
(1940) 10 AHC CK 0029
In the Allahabad High Court
Case No : Miscellaneous Case No. 866 of 1939
KUNJAMAL AND SONS, IN RE.

Date of Decision : 02-10-1940

Acts Referred:

Income Tax Act, 1961 — Section 66(2)
Transfer of Property Act, 1882 — Section 53A

Citation : (1941) 9 ITR 358

Final Decision : Disposed Of

Judgement

At the instance of Messrs. Kunjamal and Sons of Agra, the assessee in the present case, the Commissioner of Income Tax, Central and United Provinces, drew up a statement of the case and referred it to us u/s 66(2) of the Indian Income Tax Act after formulating three questions of law which might be mentioned at this very stage.

"(1) Whether there was any material before the Income Tax Officer to justify his rejection of the accounts of the money-lending business ?

(2) Whether in framing his estimate of Rs. 18,000 for money-lending, the Income Tax Officer was correct in law in holding that the interest on the loan of Rs. 15,000, advances to Babu Lal in February 1922 was received during the account year November 1935-November 1936 ?

(3) Whether on the facts of the case, the interest of Rs. 546, paid to one of the partners of the firm to which the petitioner had succeeded u/s 26(2) of the Act has been correctly disallowed ?"

The assessee is a Hindu undivided family and the assessment year is 1937-38, the accounting year being November 1935 to November 1936. The assessee was a partner with Bansidhar Ganga Prasad, but the partnership was dissolved on March 31, 1936. The partnership carried on business at Agra and at Delhi, but after dissolution the assessee (Messrs. Kunjamal & Sons) took over the Agra business and the Delhi business fell to the share of the other partner Bansidhar Ganga Prasad.

When the assessee received notice for filing a return he did so showing an income of Rs. 6,704 from property and a loss of Rs. 6,207 from business. No income from money-lending business was shown at all in the return. The Income Tax Officer of Agra was not satisfied with the correctness of the return and he, therefore, issued notices under Sections 22(4) and 23(2) of the Act. On receipt of these notices the assessee on the 4th of January 1938 filed a petition and said that certain corrections should be made in the return u/s 22(3) of the Act. He then showed an income from property of Rs. 8,318 instead of Rs. 6,704 and the loss from business was shown as Rs. 6,390 instead of Rs. 6,207 in the original return and an income of Rs. 5,000 was shown from money-lending. The petition further stated that some interest was received from Nanhemal and Lachminarain Ramnarain, but this income was not the income of the assessee but of certain ladies of the family. He also mentioned a transaction with one Babulal. He said that the entire loan together with interest had been realised in the assessment year 1935-36.

The Income Tax Officer looked into the assessee's books of accounts and came to the conclusion that there was at least one other omission, namely a sum of Rs. 200 which had been received as interest from one Shiv Narain of Pipalmandi and this item did not find place in the books of the assessee. He then issued a notice u/s 23(3) and asked for elucidation on certain specified points, namely on the sale deed by Babulal executed on June 8, 1936 and on the amount of interest received from Shiv Narain of Pipalmandi. The assessee examined himself and he said that he had been in charge of the business for five or six months only and therefore he was not fully conversant with the business of the family and he had stated in his application dated January 4, 1938 about the transactions with Babulal and Hari Mohan, and as regards the investments made by the ladies of the family he gave a list of three such investments but persisted in saying that the income received from those investments was not the income of the assessee. Beyond his own statement he adduced no proof to show that the investments made by the ladies of the family were not the investments of the assessee himself and therefore the Income Tax Officer felt that he could not use the books of the assessee as a safe basis for computing the petitioner's income from money-lending. As regards the transaction with Babulal he found that the facts were that a sum of Rs. 15,000 was advanced to Babulal on a mortgage deed in February 1922 and a decree on the basis of that mortgage was passed by the High Court on November 26, 1934 when effect was given to a compromise between the parties. Under this decree the assessee or his predecessor agreed to give up a sum of Rs. 8,000 and accept a decree for Rs. 30,000 only instead of Rs. 38,000, but it was stipulated in the compromise that a sale deed for the entire mortgaged property should be executed in favour of the decree-holder within four months from the date of the High Court's decree and in that event the decree will be fully satisfied. Possession seems to have been delivered to the assessee soon afterwards but the sale deed itself was not executed till June 8, 1936. We have already stated that the accounting year of the assessee was November 1935 to

November 1936 and the sale deed would therefore fall within the accounting year. Possession had been given in 1934. The Income Tax Officer was of the view that full satisfaction of the decree was obtained in June 1936 and he, therefore, after making certain calculations computed the income of the assessee from this transaction as Rs. 9,777. The assessee himself had shown Rs. 5,000 as income received from one Hari Mohan; to this the Income Tax Officer added a sum of Rs. 9,777 in connection with the transaction of Babulal, making the income of the assessee as Rs. 14,777. He computed the whole income as Rs. 18,000 because he felt that Rs. 200 received as interest from Shiv Narain and other interest received by the ladies should also be added to the income of the assessee and for ought he knew in view of the concealments made by the assessee some other income might have been derived. He thus came to the conclusion that an estimate of the assessee's income from money-lending should be made at Rs. 18,000.

The facts which we have given so far are sufficient for determination of the first and second questions formulated by the learned Commissioner. The first question, namely, whether there was any material before the Income Tax Officer to justify his rejection of the accounts of the money-lending business has got to be answered in favour of the Department, and it was not seriously argued that the first question was not really a question of fact. The materials which the Income Tax Officer had for rejecting the account books of the assessee have already been stated at length in our judgment. We have already said that there were several concealments in the books of the assessee and the Income Tax Officer was thus justified in rejecting the account books.

Coming to the second question, namely the question of the transaction with Babulal, it was argued before us that possession had been delivered to the assessee of the mortgaged property some time in 1934 prior to the accounting year which commenced in November 1935. And the mere fact that the sale deed was executed on June 8, 1936 would not make the amount received from Babulal as income received in the accounting year. It was not contended before us that in the year 1935-36 the assessee had shown his income in the return or that that amount of income had been assessed to Income Tax in that particular year, but what was really contended was that, if this income had escaped assessment, proper proceedings, u/s 34 of the Act if available, ought to have been taken by the Department. In this connection reliance was placed on Section 53A of the Transfer of Property Act and it was argued that Babulal had contracted to transfer for consideration some immovable property by writing signed by him and the terms necessary to constitute the transfer could be ascertained with reasonable certainty from that writing and the transferee namely the assessee, had in part performance of the contract taken possession of the property; therefore Babulal was debarred from enforcing against the transferee any right in respect of the property of which the transferee had taken possession on the ground that there was not regular instrument of transfer written and registered. It had, however, to be borne in mind that Section 53-A only enunciates the doctrine of part

performance and does not in any way invest the transferee with any title in the property of which the transferee might have taken possession, and further the proviso to Sec. 53-A shows that if Babulal for instance, had transferred the property which had taken possession of by the assessee to some person who had been no notice of the contract or the part performance thereof, the assessee ran the risk of losing the property. His title to the property - a title which would be available against the world-became complete only on the execution of the sale deed and the Income Tax authorities were perfectly justified in treating the income as accruing during the accounting year which could be assessed to tax in the assessment year 1937-38. Question No. 2 has also, therefore, got to be answered against the assessee and in favour of the Department.

We now come to question No. 3, and in that connection certain more facts have got to be stated. We have already indicated in an earlier portion of our judgment that the assessee on the dissolution of partnership with Bansidhar Ganga Prasad came to possess the Agra business, and in the question that has been formulated before us it has been assumed that the assessee succeeded to the former business within the meaning of Sec. 20(2) of the Act. The first complaint of learned counsel for the assessee is that there was no warrant for this assumption but that the Department should have considered whether there was a succession of not and should have referred the question of succession itself as a matter of law to this Court. We also feel that it would have been better if this matter had been referred to us as a question of law, but we find that nowhere did the assessee dispute the factum of succession. The Income Tax Officer says on this point that interest paid to Bansidhar Ganga Prasad, partner, is to be disallowed as the period for which the interest had been paid was the time when Bansidhar Ganga Prasad were partners with the assessee and the assessee had succeeded to that business. There was an appeal to the Assistant Commissioner and all that the assessee complained of was that the Income Tax Officer was wrong in not allowing Rs. 546 paid to Messrs. Bansidhar Ganga Prasad in cloth agency account as the sum was paid on the money invested by them. This is not a complaint that there was no succession within the meaning of Section 26(2) of the Act. The Assistant Commissioner was also against the assessee on this point and he was of the opinion that Rs. 546 paid as interest by the assessee to the partner was not allowable. Presumably the contention of the assessee was that this interest was allowable by virtue of Section 10(2)(iii) of the Act, and both the Income Tax Officer and the Assistant Commissioner held the view that this could not be done.

When the assessee applied to the Commissioner u/s 33 for review and in the alternative u/s 66(2) for referring certain questions of law to us, the assessee said nothing on the question of succession and simply pointed out that the payment to Bansidhar Ganga Prasad was a legitimate and admissible expenditure and the Income Tax Officer was not right in disallowing Rs. 546 and when the assessee came to formulate the law points in the case he in this connection framed the following question of law :

"Whether the interest on deposit of a person who had ceased to be a partner before the end of the previous year can be added to the income of the assessee."

In neither of these two statements did the assessee claim that there was no succession.

We, therefore, repel the contention of the assessee advanced before us that the question of succession arises out of the appellate order of the Assistant Commissioner and that that question, as a question of law, ought to have been referred to us. We, therefore propose to answer the third question after making some verbal alterations in the question. It should be understood that we are not resettling the third question but are simply changing the language of the same so that it might fit with the circumstances enumerated above. The question would run as follows :-

Whether on the assumption that the petitioner had succeeded u/s 26(2) of the Act to one of the former partners of the firm the interest of Rs. 546 had been correctly disallowed ?

Even with this alteration we find that it would have been much better if the Income Tax authorities had taken some pains to state clearly as to what the contention of the assessee in this connection was and what the Income Tax authorities themselves thought regarding this payment of interest. The position taken by the assessee before us is that the partnership firm borrowed some capital for the purposes of the business from one of the partners, namely Bansidhar Ganga Prasad, and the payment of interest thereon was not in any way dependent on the earning of profits and therefore the profits or gains of the assessee should be computed after making an allowance for this interest. The Income Tax officer does not anywhere say that this was not capital borrowed but capital invested, nor does the Assistant Commissioner make this point clear in his appellate order. The Commissioner in the statement of the case undoubtedly says that the sum of Rs. 546 was interest paid to Bansidhar Ganga Prasad on capital invested in the old firm. If this was capital invested by the former partner, then no allowance could be made in respect to this sum u/s 10(2)(iii). There is also one ground in the grounds of appeal filed by the assessee before the Assistant Commissioner which would go to show that the assessee himself treated the advance made by Bansidhar Ganga Prasad as an investment. In ground No. 5 the assessee says :

"... The Income Tax Officer was wrong in not allowing Rs. 546 paid to Messrs. Bansidhar Ganga Prasad in cloth agency account as the same was paid on the money invested by them."

When the assessee wanted certain questions of law to be referred to us he treated the advance made by Bansidhar Ganga Prasad as the deposit of Bansidhar Ganga Prasad. The word deposit occurring where it does is more consistent with the theory of investment than with the theory of borrowing. On the whole we, therefore, think that the assessee was not entitled to an allowance

in respect of this sum of Rs. 546.

For the reasons given above, we answer the three questions of law in favour of the Department, answering all of them in the affirmative. Let a copy of our judgment under the seal of the Court and the signature of the Registrar be sent to the Commissioner of Income Tax, Central and United Provinces. In view of the fact that the statement of the case prepared by the Commissioner did not do full justice to the third question formulated, we think the assessee should pay only half the costs of the reference. Learned counsel for the Department is entitled to a fee of Rs. 200.

Reference answered in the affirmative.