Rowji Sojpal Vs Commissioner of Income Tax, Bombay

Court: Bombay High Court

Date of Decision: Feb. 6, 1957

Acts Referred: Income Tax Act, 1922 â€" Section 12(B), 12B(1), 9

Citation: AIR 1957 Bom 294 : (1957) 59 BOMLR 445 : (1957) ILR (Bom) 447

Hon'ble Judges: Chagla, C.J; Tendolkar, J

Bench: Division Bench

Advocate: N.A. Palkhivala and N.F. Damania, for the Appellant; A.G. and G.N. Joshi, for the Respondent

Judgement

Chagla, C. J.

1. This is one of those cases which goes to show that the legislature in enacting a taxing staute does not -- possibly cannot -- take into

consideration all eventualities and all contingencies. The assessee was joint with this brother prior of 1932. On the 19th of April 1932 there was a

partition and the property in question came to his share on that partition. At the date of the partition the assessee had sons and therefore on the

partition taking place the property became joint family property as between the assessee and his sons. There was a partition between the assessee

and his sons on the nth of June 1944 and on that partition again the property came to the share of the asseessee On the 22nd of August 1947 the

assessee sold the property and made admittedly a capital gain of Rs. 97,251/-. The Department seeks, to bring this capital gain to tax.

2. It is not disputed by the assessee that he is liable to pay the tax, unless his case falls within the second proviso to Sub-section (1) of Section

12B; and that proviso runs as follows:

Provided further that the tax shall not be payable by an assessee in respect of any profits or gains arising from the sale, exchange or transfer of a

capital asset, being property the income of which is chargeable u/s 9 and which has been possessed by the assessee or a parent of his for not less

than 7 years before the late on which the sale, exchange or transfer took place: .....

Therefore, in order to attract the application of this proviso, the assessee must establish, first, that the Capital asset is a property which is

chargeable u/s 9, and, secondly, that he or his parent has been in possession of the property for not less than seven years. Now the first"" condition

is satisfied because this is a property which is chargeable u/s 9. The difficulty in the way of the assessee is to establish that he or his parent was in

possession of this property for not less than seven years before the date of the sale. Now undoubtedly on the partition taking place between him

and his sons, the assessee was in possession of this property and he continued to be in possession till the 22nd of August 1947. But the question is

whether it could be said that he was in possession with regard to the remaining prior period which is necessary to make up the seven years

prescribed by this proviso. Now during that remaining period the property belonged to the undivided Hindu family consisting of, the assessee and

his sons'', and the narrow question that arises for our consideration is whether it could be said that the assessee was in possession of this property

when he was not the sole owner or exclusive owner of this property and the property belonged to the joint family.

3. Now it is been settled Jaw as to the rights of coparceners in a joint Hindu family that it cannot be predicated of any property of any joint Hindu

family that a particular share in it belongs to a particular coparcener. Hindu law recognises both community of interest and unity of possession in the

joint family properties between all the members of the family. In other words, all coparceners are owners of the property and all coparceners are

entitled to possession of the property. Could it, therefore, be said that during this period, when the Joint family was the owner of this property, the

assessee was in possession of it? It is clear that the expression ""possessed by the assessee"" used in the second proviso means ""possessed

juridically"". The possession contemplated is a juridical possession and not actual possession. The juridical possession'' of this property was not

with the assessee, but with the assessee along with his sons who were the coparceners and who constituted the Joint and undivided Hindu family at

the material time. Now Mr. Palkhivala''s argument is that there is no warrant for reading into this Section the qualification that the possession

contemplated by this section is an exclusive possession. Mr. Palkhivala says that his client was in possession of this property even though he may

have been in possession jointly with others. Now it would not be correct to say that a person, owns a property or is in possession of a property

unless the ownership or the possession was exclusive. If the ownership or possession was not exclusive, then the ownership or possession would

have to be qualified or limited by appropriate words. In not so qualifying or limiting the expression ""possession"" it is clear that the Legislature

contemplated the exclusive possession on the part of the assessee or his parent. Mr. Palkhivala drew our attention to the provision of Hindu law

where a coparcenary is constituted by a father and his sons, and he emphasized the fact that in the case of such a coparcenary the father is entitled

to possession of the property. It is perfectly true "that, when you have a father constituting a joint family with his sons, he has a right to fie In

possession of joint family property and exclude the possession of the sons and the sons cannot have any grievance against any such exclusion so

long as the joint family continues. But the possession here is not juridical, but actual possession. Although the father may be in actual possession,

the Juridical possession is still with the father and the sons jointly; it is not solely"" with the father. If our right in the view that we take -- and that

aspect of the case is not challenged by Mr. Palkhivala --that the possession that we are dealing with here is Juridical and not actual possession,

then we Jail to see what difference it would make to this argument if the father is in actual possession, but not in juridical possession, of the whole

of the property.

4. Mr. Palkhivala has drawn Our attention to the difficulties and anomalies that might be created by our placing this construction on the section

when a question arises as to tenants-in-common or Joint tenant. It is unnecessary to decide more than what actually arises for our decision on this

reference. We realise the hardship of the assessee in case where he is the owner of this property and had rights of ownership in this property for a

very long time even longer than the seven years required by the proviso. But it is a mistake to attempt to gather the intention of the Legislature or to

construe a section by considering what difficulties will arise if a particular construction was given to this section. Undoubtedly if two views are

possible and two constructions are possible, it is better to lean in favour of that construction which would lead to the least amount of difficulty and,

which would be most favour to the assessee. But if the construction is then it is for the Legislature to amend to so as to avoid hardships being

caused to certain type of assessees.

5. Mr. Palkhivala says that he does not to give up the contention that was put of before the Tribunal that a Hindu undivided would fall in the

category of ""a parent"" re to in the proviso. How the sons of the as who were Joint with him can become a under the proviso it is rather difficult for

understand, and however much we may stretch the language of a proviso in favour assessee, we cannot convert sons into parer.

6. We, therefore, agree with the view by the Tribunal that the case of the assessee not fall within the second proviso to Section 12. We must

answer the question submitted to the negative. Assessee to pay the costs.

7. Answer in ne(sic)