
(1943) 06 CAL CK 0012
In the Calcutta High Court

Estate of Harendra Kumar

APPELLANT

Vs

I.T. Commissioner

RESPONDENT

Date of Decision : 18-06-1943

Acts Referred:

Income Tax Act, 1961 — Section 10, 41(1)

Citation : AIR 1944 Cal 308

Hon'ble Judges : Derbyshire, C.J;Gentle, J

Bench : Full Bench

Judgement

Gentle, J.—This reference arises out of a deed creating a trust which was executed by the late Rai Harendra Kumar Roy Choudhury Bahadur on 3rd September 1930. By the deed of trust the settlor granted, conveyed, assigned and transferred unto the trustees several lands and other immovable property, mortgages of which he was the grantee, securities and investments and the goodwill of the settlor's banking and money-lending business as a going concern together with its assets, outstandings and liabilities. The properties are specified in Schs. A, B, C and D and their value is expressed to be about rupees nineteen lacs. The first trustee was the settlor himself and upon his death or retirement his son Ganendra Kumar Rai Choudhury should become the trustee and upon his death or retirement the grandsons of the settlor indicated in the instrument. The son, Ganendra Kumar Rai Choudhury, is the present trustee. The deed directed the trustee to collect the income from all the trust properties and out of the income: he should pay the costs and charges of carrying on the business and realising the income and outstandings; carry out the worship of the family deities in the same manner as the settlor had done up to the execution of the deed; maintain some specified educational institutions and a hostel on the same scale as the settlor; pay to charities (which are not described or indicated) up to the amounts stated; pay the expenses of pilgrimages of members of the family on such scale and at such times as the trustee in his discretion should think proper; and, lastly, pay the cost of maintenance and medical attendance and treatment of the settlor, his son, his grandsons and great grandsons and members of their

respective "families including their mothers, wives and children and also the customary social ceremonies of any of them, the scale of expenditure being such as the trustee in his discretion should consider proper. Further the settlor's wife was to have the right of residence in the settlor's houses; his daughters should be at liberty to reside in the houses as long as their mother should live there. One daughter, named in the deed, was to receive Rs. 25 per month so long as she lived away from her mother during the latter's lifetime and from the rest of the family after her mother's death. A daughter-in-law, the widow of a predeceased son of the settlor, was to receive Rs. 25 per month and the son was to be paid Rs. 100 monthly whilst he acted as trustee.

2. The trust was to continue for 25 years from its creation and at the conclusion of that period the corpus of the trust property should devolve upon the settlor, if he were still alive, and if he had died meanwhile it would devolve upon the settlor's sons, grandsons and great grandsons as indicated in the deed. The settlor died in the year 1936. Until the income tax year 1939-1940 two assessments were made upon the income, one in respect of the profits from the business, which was in the hands of the trustee, and the other in respect of the income from the other sources and investments which also were in the hands of the trustee. The first assessment was made upon the trustee as an individual and the second upon a Hindu undivided family. In the year 1940-41 all the income of the trust was included in one assessment and tax was levied at the maximum rate. This reference concerns the last assessment and the points for decision are whether the inclusion of the whole of the trust income in one assessment is correct and also whether this income is subject to tax at the maximum rate. All the properties in the hands of the trustee are trust properties and the trustee, as such, carries on the business, and collects the profits from it together with the income from the various investments. The several properties, including the business, from which income is derived are not joint family properties nor properties belonging to a Hindu undivided family but they are trust properties belonging to the trust. The cestui que trusts are not only the members of the settlor's family, that is to say a Hindu family which may or may not be undivided, but the beneficiaries include a school and a hostel and, in addition, some undetermined and unspecified charities. Except for the sum of Rs. 25 payable monthly to a daughter-in-law, a like sum payable to a daughter upon certain contingencies and the sum of Rs. 100 per mensem which the present trustee, the son of the settlor, is entitled to receive whilst he acts as trustee, substantially all payments are to be made at the discretion of the trustee with the exception that in regard to the carrying out of the worship of the family deities and the maintenance of the educational establishment and the hostel, which are to be carried out in the same manner and on the same scale as had been the settlor's custom. It is quite clear that the substantial payments, out of the income, which the trustee has to make are matters entirely in his discretion and his decision. Incidentally, the sum of Rs. 100 monthly which the present trustee is entitled to receive whilst acting as trustee, is not the sole benefit which

he can demand under the trust. He is also entitled to be paid such sums in respect of his own maintenance, medical expenses and the like as in his own discretion he may determine. In these circumstances in my view the interests of the cestui que trusts are indeterminate. It is now convenient to refer to Section 41(1), income tax Act, the material portions of which are as follows:

3. "In the case of income, profits or gains chargeable under this Act which ... any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise ... are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such ... trustee or trustees in the like manner and to the same amount as would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable and all the provisions of this Act shall apply accordingly: Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate." The learned, advocate on behalf of the respondent has conceded that, in so far as the present reference is concerned, since the income, profits or gains or any part thereof are not specifically receivable on behalf of any one person the operation of the proviso must apply without further consideration of the words which follow in the proviso. I prefer to rely upon the alternative, that where the individual shares of persons on whose behalf they are receivable are indeterminate the tax shall be levied and recoverable at the maximum rate. The individual shares of the person, namely of the beneficiaries, on whose behalf the income of the trust is received by the trustee are certainly indeterminate and might well vary in respect of many of the cestui que trusts from year to year according to the wish or even the whim of the trustee himself. That being so the provision of the proviso comes into operation and the tax which is leviable must be at the maximum rate prevailing during the year of the assessment. On behalf of the applicant it was contended that since Section 10 of the Act provides for tax being payable by an assessee under the head of profits and gains of a business, profession or vocation, there should be a separate assessment in respect of the business profits inasmuch as no reference is made to business profits and gains in Section 41 (1). Section 8 provides for the payment of tax by an assessee upon interest on securities. By Section 9 the assessee pays tax upon income from property. It was not suggested, in the course of argument, that there should be separate assessments in respect of securities and property as well as of the business income of the trust. Section 41 (1) makes no mention either of business, securities or property. It deals with income, profits and gains which a trustee is entitled to receive and the tax is to be levied upon the trustee in the same manner and to the same amount as it would be leviable upon or receivable from the person on whose behalf income, profits and gains are receivable. The provisions of this section relate to all trust income, profits and gains. It was conceded that if there had been no trust

created by the settlor then, during his lifetime, he would have been properly assessed in one assessment in respect of the income which the trustee now receives. Section 41(1) enables a trustee to be assessed in respect of the income, profits and gains of a trust as a whole whatever its source maybe and the expression "income, profits and gains" relates to all income which reaches the hands of a trustee whether it is from investments in securities and from immovable properties, or upon the profits of a business which the trustee, as such, conducts and which belongs to the trust.

4. Reference was made to Section 25A of the Act and it was argued that since there was an assessment up to the year 1939-40 upon a Hindu undivided family, since partition has not taken place and no Order has been made by the income tax Officer under the provisions of Section 25A (2) it must follow that an assessment should continue to be made upon the entity of a Hindu undivided family. Particular reliance was placed upon Sub-section (3) which is as follows: "Where such an Order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family." This provision can only relate to income, profits or gains from property belonging to a Hindu undivided family. The property, the subject of the present reference, is not such property, but it is the property of a trust. Further the beneficiaries of the trust are not only the members of a Hindu family, which may or may not be undivided, but also a school, a hostel and such other charities to which the trustee may feel disposed to make payments. An assessment cannot be made in respect of income, in which such institutions are entitled to participate, as upon a Hindu undivided family. Moreover the members of the Hindu family, who are cestui que trusts are entitled to participate under the trust, not as members of such family but as beneficiaries of the trust. There are two questions which have been referred: (1) Whether in the facts and circumstances of the case the assessment of the whole income of the trust in the hands of the trustee in one assessment was valid in law ? (2) Whether in view of the provisions of Sub-section (1) of Section 41, income tax Act, the tax was correctly levied in this case at the maximum rate ? In my view the answer to each question should be in the affirmative.

Derbyshire, C.J.

I agree.