(1981) 04 SC CK 0024

Supreme Court of India

Case No: Civil Appeal No. 1038 of 1973.

Barendra Prasad Ray and Others		APPELLANT
	Vs	
Income Tax Officer, ''A'' Ward, Foreign Section and Others		RESPONDENT

Date of Decision: April 7, 1981

Acts Referred:

- Partnership Act, 1932 - Section 2

Citation: AIR 1981 SC 1047 : (1981) 22 CTR 157 : (1981) 129 ITR 295 : (1981) 1 SCALE 949 : (1981) 2 SCC 693 : (1981) 3 SCR 387 : (1981) 6 TAXMAN 19 : (1981) 13 UJ 873

Hon'ble Judges: R. S. Pathak, J; E. S. Venkataramiah, J; A. N. Sen, J

Bench: Full Bench

Advocate: S. Chowdhuri, P.P. Ginwala, T.A. Ramachandran and D.N. Gupta, for the Appellant; V.S. Desai, Champat Rai and A. Subhashini for Respondents No. 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal by certificate under Article 133 of the Constitution arises out of a writ petition filed by the appellants under Article 226 of the Constitution of India before the High Court of Calcutta. The appellants are partners of a firm of Solicitors known as M/s. Orr Dignam & Co. having its office at Calcutta. The appellants acted as the Solicitors of a German Corporation known as Ferbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning (a Corporation organised under the law of Federal Republic of Germany) (hereinafter referred to as ''the German Corporation'') in two suits filed on the Original Side of the Calcutta High Court-one Suit No. 511 of 1962 filed by the Bengal Chemical and Pharmaceutical Works Ltd. against German Corporation and another Suit No. 1124 of 1962 filed by the German Corporation against the Bengal Chemical and Pharmaceutical Works Ltd. on the alleged

infringement of a patent. The appellants were instructed by a firm of Solicitors in London namely M/s. Ashurst, Morris, Crisp & Co. (hereinafter referred to as ''the London Solicitors'') who were also acting for the German Corporation by a cable dated May 31, 1965 to retain in the said suits Mr. Blanco White Q.C., a resident of the United Kingdom, who was a barrister having considerable practice in the branch of patent law. On his arrival in India, the appellants accordingly retained Mr. Blanco White as the counsel to argue the case of their clients the German Corporation even though they did not deliver any briefs to him and also did not pay or undertake any obligation to pay any fees for his services. The briefs had been earlier delivered by the London SolicitOrs. It is stated that they did not know as to how much amount was payable to him by the London Solicitors by way of fees. The hearing of one of the said two suits lasted for thirteen days commencing from January 27, 1970 and was concluded on February 16, 1970. Mr. Blanco White left India on February 17,1973 after the hearing was over without making any arrangement regarding the payment of income tax on the fees earned by him by arguing the case of the German Corporation. Thereafter on February 19, 1970, the appellants received a notice from the income tax officer, ''A'' Ward, Foreign Section asking them to furnish information about the fees earned in India by Mr. Blanco White as counsel engaged by them to argue the case of their clients i.e. the German Corporation and also drawing their attention to the liability arising u/s 193(2) of the income tax Act, 1961 (hereinafter referred to as ''the Act'') which required them to deduct the tax payable under the Act at source on payments made to a non-resident. The appellants sent a reply to that letter on February 24, 1970 stating that Mr. Blanco White had been engaged by the London Solicitors of the German Corporation to appear before the Calcutta High Court on behalf of the German Corporation and that they had neither briefed him nor had they incurred any liability to pay him any fees. They, therefore, denied their liability u/s 195(2) of the Act. Incidentally it may be stated here that the appellants referred to one other suit i. e. Suit No. 422 of 1963 on the file of the Calcutta High Court filed by the German Corporation against Albert David Ltd. in which also Mr. Blanco White had been engaged for the p. German Corporation. Thereupon by a letter dated February 27,1970 the Income-lax Officer informed the appellants that he proposed to proceed against them u/s 163(1) of the Act treating them as the agents of Mr. Blanco White on the ground that the income in question had arisen on account of the business connection that existed between the appellants and Mr. Blanco White. To this, the appellants sent a long reply dated March 10/11, 1970 denying their liability to be proceeded against u/s 163(1) of the Act. In the course of the said reply, the appellants contended inter alia that they had not either engaged or briefed Mr. Blanco White in the three suits on the file of the Calcutta High Court; that they had not paid or promised to pay any fees to him and that, therefore, no income had accrued to Mr. Blanco White on account of any business connection that existed between them and Mr. Blanco White. The appellants further contended that as Mr. Blanco White was a barrister who was not carrying on any business but had only rendered professional service in Calcutta, the

connection if any, could not be a business connection. They also questioned the jurisdiction of the income tax Officer to make any assessment treating them as the representative assessees of Mr. Blanco White. The income tax Officer by his letter dated March 25, 1970 rejected the plea of the appellants and called upon them to appear before them on April 18, 1970 to make any other submission that they had to make. Thereafter the appellants filed a petition under Article 226 of the Constitution before the High Court of Calcutta and obtained d rule nisi on May 25,1970 calling upon the income tax Officer, the Commissioner of income tax West Bengal I and the Union of India to show cause as to why the proposal to initiate proceedings under the Act as stated above should not be quashed and a writ in the nature of mandamus prohibiting them from proceeding against the appellants u/s 163(1) of the Act should not be issued. The petition was contested by the respondents. In the Counter Affidavit filed by the income tax Officer, it was asserted that the Department had received information that Mr. Blanco White had charged Rs. 17,000/- per day by way of fees for appearing in the Calcutta High Court in the suits referred to above ; that Mr. Blanco White was not domiciled in India; that inasmuch as his stay in India did not exceed ninety days it was not necessary for him to obtain a Tax Exemption Certificate for leaving India; that the appellants had acted as instructing Solicitors to the German Corporation in the three suits in which Mr. Blanco White had argued as counsel; that he could not have, according to the Calcutta High Court Rules (Original Side) appeared before that court unless he was instructed by an Attorney of that Court who in the instant case happened to be the appellants and that, therefore, there existed a business connection which brought the appellants within the scope of Section 163(1) of the Act. It was also contended by the respondents that the petition was premature as the matter had still to be decided in accordance with the procedure prescribed by the Act. The learned Single Judge who heard the petition was of the view that the question whether the case came within the purview of Section 163(1) had to be determined after ascertainment of facts by the income tax Officer and that therefore, the petition was liable to be dismissed on the ground that it was a premature one. Accordingly he dismissed it without expressing any opinion on the merits of the case. Aggrieved by the decision of the Single Judge, the appellants preferred an appeal before the Division Bench of the Calcutta High Court. The Division Bench dismissed the appeal holding, inter alia, that from the facts disclosed before the Court it appeared that from May 31, 1965 upto Febuary 16, 1970 there was business connection (directly of indirectly through correspondence) between the appellants firm and the non-resident British counsel, Mr. Blanco White, that it could not be said that there was no element of continuity and that the transaction was a solicitory and isolated one and that taking into account the surrounding circumstances and particularly the relationship between the Solicitors and a counsel, an agency could very well be said to have been established between the appellants'' firm and the non-resident British counsel, Mr. Blanco White. The Division Bench further held that there was business connection between them and that it was not possible to accept the contentions of appellants

that no income either accrued or arose to Mr. Blanco White in India. The appeal was accordingly dismissed. On a certificate granted by the Division Bench under Article 133 of the Constitution, the appellants have come up in appeal to this Court against the judgment of the Division Bench of the High Court.

2. It should be stated here that alongwith the petition for a certificate under Article 133 of the Constitution, the appellants filed an application before the High Court for stay of further proceedings before the Department. On that application, the High Court passed an order on March 12, 1973 stating that the order of stay already granted would continue subject to the following modification:

(1) The respondents will be at liberty to decide after giving the petitioners a hearing whether the petitioners firm should be treated as agent of Mr. Blanco White u/s 163 of the income tax Act, 1961;

(2) If they so decide the respondents will be at liberty to issue a notice u/s 148 of the Act but will not take any further steps thereafter until the disposal of the application;

(3) The petitioners will also be at liberty to appeal from any order made u/s 163 without prejudice to their contentions in the proposed appeal to the Supreme Court.

3. We are informed that pursuant to the liberty given by the said order, the income tax Officer made an order on March 23, 1977 treating the appellants'' firm as the agent of Mr. Blanco White u/s 163(1) of the Act and also on the same date issued a notice u/s 148 of the Act to the appellants to file a return of the income of Mr. Blanco White. It is also stated that the appellants preferred an appeal against that order before the Appellate Assistant Commissioner without prejudice to the appellants'' contentions in their appeal to this Court. Ultimately on November 30, 1973 this Court made an order that the appellants might apply to the Appellate Assistant Commissioner for an order of stay in respect of the question whether they were agents of Mr. Blanco White and that at any rate even if the income tax Officer were to proceed with the case, he would make the assessment but would not make a final demand till the disposal of the appeal. It is further stated that pursuant to the notice u/s 148 of the Act, the appellants filed a ''nil'' return. Thereafter we are informed that the income tax Officer intimated the appellants on September 17, 1977 that he had completed the assessment of Mr. Blanco Waite for the assessment year 1970-71 treating the appellants'' firm as the agent and that copies of the assessment order, demand notice and challan would be forwarded to them after disposal of this appeal.

4. It is necessary to refer at this stage to certain relevant facts of the case. The appellants were acting as the Solicitors of the German Corporation in India in the cases referred to above and the London. Solicitors were acting as its Solicitors in London. Suits Nos. 511 and 1124 had been instituted in 1962 and suit No. 422 in 1963. On May 31, 1965, the London Solicitors sent a cable to the appellants which E read as follows :

Dignior Calcutta
We act for Farewerke Hoechst this country and understand that you act India stop in connection acting infringement Indian Tolbutamide patent have been instructed to retain Blanco White as counsel to attend hearings Calcutta and Bombay stop Imperative to know dates of respective actions since counsel can only accept subject to other Commitments stop Please cable hearing dates if known or date when Information available stop Our Ref Lcc.

Ashursts London

Col Blanco White REF : LCC.

5. The above cable shows that the London Solicitors had sought information about the suits in Calcutta to enable them to engage Mr. Blanco White to plead on behalf of the German Corporation in the said suits. On December 23, 1969, the London Solicitors wrote a letter to the appellants in which it was stated that the copies of certain documents sent by the appellants had been handed over to Mr. Blanco White in addition to copies of certain other documents which they themselves had handed over to him. A part of the aforesaid letter which is relevant for the purpose of the present case, is reproduced below :

...We are asking Mr. Divecha of Hoechst Pharmaceuticals Limited, Bombay, to arrange for copies of the evidence in the Bombay case to be sent to you. The formulation of the evidence can then be discussed between you and your Counsel and Mr. Blanco White when he arrives in Calcutta. The remaining documents which we are sending you are three bound volumes of pleadings which you sent to us in the early stages but which will no doubt be of use to you at the trial, Mr. Blanco White of course has copies of all the pleadings in the three cases.

There are a number of points which Mr. Blanco White has asked us to put to you for consideration and these are as follows :

1. It is not entirely clear from the pleadings that Indian Patent No. 66049 is a document in the Albert David case. Will you please consider whether this specification may have to be strictly proved ?

2. In the infringement action by Hoechst against Bengal Chemicals, the defendants have objected there is no claim against the second and third defendants, that is the inventors named in the Patent. Mr. Blanco White sees no reason to pursue this point and, subject to your views, would suggest that it is abandoned.

3. In the threats action by Bengal Chemicals, again subject to your views, Mr. Blanco White would not propose to argue that Hoechst did not in fact threaten proceedings.

4. Also in the threats action, there is a point which we would mention here on which we are asking Hoechst Pharmaceuticals Limited of Bombay for information. Bengal

Chemicals have said in their affidavits filed in the interlocutory proceedings in April 1962 that they stopped production of Tolbutamide because of the threats made by Hoechst. At the same time it appears that they published advertisements in the Punjab Medical Journal and the Indian Medical Journal of 1st May of that year. We are asking Hoechst Pharmaceuticals if they can say when these advertisements would have had to have been sent to those Journals for publication on that date.

Mr. Blanco White will be flying in Calcutta on BOAC Flight No. 914 leaving London on Tuesday, 20th January 1970 and arriving at 6.40 a.m. local time on Wednesday, 21st January. He would like to have preliminary discussion with you and counsel on matters of procedure, etc. on Thursday morning and possibly Wednesday afternoon. We believe that the gentlemen from Hoechst, Frankfurt plan to arrive in Calcutta on Thursday, 22nd January, so as to be available for more detailed talks starting on Friday. We are asking Hoechst, Bombay to arrange for hotel accommodation for Mr. Blanco White.

6. Then there is the letter dated January 8, 1970 written by the London Solicitors to the appellants enclosing copies of the briefs which had been delivered by the London Solicitors to Mr. Blanco White. The said suits came up for hearing on January 27, 1970. The appellants had engaged Mr. P.P. Ginwala, Mr. A.K. Basu and Mr. Sankar Ghose to appear on behalf of the German Corporation in the said suits. In paragraph 6 of the writ petition filed before the High Court out of which this appeal, arises, the appellants have stated as follows :

On 27th January 1970 the said suits were called on before his Lordship the Hon''ble Mr. Justice K.L. Roy. It was decided to take up Suit No. 1124 of 1962 first. In the said suit Mr. Blanco White, Q.C. appeared with Mr. P.P. Ginwala, Mr. A.K. Basu and Mr. Sankar Ghose. The said suit No. 1124 of 1962 was heard on 27th, 28th, 29th, 30th January 1970, 2nd, 3rd, 4th, 5th, 6th, 9th, 12th, 13th and 16th February 1970 and judgment was reserved. The other suits were adjourned until after the judgment.

7. In his letter dated March 21, 1973 written to the London Solicitors marked as Annexure ''E'' to the writ petition, Mr. Blanco White while attempting to make out a case supporting the appellants admitted that he was not disputing that when he was actually in Court in Calcutta, he was, formally, there on instructions from the appellants as attorneys. The relevant part of that letter reads :

Dear Mr. Gane,

Farbwerke Hoechst v. Bengal Chemical.

Certainly I can confirm that, when I appeared before the Calcutta High Court in January and February 1970. I was briefed by your firm and not by Orr. Dignam & Co. Accordingly, whilst I would not dispute that when I was actually in Court in Calcutta I was, formally, there on instructions from Orr. Dignam as attorneys of record, all arrangements relating to my fees were made with you (as the English Solicitors of

Hoechst in Germany) and Orr. Dignam were at no time concerned with these arrangements.

8. Mr. Blanco White left India on February 17, 1970 without making any arrangement for the settlement of his liability under the Act. When the income tax Officer issued the notice dated February 19, 1970 to the appellants drawing their attention to the provisions contained in Section 195(2) of the Act and requesting them to furnish information regarding the income earned by Mr. Blanco White by arguing the case before the Calcutta High Court on behalf of the German Corporation, the appellants replied on February 24, 1970 stating that the London Solicitors had engaged Mr. Blanco White to appear on behalf of the German Corporation before the Calcutta High Court; that the appellants had not briefed him nor did they know on what fees, if any, he had been engaged. In their letter dated March 10/11, 1970 to the notice dated February 17, 1970 issued by the income tax Officer to the appellants u/s 163(1) of the Act, the appellants again stated that they had not engaged or delivered any brief to Mr. Blanco White and that they had no business connection with him. It was urged before the High Court by the appellants that there was no sort of connection between the appellants and Mr. Blanco White and even if there was any connection, it was just a casual one and could in no case be termed as business connection: that they had not undertaken to pay any fees to him for appearing in the suits and that, therefore, the appellants were not liable to be assessed. The Division Bench of the High Court which heard the appeal came to the conclusion that there was business connection between the appellants and Mr. Blanco White; that it could not be said that there was no element of continuity and the transaction was a stray or an isolated one and that the appellants were not entitled to the issue of the writ prayed for on the facts and in the circumstances of the case.

9. For proper appreciation of the contentions advanced by the A parties before us, it is necessary to refer to some of the provisions of the Act. Section 160(1)(i) of the Act provides that in respect of the income of a non-resident specified in Sub-section (1) of Section 9 of the Act, the agent of the non-resident, including a person who is treated as an agent u/s 163 is a representative assessee. Section 161(1) of the Act stipulates that every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in Chapter XV of the Act be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. Section 163(1)(b) and (c) of the Act provides that for purposes of the Act any person in India who has any business connection with the non-resident or from or through whom the non-resident is in

receipt of any income whether directly or indirectly can be treated as an agent of such nonresident. Section 5(2) of the Act inter alia provides that subject to the provisions of the Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which accrues or arises or is deemed to accrue or arise to him in India during such year. The relevant part of Section 9(1) of the Act reads :

(1) The following incomes shall be deemed to accrue or arise in India-

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfer of a capital asset situate in India;

Explanation-For the purposes of this Clause-(a) in case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India....

10. From the facts stated above it is seen that from the year 1965 there was correspondence between the appellants and the London Solicitors who in their turn had engaged Mr. Blanco White in connection with the suits in question. It shows that there was a connection between the appellants and Mr. Blanco White though it was an indirect one. After his arrival in India, it must be assumed that the appellants had done all that was suggested in the letter of the London Solicitors dated December 23, 1969. It is admitted that Mr. Blanco White appeared with the Indian counsel engaged by the appellants and argued the case on behalf of the client of the appellants in the suit in which they were acting as solicitOrs. Even though the appellants did not hand over any briefs directly to Mr. Blanco White, it is seen that part of the records handed over to Mr. Blanco White by the London Solicitors consisted of the copies of records sent by the appellants to the London SolicitOrs. It is further seen that Mr. Blanco White appeared before the High Court alongwith the Indian counsel engaged by the appellants, though with the leave of the Court granted presumably u/s 32 of the Advocates Act 1961. We are also of the view that there must have been discussion between the appellants and Mr. Blanco White before the case was argued by him. Moreover, Mr. Blanco White could appear only with the consent of the appellants who were the Solicitors on record. In the circumstances, it cannot be said that the High Court was wrong in holding that there was connection between the appellants and Mr. Blanco White. The said connection cannot also be termed as a casual one having regard to the period over which it had existed. It was real and intimate and Mr. Blanco White earned the fees for arguing the case in India only through the said connection. The case satisfies the test laid down by this Court in Commissioner of income tax, Punjab v. R.D. Aggarwal and Co. and Anr. 56 ITR 20 for holding that there was connection between the appellants and Mr. Blanco White. The finding of the High Court on the above question also

appears to be well founded.

11. The only remaining question which needs examination is whether the said connection was a business connection. The contention of the appellants is that a professional connection cannot amount to a business connection attracting Section 9(1) of the Act. In support of this contention the appellants depend upon the definitions of the expressions ''business'' and ''profession'' found in Section 2(13) and Section 2(36) of the Act. Section 2(13) of the A Act reads:

"business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

12. Section 2(36) of the Act provides:

"Profession" includes vocation".

13. Section 14 of the Act which enumerates the heads of income which give rise to a liability to tax under the Act treats the income from profits and gains of business and profession as a single head. Sections 28 to 44B of the Act constitute the fascicule of provisions dealing generally with the computation of income from business and profession although not all those provisions are applicable to income from a profession.

14. The definition of the expression ''business'' given in the Act is an inclusive one. The expression ''business connection'' however is not defined in the Act. It is manifest that the words in Section 9(1) and Section 163 are comprehensive enough to include all heads of income mentioned in Section 14 of the Act. It is no doubt true that there is specific reference to ''business'' in Section 9(1) and there w is no reference to ''profession''. But no tenable reason is discernible from the statute for excluding income arising out of profession from its scope. In this connection two submissions are made on behalf of the appellants (1) that it was the intention of the Parliament to exclude non-residents engaged in learned professions from the operation of Section 9(1) and that even if the intention of the Parliament was not to exclude such persons from Section 9(1) since there is an omission to refer to them expressly the lacuna should not be made good by giving a wide interpretation to the expression ''business connection''. We do not find that there is any substance in the first submission. There could be no good reason for the Parliament for excluding non-resident professional men from the purview of Section 9(1) of the Act. There is no material on which we can reach that conclusion. In so far as the second submission is concerned, we have to examine whether it would really amount to filling up a lacuna in the section if the expression ''business connection'' is interpreted as including within its scope ''Professsional Connection'' also.

15. In Commissioner of Income Tax, Bombay v. Currimbhoy Ebrahim & Sons Ltd. 3 ITR 395, Sir George Rankin speaking for the Judicial Committee of the Privy Council while construing the expression ''business connection'' in Section 42(1) of the Indian

Income Tax Act 1922 observed:

The phrase "business connection" is different from, though doubtless not unrelated to, the word "business" of which there is a definition in the Act.

16. The expression ''business'' does not necessarily mean trade or manufacture only. It is being used as including within its scope professions, vocations and callings from a fairly long time. The Shorter Oxford English Dictionary defines ''business'' as ''stated occupation, profession or trade'' and '' a man of business'' is defined as meaning ''an attorney'' also. In view of the above dictionary meaning of the word ''business'' it cannot be said that the definition of business given in Section 45 of the partnership Act, 1890 (53 & 54 Vict. Clause 39) was an extended definition intended for the purpose of that Act only. Section 45 of that Act says:

The expression business includes every trade, occupation, or profession.

17. Section 2(b) of the Indian Partnership Act, 1932 also defines "business" thus :

"business" includes every trade, occupation and profession".

18. The observation of Rowlatt, J. in Christopher Barker & Sons v. Commissioner of Inland Revenue [1919] 2 K.B. 222 at page 228 "All professions are business, but all businesses are not professions,..." also supports the view that professions are generally regarded as businesses. The same learned Judge in another case Commissioner of Inland Revenue v. Marine Steam Turbine Company Limited [1920] 1 K.B. 193 held:

The word ''business'' however is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on and it is in this sense the word is used in the Act with which we are here concerned.

19. The word ''business'' is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. We are of the view that in the context in which the expression ''business connection'' is used in Section 9(1) of the Act, there is no warrant for giving a restricted meaning to it excluding'' professional connections'' from its scope.

20. There is very little substance in the submission made on behalf of the appellants that since Mr. Blanco White could not appear as counsel as of right either under the Advocates Act or under the Calcutta High Court Original Side Rules, he could not be treated as having any business connection with the appellants. As noticed earlier, Mr. Blanco White appeared alongwith the Indian counsel engaged by the appellants and the appellants continued to represent the German Corporation when Mr. Blanco White argued the case before the High Court. It is difficult to hold that he was a stranger to the appellants. The appellants may not have engaged him to argue the case but they allowed him at the request of the London Solicitors to argue

the case and willingly cooperated with him in doing so. That it was their case that Mr. Blanco White argued cannot be denied. The appellants may not have undertaken to pay his fees but he could not have argued and earned the fees without associating himself with the appellants. The fact that Mr. Blanco White being a barrister could not file a suit to recover the fees would not make any difference in this case as in the letter dated August 19, 1980 written by the London Solicitors to the appellants which is produced before us it is stated that the fees of Mr. Blanco White amounted to Rs. 2200 with refreshers at the rate of Rs. 220 per day. We need not go into the correctness of these figures but the fact remains that Mr. Blanco White has earned income for the work done in India. We do not propose to go into question as to what would happen if no fees have been realised by him at all.

21. In view of the foregoing we are of the view that the judgment of the Division Bench of the High Court which is under appeal does not call for interference.

22. In the result, the appeal is dismissed. The parties shall, however, bear their costs.