
(1996) 09 AP CK 0038

In the Andhra Pradesh High Court

Case No : R.C. No. 14 of 1988 & RC No. 14 of 1988

Commissioner of Income Tax

APPELLANT

Vs

Nandanam Constructions

RESPONDENT

Date of Decision : 02-09-1996

Acts Referred:

Income Tax Act, 1961 — Section 22, 263, 27

Citation : (1997) 137 CTR 501

Hon'ble Judges : T.C. Rangarajan, J; M.N. Rao, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant; C. Kodandaram, for M. Ravindranath Reddy, for the Respondent

Judgement

M.N. Rao, J.—The Tribunal has referred the following question of law to this Court for consideration under s. 256(1) of the IT Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the annual value of the properties, of which the assessee is the legal owner, cannot be assessed in the assessee's hands under s. 22 of the Act ?"

2. The assessee is a registered firm dealing in real estate business. It constructs and sells flats on ownership basis. Its method of accounting for profit is by treating the date of handing over the possession of the flat to the owner as the date of sale irrespective of the date of registration of the sale deed. In respect of the asst. yr. 1979-80, previous to the accounting year 1978-79, the assessee returned an income of Rs. 1,33,166 on the basis of its books and the ITO expressed the view that the profit should have been higher and estimated the same at Rs. 1,73,000 making a net addition of Rs. 39,830. The CIT(A) was of the prima facie view that the property income till the date of registration was liable to be assessed in the hands of the assessee. When the matter was pending decision of the CIT(A), the Administrative Commr. issued notice under s. 263 of the Act calling upon the assessee to show cause why the income from house

property should not be assessed in his hands for the period between the date of handing over of the possession and the date of registration of flats in favour of the purchasers. After hearing the assessee, he set aside the assessment so as to include the income from the property in the total income of the assessee. Aggrieved by that, the assessee preferred an appeal to the Tribunal.

The Tribunal after considering the case law on the aspect of ownership and possession, the concept of ownership under the Transfer of Property Act, and the liability of a person to pay the tax by virtue of his being in possession of the property, held that the assessee could not be subjected to tax in respect of the property for the interregnum between the date of handing over the possession and the date of registration for the flats sold. At the instance of the Revenue, the above question was referred to this Court for consideration.

3. Having regard to the decision of the Supreme Court in *R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, , we are of the view that the answer to the question must be in the affirmative and in favour of the assessee. In the case before the Supreme Court, the assessee was owner of certain property in Pakistan and the same was vested in the Custodian of Evacuee Property by virtue of s. 6(1) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949. The assessee claimed certain losses by way of payment of interest to a bank on the ground that it arose out of income from the property in respect of which the income was nil as the property has been taken over by the Custodian of Evacuee. The ITO disallowed the claim as the property itself did not belong to the assessee and he cannot claim any such deduction. The Tribunal came to the conclusion that the assessee continued to be the owner of the property for the purpose of computation of loss. The Supreme Court discussed the question as to who is the owner referred to in s. 9 of the Indian IT Act, 1922, corresponding to s. 22 of the present Act as under :

"The question is who is the "owner" referred to in this section ? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property ? It must be remembered that s. 9 brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence, for the purpose of s. 9, the owner must be that person who can exercise the right of the owner, not on behalf of the owner but in his own right.

For a minute, let us look at things from the practical point of view. If the thousands of evacuees who left practically all their properties as well as businesses in Pakistan had been considered as the owners of those properties and businesses as long as the "Ordinance" was in force, then those unfortunate persons would have had to pay Income Tax on the basis of the annual letting value of their properties and on the income, gains and profits of the businesses left by them in Pakistan though they did not get a paisa out of those properties and businesses. Fortunately, no one in the past interpreted the law in the

manner Mr. Mahajan wants us to interpret. It is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice."

4. Sri S. R. Ashok, learned standing counsel for the Revenue, contends that this Court on a previous occasion in CIT vs. Nawab Mir Barkat Ali Khan (1974) Tax LR 90 held the view that the ownership does not change until registered sale deed is executed by the vendor and, therefore, the expression "owner" in s. 9 of the Indian IT Act, 1922, or s. 22 of the IT Act, 1961, does not include beneficial or equitable owner. The decision of the Division Bench in Nawab Mir Barkat Ali Khan (supra) was rendered without noticing the Supreme Court decision in R. B. Jodha Mal Kuthiala's case (supra) although the latter was earlier in point of time. The observations of the Division Bench of this Court in Nawab Mir Barkat Ali Khan's case (supra) were :

"The owner may or may not actually receive the income. It is enough for the section if he is owner of the property. It is immaterial whether the owner is in possession and enjoyment of the property or some one else is. Ownership by itself attracts the charge, even if there is no possibility of his receiving any income."

These observations are clearly contrary to the law declared by the Supreme Court in R. B. Jodhamal Kuthiala's case (supra) in which it was laid down as under :

"But the real question is, can that right be considered as ownership within the meaning of s. 9 of the Act. As mentioned earlier, that section seeks to bring to tax income of the property in the hands of the owner. Hence, the focus of that section is on the receipt of the income. The word "owner" has different meanings in different contexts. Under certain circumstances a lessee may be considered as the owner of the property leased to him. In Stroud's Judicial Dictionary, 3rd Edn., various meanings of the word "owner" are given. It is not necessary for our present purpose to examine what the word "owner" means in different contexts. The meaning that we give to the word "owner" in s. 9 must not be such as to make that provision capable of being made an instrument of oppression. It must be in consonance with the principles underlying the Act."

5. Learned standing counsel for the Revenue has invited our attention to another decision of the Division Bench of this Court in Commissioner of Income Tax Vs. Trustees of H.E.H. The Nizam's Miscellaneous Trust, in support of his contention that income of the present nature is liable to be taxed at the hands of the legal owner. In the case during the intervening period between the date of possession and the date of registration, the purchaser received the rents and showed them as income from other sources. The owner was already assessed to tax on the very same income. On the question of liability of the purchaser, the Division Bench held that as that income was already subjected to tax in the hands of the owner, it could not once again suffer tax in the hands of the purchaser. Although

the Division Bench has cited the Supreme Court ruling in *R. B. Jodha Mal Kuthiala*'s case (supra), we find no discussion as to its effect on the liability of the owner to pay tax in a situation where possession was handed over to a purchaser and the income was received by the latter. Learned counsel for the assessee points out that in this case also there is a clear finding by the Tribunal that property income was taxed in the hands of the purchasers and hence it cannot be taxed again in the hands of the assessee.

6. A latter Division Bench of this Court to which one of us, M. N. Rao J., was a party in *Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd.*, followed *R. B. Jodha Mal Kuthiala*'s case (supra) in determining the claim for depreciation by the purchaser in the absence of a registered sale deed for the period between registration and handing over of the possession. While considering an analogous provision in the Municipal Act, the Supreme Court has taken the same view in *Municipal Corporation of Delhi Vs. M/s. Trigon Investment and Trading Private Limited* and another, by treating a person in possession under s. 53A of the Transfer of Property Act as the owner for levy of municipal tax on annual value. The Supreme Court held that a person in possession of a flat having paid full consideration even where the instrument of transfer is not registered is entitled to receive the rent and he would be the owner for the purpose of municipal tax and liable to pay the municipal-tax irrespective of his position in general law. Following the binding precedent in *R. B. Jodha Mal Kuthiala vs. CIT* (supra) under the IT Act, we answer the question in favour of the assessee and against the Revenue.

7. We must mention in this context that the definition of "owner of house property" as contained in s. 27 of the Act was amended by inserting clause (iiia) by the Finance Act of 1987 so as to make the position clear and explicit. The amended provision reads as under :

"(iiia) A person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in s. 53A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building or part thereof."

8. It is thus clear that in order to set at rest the doubts as regards the liability of the so-called legal owner, who more often than not, was only left with an obligation to effect registration rather than be left with any right over the property and with a view to rationalise the tax structure the amendment was brought in. The memorandum has recognised the fact that in several cases pending resolution of disputes the legal as well as the beneficial owners were assessed to tax in respect of same income and such a situation was forbidden by law, the amendment was felt to be necessary. The amendment thus being clarificatory in nature, brings the statute to accord with the Supreme Court decision and puts the matter beyond the pale of controversy.

9. For the above reasons, following the binding precedent in *R. B. Jodha Mal*

Kuthiala"s case (supra) we answer the question in affirmative, in favour of the assessee and against the Revenue. No costs.