(1989) 02 CAL CK 0002

Calcutta High Court

Case No: IT Ref. No. 306 of 1981

COMMISSIONER OF INCOME TAX	APPELLANT
Vs	
DR. A. K. BASU.	RESPONDENT

Date of Decision: Feb. 28, 1989

Acts Referred:

- Income Tax Act, 1961 - Section 254(2)

Citation: (1991) 91 CTR 155 : (1990) 53 TAXMAN 339

Hon'ble Judges: Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J; Bhagabati Parsad Banerjee, J

Bench: Full Bench

Judgement

SUHAS CHANDRA SEN, J. :

The following question of law has been referred to by the Tribunal under s. 256(1) of the IT Act :

"Whether on the facts in the circumstances of the case, in view of the Supreme Court decision in CWT vs. Bishwanath Chatterjee (1976) 103 ITR 53 & in particular, the Supreme Courts observations in (1970) 76 ITR 679 to the effect The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara School of Hindu Law, the Tribunals finding that the question whether the three brothers governed by the Dayabhaga School of Hindu Law could elect to form an HUF hotchpot was not a debatable proposition beyond the scope of s. 254(2) of the IT Act, 1961, was correct ?"

The relevant assessment year is the asst. yr. 1976-77 for which the accounting period is the year ended 31st March, 1976.

The facts as stated by the Tribunal are as under.

2. The dispute relates to the income of the assessee from his interest in house at 74, Ashutosh Mukerjee Road, Calcutta. The property originally belonged to Mrs. Lilabati Basu. After her death on 3rd September, 1966, the same devolved on her three sons including the assessee. The claim of the assessee was that the income from the property should be assessed in the hands of the family the ITO rejected the claim on the ground that under the Dayabhaga School of Hindu Law, which was admittedly applicable to the assessee and his family, the assessee is deemed to be a co-owner having a definite interest therein. On appeal before the CIT(A), the assessee gave further details in regard to the ownership of the said property and its devaluation upon him. The CIT(A) accepted the facts stated in the statement given to him on the ground that similar statement had been furnished to the ITO and he came to the conclusion that the property belonged to the HUF and should not be assessed in the individual hands of the assessee, by treating him as co-owner thereof.

3. The Revenue went up on appeal before the Tribunal. The Tribunal held that the question for consideration was whether in respect of a Dayabhaga family there can be a joint family holding of a house property. Mr. Poddar pointed out that Mulla on Hindu Law, 14th Edn., Sec. 227 at page 277 had stated that there can be a joint Hindu family under the Dayabhaga system. Mr. Poddar may be right and we do not want to say anything about that. But the more fundamental problem which he has to face is that in respect of a house property belonging to a joint Hindu family (sic) income in the face of s. 26 of the IT Act, 1961. This is particularly so because of the decision of the Supreme Court in the case of Commissioner of Wealth Tax, W. Bengal Vs. Bishwanath Chatterjee and Others, . The Court no doubt was dealing with the matter arising under the WT Act but the observations of the Supreme Court and the principle laid down are equally applicable to a matter under the IT Act while dealing with a property as in this case. At page 542 their Lordship stated :

For reasons already stated, the coparcenary had unity of possession but not unity or ownership on the property each coparcener, therefore, took a defined share in the property and was the owner of his share.

4. Faced with the above position as per the binding decision, it may be difficult for us to accept the contention of Mr. Poddar that there can be a family which has to be assessed in respect of the house property. In fairness to Mr. Poddar, we may point out that under ls. 20A of the old Act or under s. 171 of the present Act in order to constitute a partition there should be actual division by metes and bounds and mere ascertainment of shares is not enough. Therefore, Mr. Poddar argued that in the case of Dayabhaga family there is only ascertained and defined share but there is no division by metes and bounds. In other words, the first step in relation to a partition under Mitakshara Law is already there in Dayabhaga Law. But it cannot be said under the IT Act that there is no family. What Mr. Poddar wanted us to notice is that under Dayabhaga Law the member own the property but in defined shares. But under the IT Act that would not be enough to treat that the property does not

belong to the family inasmuch as the section requires that there should be actual physical division so that the family can be treated as disrupted for the purpose of IT Act. If that is so, Mr. Poddar continued that even under the Dayabhaga Law it must be held that the family can be assessed in respect of a house property since there is no physical division of the property though the shares are ascertained. Mr. Poddar also pointed out that the above aspect has not been argued in the earlier cases. Mr. Poddar also urged that s. 26 of the IT Act, can have no application to the case of co-shares of a Hindu family governed by Dayabhaga Law.

5. After the judgment of the Tribunal, the assessee made an application for rectification of the order passed by the tribunal on the ground that the point at controversy had been brought to an end by a judgment of the Calcutta High Court in the case of Commissioner of Income Tax Vs. P.N. Talukdar, . The Tribunal allowed the rectification application and held that the property which was the subject-matter of dispute belonged to he joint family of the assessee and his brother and therefore, the income thereof could not be assessed in his individual assessment.

6. The controversy is whether, there was a rectifiable error under s. 254(2) of the IT Act. Sec. 254(2) provides that the Appellate Tribunal may at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record amend any order passed by it under sub-s. (1) and shall make such amendment if the mistake is brought to its notice by the assessee or the ITO provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do and has allowed the assessee a reasonable opportunity of being heard.

The language is identical with the language employed in s. 154 which gives power to the ITO to rectify the order of assessment under s. 154. It is well settled that the rectification can only be of an obvious error of fact or law. If the error that is sought to be rectified is controversial and if two are possible on the question in dispute then it will not be a case of error apparent on the fact of the record. In the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , it was laid down by the Supreme Court that a mistake apparent on the face of the record must be an obvious and patent mistake.

7. Mr. Poddar has argued that if a controversy on a point of law has been settled by a decision of the High Court and if the order under consideration of the Tribunal under the IT Act is not consistent with the judgment of the High Court then there is obviously in error of law apparent on the face of the record and that can be rectified by the Tribunal. Our attention was also drawn to a large number of decisions of this Court on the concept of the Dayabhaga Hindu Joint Family.

8. It was emphasised that the family property of which shares were ascertained, definite and known had to be assessee separately by virtue of the provisions of s. 9 of the IT Act, 1922 corresponding to ss. 22 and 23 of the IT Act, 1961.

9. In the case of Commissioner of Income Tax Vs. Sm. Bani Rani Rudra, , the assessee was an HUF governed by Daya Bhaga School of Hindu Law. The family came into existence on the death of J. K. Rudra who died intestate in 1939. The family consisted of his widow, Smt. Bani Rudra and a minor son Chandra Sekhar Rudra. The parties being governed by Daya Bhaga Law, neither the son nor the wife had any interest in these properties during the life time of J. K. Rudra. On the death of Sri. J. K. Rudra, his son and his wife succeeded to these properties in equal shares. The question that fell for consideration was whether the income of the house property belonging to the joint family property should be assessed as joint family property in the hands of HUF or individually in the hands of widow and the son. It was held in that case :

By reason of the Hindu Succession Act, s. 14, the limited interest which she got under the Act of 1937, was converted into that of a full owner. But for the Income Tax purposes we have got to see whether her share and that of her son, who were the owners of the properties left by J. K. Rudra could only be assessed in their hands under s. 9(1) read with s. 9(3) which could not be treated as income belonging to a joint family even if there was no burden between the widow and her son.

10. We were also referred another decision BISWA RANJAN SARVADHIKARY Vs. Income Tax OFFICER, F-WARD, DISTRICT II(2), CALCUTTA, AND ANOTHER., . There it was held that where a widow and a son governed by the Daya Bhaga School of Hindu Law had defined shares in the properties they could not be assessed in the status either of an association of persons or of an HUF. The tax had to be assessed separately on the individuals on the basis of their respective shares of the income from the properties.

11. The case of COMMISSIONER OF WEALTH-TAX, WEST BENGAL Vs. GOURI SHANKAR BHAR., was a case under the WT Act. It was held that the heirs of a Hindu governed by the Daya Bhaga School could not be assessed to wealth-tax as HUF on the entire wealth left by the deceased but each of the heirs must be separately assessed wealth tax on his share as an individual, unless there was an evidence to show that the heirs had voluntarily decided to set out themselves into a Hindu joint family.

12. The Supreme Court on appeal Commissioner of Wealth Tax, West Bengal Vs. Gauri Shankar Bhar, observed as follows :

The learned Solicitor-General appearing for the CWT very appropriately conceded that the property with which we are concerned in this case was the individual property of the deceased prafulla Chandra Bhar. He also conceded that on the death of the said Prafulla Chandra Bhar the property devolved on his heirs in severalty.

Each one of his heirs took a definite share in the property left by the deceased. In view of that concession it is not necessary for us to decide in this case whether a Dayabhaga Hindu family can be considered as and HUF within the meaning of s. 3 of the WT Act, 1957.

Quite clearly on the facts of this case the heirs of the deceased took the property of the deceased in separate shares. Therefore, in law each of them is liable to pay wealth-tax as individual. It cannot be said that an individual who inherits some property from some one becomes an HUF merely because he is a member of the HUF.

In this view of the matter we find no substance in this appeal and the appeal is accordingly dismissed. The respondent has not appeared in this case. Hence there will be no order as to costs. We are thankful to Mr. T. A. Ramchandran for appearing as amicus curiae in this case at our request.

This case has been sought to be distinguished by Mr. Poddar on the ground that the case was really disposed of on concession.

What was conceded by the Solicitor General appearing for the CWT was that property originally was individual property of the deceased Prafulla Chandra Bhar. On the death of Prafulla Chandra Bhar the property was divided on his heirs in severalty. Each one of his heirs took a definite share in the property left by the deceased. This concession had to be made because the family was governed by Dayabhaga School of Hindu law. The Supreme Court held that since the heirs of the deceased took the pridamperty in separate shares, then in law each one of them was liable to pay wealth-tax as individual on the share that devolved on him.

13. In the case of CWT vs. Bishwanath Chatterjee & Others (supra) the Supreme Court observed as follows :-

In the case before us, it is not in dispute that the property in question was the individual property of Bireswar Chatterjee and that it devolved on his heirs according to the provisions of the Hindu Succession Act, 1956. It will be recalled that a suit for partition was filed on 21st June, 1957, and a preliminary decree was passed on 4th July, 1959. For reasons already stated, the coparcenary had unity of possession but not unity of ownership on the property. Each coparcener, therefore, took a defined share in the property the coparcener. It was his net wealth within the meaning of s. 2(m) of the Act and was liable to wealth-tax as such under s. 3.

14. Mr. Poddar has strongly relied on two judgments - One of this Court and the other is of the Supreme Court. In the case of CIT vs. P. N. Talukdar (supra) a Division Bench of this Court took the view that under the Hindu law any member of a joint family might throw his self-acquired property into the hotchpot of the family. The separate property of a Hindu ceases to be separate and acquires the character of joint family property not by any physical mixing with joint property but by the

individuals volition and intention evidenced by his waiving and surrounding his separate rights in it. Hence, the throwing of a separate property into the family hotchpot was possible even if the family hotchpot was empty. It was held that even in the case of a Hindu governed by the Daya Bhaga School, the separate property of member of the family might be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. But that was a case of an individual who has converted his individual property into a joint property. The joint family consisted of the individual, his wife and minors childer. But in the instant case, three brothers have succeeded to the property.

15. It has been argued on behalf of the Revenue that in this case, the mother had been given life interest in the property and thereafter the three brothers after the death of the mother had acquired definite and ascertained shares in the property. It has been argued that if an assessment under s. 22 of the Act had to be made, then the owner of the property had to be assessed. Admittedly, there is no unity of ownership, but if there is no unity of ownership, the property cannot be assessed jointly but has to be assessed individually. Moreover, under the Daya Bhaga School of Law, a joint family does not come into existence automatically as soon as the father or mother dies and the property devolves upon the children.

16. We are not expressing any opinion on this controversy. The contention raised on behalf of Mr. Poddar is that the argument advanced by Revenue is not correct in the view of the judgment of this Court in the case of CIT vs. P. N. Talukdar (supra). It may not be correct but we are of the opinion that it is a case where two view are possible. The case of CIT vs. P. N. Talukdar is distinguishable on facts.

17. Lastly, Mr. Poddar argued that correct principle of law has been enunciated by the Supreme Court in the case of State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh and Others, . There it was observed that while under the Mitakshara Hindu Law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Daya Bhaga law, there is no unity of ownership of coparcenary property with the members thereof. Every coparcener takes a defined share in the property and he is the owner of that share. But there is, however, unity of possession.

This decision of the Supreme court does not advance the case of the assessee in any way. The question of making an assessment on the joint family as owner of the property does not arise under s. 22 of the IT Act, unless there is unity of ownership. It the property is owned by co-owners and their shares are definite and ascertainable, then assessment in respect of the property has to be made individually on each of the co-owners in respect of his share of property.

In our view, this is a point which is not free from doubt. It cannot be said that it is not possible to take two views on this controversy.

18. Assuming that the Tribunal in its original appellate order had made a mistake in our view, the mistake was not of such a nature as could be rectified under s. 254(2) of the IT Act.

19. In that view of the matter, the question is answered in the negative and in the favour of Revenue.

There will be no order as to costs.

BHAGABATI PRASAD BANERJEE, J. :

I agree.