In Re: Keshardeo Chamria

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SooperKanoon Citation : sooperkanoon.com/864688

Court : Kolkata

Decided On : Mar-04-1937

Reported in : AIR1937Cal583

Appellant : In Re: Keshardeo Chamria

Judgement :

Panckridge, J.

1. This reference under Section 66(2), Income-tax Act, arises out of circumstances of some complexity. The assessee Keshardeo Chamria instituted a suit in 1929 on the Original Side of the Court for a declaration that he had been validly adopted by one Amloke Chand, deceased, and was accordingly entitled under Mitakshara law to certain immoveable properties jointly with the defendant Ramprotap, Amloke Chand's brother. There was also a prayer for partition.

2. Ramprotap filed a written statement denying the adoption, and also denying that the properties alleged by the assessee to be joint family properties were in fact such with the exception of one No. 23, Cullen Place, Howrah.

3. On 23rd May 1930, a decree was made by consent. Unfortunately the decree has been drawn up in somewhat ambiguous language, and still more unfortunately the Commissioner of Income-tax appears to be under a misapprehension as to its effect. It was agreed under the terms of settlement annexed to the decree that the assessee was the validly adopted son of Amloke Chand. The decree further

declared that the assessee was entitled to one equal half part or share of the residue of the joint estate mentioned in the terms, after setting apart eleven lacs of rupees for allotment to Ramprotap, and also after setting apart certain of the premises in suit for religious and charitable purposes. Ramprotap was then declared entitled to the remaining equal half part or share. Commissioners of partition were appointed and directions given for accounts, and for mutual conveyances on the basis of the award to be made. Now from the language of the decree one would expect to find a list of admitted joint properties in the terms of settlement, and on the other hand, if no properties were admitted to be joint, one would expect in the body of the decree directions on the Commissioners to enquire what the joint estate consisted of.

4. In fact there is no list of joint properties nor any direction for such an enquiry. Indeed it is admitted that the consent decree did not settle the dispute in so far as the alleged joint nature of the properties claimed in the plaint was concerned, and we have been told that the present Commissioner of partition is in fact holding an enquiry of the sort indicated. Unfortunately the Commissioner of Income-tax states more than once in his letter of reference that the consent decree declared the assessee and Ramprotap to be the owners of the properties in suit in equal shares.

5. On 28th July 1930 the Official Receiver was appointed receiver of the properties (described in the order as 'the immovable properties belonging to the parties to this suit'). An important order was made by consent on 2nd April 1931. The Official Receiver was discharged in respect of the properties, and the assessee and Ramprotap were jointly given liberty to realise the rents thereof on joint receipt, and to meet the necessary expenses thereout, and to file rent suits. The documents of title were to be kept in the joint custody of the assessee and Ramprotap and the assessee were given liberty to invest the money which would come into their hands or divide the same equally. There was also liberty to either party to apply for the re-appointment of the Official Receiver, who in point of fact was re-appointed under an order of the Court dated 23rd August 1933. The Commissioner of Income-tax states that the Official Receiver did not obtain possession until the latter part of February 1934.

6. The Income-tax Officer has in these circumstances disregarded the order of August 1933, and has treated the financial years 1932/33 and 1933/34 on the basis that the order of 2nd April 1931 was effective throughout. No objection has been taken to this way of treating the assessment, the assessee's complaint being that on the basis of the 1931 order the department should have applied Section 41, Income-tax Act. During the years in question the assessee and Ramprotap, in exercise of the liberty given them under the order, have been collecting the rents of the properties and dividing them equally. The Income-tax Officer in these circumstances has treated the rents collected subject to the statutory deductions as the bona fide annual value of the properties within the meaning of Section 9, Income-tax Act, and the assessee and Ramprotap as the 'owners' of the properties in equal shares. He has accordingly included half the annual value in the assessable income of the assessee under the head 'property', the actual amounts being Rs. 33,920 out of a total income of Rs. 48,628 for 1932/33 and Rs. 28,177 out of a total income of Rs. 54,558 for 1933/34.

7. The assessee appealed against the orders of the Income-tax Officer made in the two assessments but the Assistant Commissioner dismissed the appeals, and confirmed the orders of the Income-tax Officer. The matter was then taken to the Commissioner of Income-tax, before whom the assessee formulated certain questions of law {see Appendices B and B(1) to the statement of the cases). The Commissioner has taken the same view as the Assistant Commissioner and the Income-tax Officer, but has referred the following question of law to this Court:

Whether in the circumstances described above, the present assessee and Rai Bahadnr Ramprotap Chamria were the managers of the properties appointed by or under any order of a Court within the meaning of Section 41, Income-tax Act, and whether in the facts and circumstances given above the Income-tax Officer acted illegally in assessing the present assessee in respect of his share of the property?

8. If I understand the assessee aright, he maintains first that for purposes of assessment he is not the owner of the property within the meaning of Section 9. Alternatively it is said that if the assessee is in any sense the owner, he is only so as a member of an 'association of individuals' within the meaning of Section 3.

Next it is argued that whether he is the owner or not, the provisions of Section 41 apply and are mandatory. In other words, at the time that the income was received, it was received by the assessee and Ramprotap as managers appointed by or under an order of the Court, and they can only be assessed in that capacity. It will be noticed that most of these submissions are not directly connected with the question formulated by the Income-tax Commissioner, but at the same time it is I think, necessary for us to express our views upon them.

9. It may not at first sight be apparent in what respect the assessee has been prejudiced by the suggested failure of the Department to apply Section 41, because if the tax had been deducted while the rents were in the hands of the assessee and Ramprotap as joint managers, although, the money available for division would have been less, the dividend presumably would not be liable for tax. The assessee however suggests that if all or any of the disputed properties are found not to be joint, he will be called upon to refund to Ramprotap what he has drawn in respect of that property without any allowance for the Income-tax paid. I do not think it necessary to speculate as to the position which will arise in such a case, for I cannot see that such considerations can affect the construction of the section.

10. Now with regard to the ownership of the property the position is that the assessee has been assessed in respect of property of which at the time of assessment he alleged he was the owner, and of which he still alleges himself the owner, for he does not object to the assessment on the ground that he is not the owner. He points out however that his title is disputed, and that to establish it he has been compelled to institute a suit which may terminate in part, at any rate, in favour of Ramprotap, who until the Official Receiver was appointed on 28th July 1930, was in possession of the disputed properties.

11. To adopt the language of the assessee's counsel, the law says owners shall be taxed; it does not say that claimants shall be taxed. Now it is clear that before an assessee can be taxed as an 'owner' under Section 9, it must be decided that he is in fact the owner of the property in question, and in my opinion this decision rests with the Income-tax Officer, subject to the rights of appeal under Sections 30

and 31. The mere existence of a dispute as to title, even where a suit has been filed, cannot of itself hold up an assessment, otherwise it would be open to an assessee to delay assessment indefinitely by arranging for the institution of collusive proceedings. This difficulty is not met by pointing to Section 41, because as often as not in a suit for declaration of title and ejectment no receiver is appointed and the possession of the party remains undisturbed. It appears therefore that the Income-tax Officer had prima facie the power to decide that the assessee was the owner of a half share in the properties without waiting for the final determination of the High Court suit.

12. It is hard to see in this case how the decision, if it is to be called a decision, of the Income-tax Officer could have been other than it was. The assessee has throughout asserted ownership and has never appealed against the assessment on the ground that be is not the owner. It is true that the Commissioner appears to be in error in considering that the assessee's ownership has been declared by the partition decree, but having regard to the assessee's assertion of ownership and the arrangement embodied in the order of 2nd April 1931, it is impossible to say that the decision of the Income-tax Officer was wrong.

13. With regard to the contention that the owners are an association of individuals within the meaning of Section 3, it is enough to say that this point is not raised in the letter of reference. In my opinion however the words 'other association of individuals' must be construed according to the ejusdem generis rule with reference to the word 'firm' preceding it and they do not Cover the members of a formerly undivided Mitakshara family after a preliminary decree for partition has been made. The members of such a family appear to me to be in the same position as the members of a Dayabhaga family, and it has never been suggested as far as I know that members of such a family cannot be individually assessed in respect of their shares.

14. As regards the provisions of Section 41, the section with which this Reference is directly concerned, the assessee's contentions are, first that the income, profits and gains represented by the annual value of the immovable properties have been received by him and Ramprotap as 'managers' within the meaning of the section,

and secondly that the provisions of the section are mandatory, and that where its conditions are fulfilled, the Department can only look to the manager, and has no recourse to the person upon whose behalf the income, profits and gains are received. On the other hand the Crown maintains that the section cannot apply in the circumstances of this case, and further submits that even if the section is applicable, it merely provides machinery for collection which is available to the Department and which the Department is not compelled to employ.

15. For the latter contention the Crown relies on the observations of the Madras High Court in Commissioner of Income-tax, Madras v. J.V. Saldhana : AIR1932 Mad378 . There a widow was assessed under Section 10(1), Income-tax Act in respect of a business carried on by her and belonging partly to her and partly to her children. It was contended that the tax should be separately assessed on the various owners of the business, and levied on the widow as guardian under Section 40. Dealing with Section 40 the Court states at p. 898:

Now the argument based on Section 40 may first be disposed of. Section 40 and the following sections have been held to be not charging sections but only machinery sections. Section 40 provides that the trustees or guardians shall be assessed in a like manner and to the same extent as the beneficiaries or wards may be assessed. Apart from the fact that these are not charging sections, it may also be observed that they are enabling sections, i.e. the Income-tax Officer can take steps to assess the trustees or guardians as representing their separate beneficiaries or wards as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them, The question in the case before us is not whether the Income-tax Officer can proceed under Section 40 or not, but where he has not chosen to proceed under Section 40 but proceeded to assess on another basis, Section 40 can be relied upon as preventing him from doing so. It is clear that the section cannot be so utilised.

16. The assessee questions the soundness of the observations made by the Madras High Court on the authority of Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, Bombay where the Judicial Committee held that in the circumstances of the case the interest on securities was 'receivable' by the

trustees within the meaning of Section 8 and that the property was 'owned' by them within the meaning of Section 9. Neither case appears to me to be a direct authority on the question whether the application of the sections (including Section 41) grouped under Ch. 5 of the Act is mandatory or discretionary. Even on the assumption that the sections are [mandatory when the conditions specified fin them are fulfilled, the assessee and Ramprotap are not in my opinion within the purview of Section 41. The order of 2nd April 1931 does not specifically appoint them to be receivers or managers, although having regard to the previous order and to the duties and powers conferred, I should hold that they could properly be described as 'managers'. But to bring them within Section 41 it is not enough that they should be appointed to 'manage' the property; they must manage it 'on behalf of another'.

17. The assessee maintains that he and Ramprotap are managing the property on behalf of that one of them who will ultimately be found, as a result of the suit, to be entitled to the property. In my judgment the Income-tax Officer, having found, as he was entitled to do, that the assessee and Ramprotrap are owners of the property in equal shares, was at liberty, if not bound, to treat them as managing, not on behalf of an unascertained owner, but on behalf of themselves. It follows that they have been rightly assessed and taxed directly. The answer to the question referred by the Commissioner will accordingly be that the assessee and Ramprotap were not managers of the properties appointed by or under any order of a Court within the meaning of Section 41, Income-tax Act, and that the Income-tax Officer did not act illegally in assessing the assessee in respect of his share of the property. The assessee must pay the costs of the Reference. The rule stands discharged with costs-10 gold mohurs.

Costello, J.

18. I agree.