolved and his share in the partnership devolved upon his legal heirs, namely, the assessee and her three sons and daughter. Clause 6 of the partnership deed stated that the capital requirements of the firm would be met by the assessee and the said Geetadevi and that the credit balance in the capital account of the assessee's late husband which had devolved upon his legal heirs would be the capital of the assessee. Upon the assessee's eldest son attaining majority, became a partner of the firm. The assessee's daughter got married and

relinquished her entitlement, inter alia, to her share in the firm by accepting a sum of Rs. 20,000.

3. For the assessment year in question, the assessee filed a return showing as her share in the income of the firm only 1/3rd of what was received her. She claimed that there was an overriding title created in favour of her two minor sons and that she could be taxed only on her real income of the firm. The Income Tax Officer did not accept the argument and assessed the entire share income from the firm in the hands of the assessee.

4. On appeal, the Appellate Assistant Commissioner held that there was a diversion of income by overriding title.

5. The taxing authorities appealed to the Income Tax Appellate Tribunal. The Tribunal, after setting out the facts, found that the position was that the assessee and her two minor children were to enjoy the share income from the newly constituted firm. Having regard to section 8 of the Hindu succession Act, the Tribunal found that the minor sons had a right to claim their part of the share income received from the firm by the assessee and that the assessee was representing their interest in the firm. The income that came to assessee from the firm was, therefore, not her income alone but that of the assessee and her two minors sons. The Tribunal accordingly dismissed the appeal filed from the order of the Appellate Assistant Commissioner.

6. Mr. Jetly, learned counsel for the Revenue, has drawn our attention to the judgments of the Supreme Court in *The Commissioner of Income Tax, Bombay City II Vs. Shri Sitaldas Tirathdas*, and *K.A. Ramachar and Another Vs. Commissioner of Income Tax, Madras*, . In the former judgment, it was held that where by reason of an obligation income was diverted before it reached the assessee, there was a case for deduction. In the latter, it was held that under the law of partnership it was only the partner who was entitled to the profits and the dispositions under an obligation incurred by the partner were of the income after it accrued to him and, hence, the entire income had to be assessed as part of his total income.

7. These judgments were considered in the judgment of the Supreme Court in *Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta*, . In that case, a partner in a registered firm entered into a sub-partnership with outsiders to the firm. The deed of sub-partnership provided that the profits and losses of the partner in the firm would belong to the subpartnership and would be divided and borne in accordance with the shares specified therein, but that the capital with its assets and liabilities would belong exclusively to the partner. The Supreme Court noted that the position was that as far as the partner was concerned, after the sub-partnership he could not treat the income as his own. The sub-partner had definite enforceable rights to claim a share in the profits accrued to or received by the partner. The sub-partnership created a superior title and diverted the income before it became the income of the partner. In

other words, the Supreme Court said, the partner in the firm received the income not only on his own behalf but on behalf of the sub-partnership. Upon this basis, the Supreme Court said, the partner in the firm received the income not only on his own behalf but on behalf of the sub-partnership. Upon this basis, the Supreme Court set aside the judgment of the High Court and observed that the High Court had been in error in holding that there was no question of an overriding obligation in the case and that the income remained the income of the partner in spite of the sub-partnership created by him.

8. Mr. Jetly submitted that the two minor sons of the assessee would have no claim to any part of the assessee's share in the income of the firm and that their only claim in this behalf lay against the assessee. In his submission, therefore, there was no creation of an overriding title. The share income in the firm accrued to the assessee and was thereafter applied in discharge of her obligation towards her two minor sons. We find ourselves unable to accept the submission now that we have seen the judgment in *Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta*, . There does not, in principle, appear to be any distinction between the facts thereof and the facts before us, for, it is very important to note that the Supreme Court did not decide on the basis that there was something special about a sub-partnership or that, by reason of the sub-partnership, the sub-partnership obtained a right to make a claim to the partners' income upon the partnership. *Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta*, would appear to have been decided upon the basis that the partner, by reason of the deed of sub-partnership, was obliged to split the income he received from the firm with his sub-partners and this created a superior title and diverted the income before it became the income of the partner. In the instant case, there is no explicit agreement to split the income with the minor sons but there is the obligation in law conferred upon the assessee by section 8 of the Hindu Succession Act.

9. We may also with advantage refer to the judgment of this court in *Commissioner of Income Tax Vs. M.D. Kanoria*, . The assessee in that case was karta of a Hindu undivided family consisting of himself, his wife and two minor sons. He had invested funds of the Hindu undivided family in certain firms and was partner in them on behalf of the family. There was a partial partition of the assets of the family invested in the firms and the memoranda attached to the partition deeds contained agreements between its members that the assessee was to remain a partner in the firms, but the profits falling to the share of the assessee were to be the profits of the members in their own respective individual right and interest in the proportion stated. There were further agreements recorded in the memoranda that the share in the profits of the firm was to be received by the assessee for and on behalf of the members of the Hindu undivided family. It was held that the memoranda of partition expressly divided the capital standing in the name of the karta among the members of the joint family with the result that though the capital stood in the assessee's name in the firms' account books, it was severally owned by the erstwhile members of the

joint family in definite shares with a further agreement that the assessee was to receive the profits for and on behalf of the contracting parties severally. After considering various judgments, this court observed that the crucial question which had to be determined was whether the income was to be treated as a diversion by an overriding charge or as its application. The test was whose income it was. If, on the terms of the memoranda of partition, the assessee, by virtue of the fact that he was allowed to continue in the two partnership firms, was to receive the share in the profits of those firms and there was an express agreement which provided that he would receive that share for and on behalf of the erstwhile members of the joint family, who had title to a part of that income in the proportion which was specified in the memorandum of the agreement, the entire share income clearly did not belong to him. The assessee had, no doubt, an obligation to pay a part of the income. That obligation, when performed, was not in the nature of an application of the income. That was an obligation which flowed from the terms of the memoranda of partition by which the title to a part of the income had already accrued in favour of the other members of the joint family. In these circumstances, this court held that the share income of the assessee in the profits of the partnership firms was subject to an overriding title in favour of the other members of the Hindu undivided family and could not be taxed in the assessee's hands.

10. Applying the principle in the instant case, the assessee's minor sons have a title to the share income received by the assessee from the firm having regard to the provisions of section 8 of the Hindu Succession Act. The assessee had, therefore, an obligation to pay to them a part of the share income. That obligation, when performed, was in the words of this court in *Commissioner of Income Tax Vs. M.D. Kanoria*, , "not in the nature of an application of the income". That was an obligation arising upon an overriding title in favour of the minor sons.

11. Based upon the judgment of the Supreme court in *Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta*, and of this court in *Commissioner of Income Tax Vs. M.D. Kanoria*, , we answer the question in the affirmative and in favour of the assessee.

12. No order as to costs.