

Rajender Kumar Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-17-1995

Reported in : (1995)53ITD130(Delhi)

Judge : V Gandhi, N Chopra

Appellant : Rajender Kumar

Respondent : Assistant Commissioner of

Judgement :

1. These cross appeals, one by the assessee and the other by the Revenue, for the assessment year 1987-88 are directed against order of CIT (A), Mazaffarnagar dated December 17, 1991. Both the appeals were heard together for the sake of convenience. We shall first take appeal filed by the Revenue wherein the following grounds of appeal have been raised: 1. That the learned CIT(A) has erred in law and on facts in deleting addition of Rs. 5,66,556 (being the value of silver coins for Rs. 1,58,373 value of Kara, Hansuli of Rs. 1,43,380 value of silver ornaments of Rs. 2,14,171 silver utensils of Rs. 16,050) by observing that the silver coins, gold ornaments, etc. have been received by way of Will of Smt. Magan Wati since the Will has never been found during the course of search nor. the same has been produced in the course of assessment proceedings.

2. That the learned CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,08,000 being investment in gold ornaments & of silver coins by observing that the same has been received by way of Will.

3. That the learned CIT(A) has erred in law and on facts in setting aside the assessment to be made afresh by observing that the same belong to others.

4. That the order of the learned CIT(A) may be set aside and that of the Assessing Officer be restored.

2. The facts of the case briefly stated, are that the business and residential premises of the assessee, his brother Surendra Kumar and his sister-in-law Smt. Poonam Mittal were subjected to search operation under Section 132 of the Income-tax Act on 4-12-1989. Ajoint Panchnama in the name of assessee and Mrs. Poonam Mittal was prepared in respect of cash, gold ornaments and silver assets found at house situated at Mohalla Misar Murar, Saharanpur. These assets were seized. Apart from cash of Rs. 40,000 jewellery (valued at Rs. 1,37,053), silver articles (valued at Rs. 5,66,556) were found from the premises. According to the Revenue, the above cash and silver articles belonged to the assessee and his brother Shri Surendra Kumar. As per the assessee, above articles were found and seized from premises which were in occupation of different persons. The authorised officer wrongly prepared Panchnama only in the name of the assessee and his brother's wife Smt. Poonam Mittal. The cash of Rs. 40,000 and certain gold articles and other assets have already been treated as fully explained and there is no dispute about these items. The controversy before us, raised in the appeal of the Revenue, relates to silver articles and pawned articles of aggregate value of Rs. 5,66,556 besides gold ornaments of value Rs. 1,08,000. The bifurcated value of different items is available in para 4 of order of CIT(A) and is as under:(i) Rs. 1,08,000 Added on account of value of 36 tolas of gold ornaments out of total of 770 gms. of(ii) Rs. 1,58,373 Value of silver coins of British Regime (3501.5 in Nos.);(iii) Rs. 3,73,601 Representing the value of silver ornaments and utensils weighing 123.200 Kgs(iv) Rs. 34,582 Old pawned articles (valued on the basis of ----- intrinsic value).

In respect of last item of pawned articles, the learned CIT(A) deleted the addition as Shri Surendra Kumar accepted ownership of these articles and admitted to have carried on business of pawning of silver jewellery. His matter is stated to be pending before the Settlement Commission. The CIT(A) further observed that in

similar manner, the Assessing Officer had added sum of Rs. 1,41,400 in respect of other pawned articles owned by Shri Surendra Kumar. The said addition was also deleted by the CIT(A) with similar observations. The Revenue has not challenged deletion of Rs. 1,41,400. In the above circumstances, we see no merit in the claim of the Revenue relating to addition of Rs. 34,582. The deletion of above amount is hereby confirmed.

3. In respect of addition of Rs. 1,08,000 and of silver coins (valued at Rs. 1,58,373) and silver ornaments and utensils (value Rs. 3,73,601), the learned CIT(A) accepted the case of the assessee that above articles belonged to different persons and were bequeathed by Smt. Magan Devi, the mother of the assessee through her Will dated 25-11-1973. Therefore, considerable arguments were addressed before us, during the hearing of this appeal, on existence and validity of aforesaid Will. The Revenue contended that Smt. Magan Devi executed no Will, whereas the assessee argued that she executed a legal and valid Will.

4. To explain source of acquisition of various assets found and seized during the course of raid, the assessee submitted that these articles were acquired through Will of Smt. Magan Devi. The Assessing Officer did not accept the above plea as no Will was claimed at the time of search operations. The Assessing Officer insisted on production of original Will which was not produced on the ground that the same was eaten away by ants. The Assessing Officer held that acquisition of jewellery of estimated value of Rs. 1,08,000 and of silver articles and coins (value Rs. 5,66,556) was not explained. While rejecting the case of the assessee, the Assessing Officer observed, "Smt. Magan Devi was never a wealth-tax assessee. She was not even income-tax assessee. The assessee has taken up this plea when the assets have been seized. Had it been so, the assets of the assessee such a big HUF would have been assessed to income-tax or Smt. Magan Devi at least should have been a wealth-tax assessee. In the absence of original 'WILL' and the fact that Smt. Magan Devi is not the assessee of wealth-tax and income-tax, and that the assessee failed to prove authenticity of the 'Will' at the time of proceedings under Section 143(3) and the plea taken by the assessee that ants have eaten away the original 'Will', all these facts reflect nothing except that it is a cooked up story of the assessee.

But not filing the original 'Will' and acceptance of the facts by Shri Rajender Kumar that the 'Will' eaten away by the ants, the assessee failed to prove his contention and has not filed any evidence in his contention. I, therefore, hold that the jewellery of gold, silver articles and coins of Rs. 5,66,556 represents pent-up resources income (concealed) of the assessee and added as concealed income".

5. The assessee impugned the above assessment in appeal before CIT(A).

In respect of 36 tolas of gold ornaments valued at Rs. 1,08,000 the learned CIT(A) accepted that these ornaments belonged to wives of the assessee and his two brothers i.e., Smt. Shyam Kumari, Smt. Poonam Mittal and Smt. Kamlesh Mittal. The premises from which these ornaments were seized was used for residential purposes by sons of late Shri Makhan Lai (father of the assessee) and by ladies for carrying on their business activities. Thus jewellery (valuable) "found from the possession and control of different persons in the said residential premises", were collected at one place and were inventorised also at one place. In this connection, the learned CIT(A) relied upon documents appearing at pages 38 and 105 of the Paper Book. He further referred to and relied upon statement of assessee Shri Rajender Kumar that family members of his other brothers were keeping jewellery with him and also in locker held by his son. As the evidence filed by the assessee was not controverted by the Assessing Officer in his rejoinder to the written statement filed before him, he accepted the claim of the assessee and deleted the addition.

6. The Revenue has come up in appeal. The learned D.R. relied upon observations made by the Assessing Officer. After hearing both the parties and after considering material available on record, we are of view that 36 totals of jewellery has rightly been accepted as explained. In the raid, cash of Rs. 50,045 was also found but was claimed to belong to the following persons: (vi) (Km.) Poonam, aged about. 22 years, daughter of Shri Rajendra Kumar.

The CIT(A) accepted that cash belonged to aforesaid persons. The revenue has accepted the aforesaid factual finding of CIT(A) and deletion of addition on account of cash is not in dispute and has become final. Thus, if sons of Shri Makhan Lal and their families were residing in the demised premises wherefrom

cash and jewellery were found, 36 tolas claimed to be belonging to four families on facts of the case, can reasonably be held to be explained. It is not in dispute that the assessee, his father and other brothers were carrying on sarrafa business for the past several years. From the assets found in the shape of cash, jewellery, silver utensils, etc., it is quite evident that earnings of above persons was substantial. Ladies in such families as per custom among Hindus generally received reasonable jewellery at the time of their marriage. Therefore, in our opinion, claim of 36 tolas with three ladies is not such a tall claim to be rejected without demonstrative evidence. On facts, the claim was rightly accepted by CIT(A). The other aspect of the matter whether Smt.

Magan Devi executed Will or not is being separately dealt with.

7. The other addition made on account of silver coins (Rs. 1,58,000) and of silver ornaments and utensils (Rs. 3,73,601) was deleted and it was held by the CIT(A) that these articles were acquired by different members of assessee's family as per the Will of Smt. Magan Devi. The learned D.R. vehemently contested the finding of CIT(A) relating to acceptance of the Will. He drew our attention to the statement under Section 132(4) of the assessee, Poonam Mittal and Shyam Kumari and pointed out that no reference to the alleged Will was made in their statements. Only in proceedings under Section 132(5) of the Income-tax Act, the Will was set up for the first time. The alleged original Will was never produced and only a copy notarised by a Notary Public was produced. The assessee did not demonstrate as to how notarised copy was obtained. Existence of original Will was not shown. Even Notary Public in his certificate did not refer to original Will but only to its copy.

He, therefore, submitted that observations of CIT(A) in para 5 of the impugned order where it is stated that original Will was seen by Notary Public are factually wrong. The Assessing Officer was fully justified in insisting on production of the original Will, as signatures of the testator for comparison were available only on the original. The contents of the Will further suggested that the testator was fully aware of registration. Yet the alleged Will was not registered. He further submitted that Will was an important and precious document usually kept in safe custody.

But, in the present case, the notarised copy was kept in safe custody (Locker) but original was permitted to be eaten by ants. This was unbelievable. The documents executed at the time of search of premises of assessee's son Rakesh Kumar showed that even torn pieces of Panchnama were collected and retained safely but strangely enough, the Will was permitted to be mutilated and destroyed.

This was unacceptable. The testator was neither income-tax assessee nor assessed under the Wealth-tax Act nor any return of her estate was filed under the Estate Duty Act. There is further no evidence to show that the lady had any reasonable source to acquire and possess articles claimed to belong to her and bequeathed by her through the Will. The affidavits produced by different persons were self serving documents having no evidentiary value. In this connection, learned D.R. relied upon decision of jurisdictional High Court in the case of Sri Krishna v. CIT [1983] 142 ITR 618 (All.). The statements recorded at the time of raid showed that none of the legacies under the Will was aware of the Will. This and above circumstances clearly showed that Will set up by the assessee was not a genuine document. The learned departmental representative accordingly impugned the order of CIT(A).

8. Shri Garg, learned Counsel for the assessee supported the impugned order. He explained that Smt. Magan Devi died in 1974 whereas her husband Shri Makhan Lal died on 23-12-1980. The Will was got mutilated in hands of Shri Makhan Lal and, therefore, a necessity to prepare a notarised copy of the Will arose in the year 1981. Accordingly notarised copy was prepared. Certificate of Notary Public who had notarised the Will was filed with the authorities and copy thereof was available at page 117 of the Paper Book. The notarised copy was seized by the Revenue on 24-12-1986 from the locker held by the assessee's son Shri Rakesh Kumar. As original Will could not be produced, secondary evidence relating to execution of Will was filed before CIT(A). The secondary evidence accepted by the CIT(A) is as under: 1. Statement of affidavit of Brij Mohan Lal who was closely related to the testator and assessee witnessed to her Will.

2. Affidavit of Shri Magan Lal who had scribed the Will at the instance of the testator. The assessee requested that Shri Magan Lal be summoned for

examination.

3. Affidavits of the assessee, his brothers Ashok Kumar and Surendra Kumar and their wives were filed and their statements on oath recorded. All the aforesaid persons deposed about the existence of Will and disclosed articles received by them under the Will. The affidavits and statements in this case cannot be held to be self serving as these are fully corroborated by other independent and contemporaneous evidence on record. The affidavits and statements have not been contested by the Revenue.

4. That notarised copy of Will was found and seized on 25-12-1986 from a bank locker which were put under restrain w.e.f. 4-12-1986.

5. It is wrong to suggest that evidence regarding existence of Will was not given at the first instance. The raid was started on 4-12-1986 and continued for several days. This would be clear from notices issued under Section 112A read with Section 132(5) of the Act on 10-12-1986 to the assessee and his brother asking them to file certain information by 24-12-1986. As search operation was going on and as officers were busy with other important matters, the detailed information was filed on 29-12-1986 wherein existence and contents of Will were explained. The father of the assessee not being a legatee under the Will did not keep the Will under safe custody.

9. Shri Garg further submitted that assessment of entire jewellery and of silver articles in the hands of the assessee was not justified. The seized documents, cash, jewellery etc. were found from a house in Mohalla Misar Murar which was occupied by the assessee, his brothers and their families. Even the Panchnama was prepared in the name of the assessee and some other persons. Cash, F.D.Rs. and some other assets mentioned in the Panchnama have already been accepted to belong to persons other than the assessee. In this connection, Shri Garg invited our attention to order passed in the case of Makhan Lal and Sons bigger HUF and Smt. Pooran Rani. These persons as per the assessment orders were shown to have same residential address. Therefore, the assessment of entire jewellery exclusively in the hands of the assessee was totally unjustified.

10. Shri Garg further argued that Revenue authorities wrongly placed onus on the assessee to explain source of acquisition. It was for the Revenue to prove first that assessee was owner of the articles for the purposes of Section 69A. These articles were not seized from the persons of the assessee but from different persons occupying the seized premises. Shri Garg further relied upon orders passed by CIT under Section 132(11) of the Income-tax Act in the case of Smt. Shyam Kumari and Smt. Kamlesh Kumari who were shown as legacies under the same Will.

The claim was duly accepted. In this connection, Shri Garg relied upon CIT v. Shamshuddin Manzoor Haque [1988] 172 ITR 696 (All.). He further submitted that order passed under Section 143(1) of the Act has all the force of a valid assessment order. Shri Garg submitted that nature of assets were such that those could not be acquired in the year of the raid. The silver coins with British marking were not a legal tender in the year 1986. In the alternative, Shri Garg contended that having regard to fact that locker from which notarised copy of Will was seized was operated last in 1984 (prior to its operation in 1986 by the Revenue) and that notarised copy of Will in the year 1981 was available, the addition could not be made in the year under consideration. Shri Garg accordingly supported the impugned order.

11. We have given careful thought to the rival submissions of the parties. The question of existence and legal execution of a Will propounded by a party and disputed by the other, is always a complex question. A Will is required to be executed and attested in the manner provided by Sections 59 & 63 of the Indian Succession Act. It is required to be proved in a Civil Court under Sections 67-68 of the Evidence Act, normally by calling scribe and attesting witnesses. In the present case also, the assessee tried to prove the Will by filing affidavits of Shri Magan Lal, who is claimed to have scribed the Will and of Shri Brij Mohan Lal who is one of the witnesses of the Will. The assessee as per letter dated 25-9-1988 further requested the Assessing Officer to make enquiry by issuance of a commission. The ITO did examine Shri Brij Mohan Lal, one of the witnesses, of the Will, but did not examine scribe or the other witness. Although technical rules of Evidence Act are not applicable to proceedings under the Income-tax Act, the question of

execution of Will is required to be examined on the basis of valid testimony of the witnesses to the Will and other relevant circumstances. Unfortunately, in this case the relevant material was not collected and it is difficult to decide the question whether Smt. Magan Devi executed a valid Will, as claimed. The Assessing Officer while holding that no Will was executed relied mainly upon the fact that original Will was not produced in proceedings before him. He refused to accept notarised copy of the Will. The production of an original Will, no doubt, is important as otherwise Will is presumed to be revoked. But aforesaid questions relating to execution or revocation of the Will, in our opinion, are not very material for disposing of the controversy before us. We shall discuss this in the following paras.

12. The 'Will' is a private document concerning legatees/heirs of a testator and the Revenue can by no stretch of imagination raise any dispute relating to validity of a Will. In income-tax proceedings, a Will is mostly relied upon as a contemporaneous document to explain source of acquisition of certain assets. Therefore, the more important question is always the source of acquisition of disputed assets, which is sought to be explained and not valid execution of the Will. For example, in this case even if it is accepted that late Smt. Magan Devi did execute a valid Will but had no source to acquire or possess silver ornaments claimed to have been bequeathed by her, the case of the assessee would not be advanced. Therefore, the important question is the capacity or source of acquisition of articles rather than legal and valid execution of Will.

As regards capacity of Smt. Magan Devi, the assessee had stated that Smt. Magan Devi in her life time was partner of M/s. Bishan Dayal Makhan Lal, Lashkar. The said firm was carrying on sarrafa business and were assessed to tax. She is also claimed to be the only daughter of her parents. It is further claimed that at the time of her marriage, much before the partition, she received jewellery and silver coins which at the relevant time were less than Rs. 10,000 in value. The father of Smt. Magan Devi died in the year 1957 and on his death, Smt.

Magan Devi received large quantity of ornaments and silver coins as legal heir of her father. The claim was supported by filing affidavits of assessee and his

brother. The Assessing Officer rejected the entire claim. He observed that Smt. Magan Devi was not shown to be assessed under the income-tax or the wealth-tax. In our considered opinion, Assessing Officer's approach was not correct. All persons assessable under the income-tax and wealth-tax are not filing their correct returns and therefore there is no presumption that a person who has not filed a return does not possess any assessable income or wealth or no income/wealth.

In our considered opinion, it was necessary for the Assessing Officer to cross examine the deponents relating to capacity of Smt. Magan Devi and then decide the issue as per facts available on record. This unfortunately has not been done. The position, therefore, is that no proper finding relating to valuable assets possessed by Smt. Magan Devi can be recorded although it is difficult to reject assessee's contention that the claim made in the affidavit was not refuted by the Assessing Officer.

13. However, even without deciding above aspect of the matter, the impugned order of CIT(A) deleting addition on account of silver coins and silver ornaments and utensils can be upheld. It is an admitted position that Will dated 25-11-1973 is tailor made and contains complete description with slight variation of silver coins and silver articles seized in rald. Though the original Will was not produced, a copy of the Will notarised by Mohd. Ilyas, Advocate-cum-Notary Public on 3-6-1981 was found and seized from locker No. 709 with P.N.B. in the name of Smt. Shyam Kumari and Shri Rakesh Kumar in December 1986. The said locker was under restrain since 4-12-1986. It was shown to have been earlier operated upon on 24th December, 1985. Thus this notarised document which clearly showed that it was made to cover and explain different articles, was in existence in 1985. The CIT(A) while deleting addition from the assessment year 1987-88, observed as under: 5.4(a) The typed papers containing a reference to these valuables (even if the said typed papers are not treated as WILL for the sake of argument) had been found from the locker which had earlier been operated on 24th December, 1985 and prior to that on 3rd January, 1984 and 30th November, 1983 and attention is invited to page 18 of the Paper Book. This shows that the valuables in question were in existence even in the earlier years. This submissions has got two aspects. First is that if we apply the test of human mind and probabilities as have been

propounded by the Hon'ble Supreme Court in the case of CIT v. Durga Prasad More reported in 82 ITR page 540, nobody would have taken care to keep these papers in locker had they been mere stray piece of papers having no evidencial value.

Secondly, the event of acquisition of the valuables stand shifted to the financial year 1983-84 (relevant to the assessment year 1984-85) and the financial year 1985-86 (relevant to the assessment year 1986-87). Therefore, no addition could be made in the assessment year under appeal which is the assessment year 1987-88.

The CIT(A) further held that the Will was notarised on 3rd June, 1981 and was therefore in existence in financial year 1981-82. The addition for any unexplained silver coins and silver articles could be made in the assessment year 1982-83 and not in 1987-88. We are inclined to subscribe to the aforesaid view taken by learned CIT(A). The seizer of the document from locker is not in dispute. It is further not in dispute that notarised copy available is a tailor made document with complete and full description of silver articles found. The aforesaid document had only single purpose to serve, that is, to explain the existence of articles mentioned in the Will. In support of the notarised document, the assessee produced certificate from Mohd.

Illyas, Notary Public, which is available at page 117 of the Paper Book. According to aforesaid certificate, Shri Mohd. Illyas, Advocate, Saharanpur confirmed that he attested the photostat copy of original Will of Smt. Magan Devi which was compared by Shri Rakesh Gupta on 3rd June, 1981. The aforesaid certificate of Notary Public has evidenciary value and cannot be rejected without good ground. In the present case, the Assessing Officer did not examine Shri Mohd. Illyas or made any adverse comment to refute the claim in the certificate. The certificate is further corroborated by affidavit of assessee and other members of the family. Having regard to the material available on record, the aforesaid certificate cannot be rejected. It, therefore, necessarily follows that at least a notarised document was made on 3rd June, 1981 to cover silver coins and silver articles in dispute. Therefore, on the basis of documentary evidence, it can safely be held that the

family of the assessee did possess articles in dispute in financial year 1981-82 which could be assessed only in assessment year 1982-83. In view of above circumstances, it is really not material whether Smt. Magan Devi executed a valid Will and possessed all these silver articles at the time of her death around 1974 or not. The deletion of addition made by the CIT(A) on above account has to be upheld.14. Shri Garg also supported impugned order of CIT(A) as in his view, the assessee cannot be held to be owner of coins and other silver articles not found to be in possession and control of the assessee.

These were in control of different persons who were occupying the premises subjected to search. For the reasons given while dealing with seizer of cash and gold jewellery, we accept this submission of Shri Garg. In the above back ground, we uphold order of CIT(A) deleting addition of Rs. 5,66,556.

15. In appeal filed by the assessee, the assessee has challenged setting aside of assessment on addition of Rs. 24,337. It was claimed that said income belonged to Smt. Shyam Kumari and could not be added in the hands of the assessee. There was positive material available on record to link income with Smt. Shyam Kumari and, therefore, CIT(A) should not have set aside assessments on this point. We have considered aforesaid submissions. It is not in dispute that the Tribunal as an Appellate Court can only interfere with discretion of CIT(A) where it is shown to have been exercised in an arbitrary manner. The present case does not fall in that category. All the material on which assessee has relied can be considered by the Assessing Officer while making fresh assessment. We, therefore, do not see any good ground to interfere with the order of CIT(A) on this point.

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