

(1985) 08 GUJ CK 0016

In the Gujarat High Court

Case No : Misc. Civil Application No. 6 of 1985 in Income Tax Application No. 79 of 1983

Rameshchandra Jivanji Bhavsar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 19-08-1985

Acts Referred:

Income Tax Act, 1961 — Section 171, 256(2)

Citation : (1986) 1 GLR 563 : (1986) 160 ITR 893

Hon'ble Judges : D.H. Shukla, J; B.K. Mehta, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; G.N. Shah, for the Respondent

Judgement

B.K. Mehta, J.—Rule. Mr. G. N. Shah appears for the Commissioner, the respondent herein and waives service of the rule.

2. Rule is made absolute for the following reasons : The applicant-assessee was the karta of a smaller Hindu undivided family of Rameshchandra Jivanji Bhavsar. There was also a bigger Hindu undivided family of Jivanji Govindji Bhavsar consisting of Jivanji, his wife, Jashoda, Rameshchandra, the present applicant, and Pramilaaben, the applicant's wife. In 1958, the said Jivanji died and the bigger Hindu undivided family was reduced to a single coparcenary with two female members. In Samvat year 2025 corresponding to the assessment year 1970-71, a partial partition was claimed to have taken place between Rameshchandra and his widowed mother, Jashoda, in respect of the business and capital of the bigger Hindu undivided family of Jivanji Govindji Bhavsar. The said partial partition was recognised by the Income Tax Officer u/s 171 of the Income Tax Act by his order of November 15, 1971. The applicant, Rameshchandra, and his mother, Jashoda, formed a partnership by bringing in capital received by him on the said partial partition which had taken place at the end of Samvat year 2025, that is, November 9, 1969. The assessee, Rameshchandra, was assessed in the status of a Hindu undivided family for the assessment years 1970-71 to

1974-75 and in respect of the assessment year 1975-76 also, the return was filed by him showing the Hindu undivided family status and the income from share in the said partnership firm. This was on the basis that Rameshchandra, his wife and sons constituted a smaller Hindu undivided family and the share obtained on partition would belong to his smaller Hindu undivided family as distinguished from the bigger Hindu undivided family of Jivanji Govindji Bhavsar. The said bigger Hindu undivided family did not file any return of income after the partial partition which took place at the end of Samvat year 2025 right up to the assessment year 1974-75 as the income from property was below the taxable limit. However, from Samvat year 2030, that is, assessment year 1975-76, Rameshchandra as the karta of a bigger Hindu undivided family of Jivanji Govindji Bhavsar started business in grains and filed the return. According to the assessee, therefore, there were two Hindu undivided families, one bigger Hindu undivided family of Jivanji Govindji Bhavsar and another smaller Hindu undivided family of Rameshchandra, which existed simultaneously according to the assessee. It was further contended on behalf of the assessee that the partial partition effected by him and his mother regarding the business assets of the bigger Hindu undivided family was valid. The Income Tax Officer held that there were no two Hindu undivided families in existence and the only Hindu undivided family which was in existence was the smaller Hindu undivided family of Rameshchandra particularly because the bigger Hindu undivided family had merged into the smaller Hindu undivided family in view of the fact that there was only one coparcener and that the widowed mother had obtained her share in the coparcenary property u/s 6 of the Hindu Succession Act and so, no longer further entitled to share on partition. He accordingly clubbed the income of both the Hindu undivided families in the assessment of the applicant-assessee.

3. In appeal to the Appellate Assistant Commissioner, the Income Tax Officer's order was upheld. On further appeal to the Tribunal, it was contended by the assessee that the partial partition was valid and, in any case, the order of the Income Tax Officer recognising this partial partition u/s 171 could not be ignored unless it was set aside in appropriate proceedings and, therefore, it was not possible to assess the income of the original Hindu undivided family as if the original Hindu undivided family had continued to exist. An alternative contention was advanced that in any case the arrangement between the assessee and his mother was a valid family arrangement and, therefore, it should be given effect to. The Tribunal held that the partition between the mother and son was not valid. The Tribunal also negated the contention of treating this as a family arrangement. In spite of this finding, the Tribunal allowed the appeal upholding the contention that the order of the Income Tax Officer recognising the partial partition could not have been ignored and that the order operated till it was set aside in appropriate proceedings. The appeal of the assessee was, therefore, wholly allowed with the result that the business income earned by the bigger Hindu undivided family could not be clubbed with the income of the smaller Hindu undivided family. In that state of affairs, the applicant having succeeded

wholly in appeal before the Tribunal could not have sought the reference. The Commissioner, however, sought the reference from the Tribunal u/s 256(1) of the Income Tax Act on the question as to whether the Tribunal was right in allowing the appeal by holding that till the order of the Income Tax Officer recognising the partial partition was set aside in appropriate proceedings, it operated for all intents and purposes and, therefore, the income of the bigger Hindu undivided family could not have been clubbed with the smaller Hindu undivided family, in that the applicant-assessee sought reference of two questions on the points of validity of partial partition and in any case it was a family arrangement which was negatived by the Tribunal. The Tribunal rejected the application of the Commissioner u/s 256(1) with the result there was no occasion for the Tribunal to refer these two cross-questions to this court. The Commissioner, however, moved this court by the present Income Tax Application No. 79 of 1983 seeking an order calling for the reference u/s 256(2) of the 1961 Act. This court has made the rule absolute calling for the statement of a case as prayed for by the Commissioner. At the stage when the Tribunal was drawing up the statement of the case for reference as directed by this court, the present applicant again approached the Tribunal for referring the two cross-questions to this court along with the question called for by this court at the instance of the Commissioner. The Tribunal found it difficult for stating the two cross-questions as prayed for by the applicant without clarification in that behalf by this court, since this court had called for the reference of a single question as prayed for by the Commissioner. It is in these circumstances that the present miscellaneous civil application has been moved by the applicant.

4. We are of the opinion that the legal position has been clearly enunciated and settled by the decision of the Supreme Court in *Commissioner of Income Tax, Kerala Vs. V. Damodaran*, . After explaining the scheme of section 256 of the Income Tax Act, 1961, which, shortly stated, enables a party aggrieved by the order of the Tribunal to seek reference. An aggrieved party is obviously that party which is aggrieved by the order of the Tribunal u/s 254 deciding the appeal against it. In a given case, the Tribunal u/s 254 may decide the appeal partly against one party and partly against the other. In such a case, each of the aggrieved parties has to seek reference and one aggrieved party cannot seek reference in respect of the decision of the Tribunal by which he is aggrieved in an application where the other party which is also aggrieved by the decision seeks reference. In other words, a party aggrieved by the decision of the Tribunal u/s 254 cannot seek reference in his capacity of non-applicant. However, there may be cases where the Tribunal might have wholly allowed the appeal on one or the other contention, though negating some of the contentions urged in support of the appeal. In such cases, the appellant before the Tribunal whose appeal has been allowed cannot be said to be an aggrieved party and cannot seek reference. However, when the other party which is really aggrieved by the decision of the Tribunal in such cases seeks reference, the appellant whose appeal has been allowed can move the Tribunal for making reference of the cross-questions in

respect of those contentions which have been negated by the Tribunal (see Commissioner of Income Tax, Kerala Vs. V. Damodaran, The present case before us falls in that second category where the appeal of the assessee was wholly allowed on one point, namely, the order of the Income Tax Officer recognising the partial partition was good for all intents and purposes, since it was not set aside and, therefore, could not have been ignored while rejecting the other contentions in support of the appeal, namely, on the validity of the partial partition and, in any case, to treat it as a family arrangement. We are of the opinion that the applicant-assessee is entitled to seek questions on these two points. Mr. G. N. Shah, appearing for the Commissioner-opponent before us urged that inasmuch as the assessee has not come u/s 256(2) before us when the Tribunal did not refer his cross-questions while dismissing the application of the Commissioner for reference u/s 256(1), is not now competent to seek directions from this court by this miscellaneous civil application. We are afraid that this contention is not well-founded for the obvious reason that the assessee was not an aggrieved party who could have sought reference u/s 256(1) and, therefore, when his cross-questions could not be referred to us since there was no occasion for the Tribunal to refer because the Tribunal has dismissed the application of the Commissioner for reference u/s 256(1), the assessee could not have come u/s 256(2) at that stage. In the alternative, Mr. Shah submitted that even if the court is of the opinion that the Tribunal should refer the two cross-questions as required by the assessee, no directions in that behalf should be given since that would be tantamount to exercising the power u/s 256(2) without proper application made in that behalf which application could not have been moved for the obvious reason of its incompetency. In support of this contention, Mr. Shah relied on the following observation made by the Supreme Court in Commissioner of Income Tax, Kerala Vs. V. Damodaran, :

"In either case, the party who is aggrieved and who desires a reference to the High Court must file a reference application for that purpose. It is not open to him to make a reference application filed by the other party the basis of his claim that a question of law sought by him should be referred. The second category consists of cases where the order made by the Appellate Tribunal u/s 254 operates entirely in favour of one party, although in the course of making the order, the Appellate Tribunal may have negated some points of law raised by that party. Not being a party aggrieved by the result of the appeal, it is not open to that party to file a reference application. But on a reference application being filed by the aggrieved party, it is open to the non-applicant, in the event of the Appellate Tribunal agreeing to refer the case to the High Court, to ask for a reference of those questions of law also which arise on its submissions negated in appeal by the Appellate Tribunal. It is, as it were, recognising a right in the winning party to support the order of the Appellate Tribunal also on grounds raised before the Appellate Tribunal but negated by it."

5. We do not find any compelling reason or any point in the above para which should deter us from issuing necessary directions calling upon the Tribunal to set

out the two cross-questions as required by the assessee. The observation which has been emphasised by us in the above paragraph does not warrant that it is only at the stage when an application for reference u/s 256(1) is made that this power of referring the cross-questions can be exercised by the Tribunal. In our opinion, reading the observation in that limited way would defeat the very purpose which has been set out in the last lines of the paragraph set out above. The ultimate purpose is to enable a non-applicant to seek questions of law arising out of the order of the Tribunal u/s 256. No doubt the part which has been emphasised in the above paragraph refers to the stage when the cross-questions can be also referred for advice, but to restrict that stage to the point of time when an application for reference is made before the Tribunal u/s 256(1) is not warranted. The stage of making application is at the time when the aggrieved party makes an application for reference whether it is at the Tribunal's level u/s 256(1) or at the High Court's level u/s 256(2). The power of the High Court u/s 256(2) for directions to the Appellate Tribunal to state a case setting out the question of law and seeking the advice thereon is co-extensive with the powers of the Tribunal to state a case u/s 256(1) (vide *New Jehangir Vakil Mills Ltd. Vs. Commissioner of Income Tax, North, Kutch and Saurashtra*, and *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, . In that view of the matter, therefore, we are of the opinion that this application should be allowed and the rule is made absolute accordingly with no order as to costs.