

(1948) 03 BOM CK 0042

Bombay High Court

Case No: Income-tax Reference No. 26 of 1947

THE EXECUTORS OF THE ESTATE
OF J. K. DUBASH

APPELLANT

Vs

COMMISSIONER OF Income Tax,
BOMBAY CITY.

RESPONDENT

Date of Decision: March 19, 1948

Acts Referred:

- Income Tax Act, 1961 - Section 25

Citation: (1948) 16 ITR 90

Hon'ble Judges: Chagla, C.J

Bench: Division Bench

Judgement

CHAGLA, C.J. - This assessee are the executors of the estate of J. K. Dubash who died on the 9th April, 1942, having made a will prior thereto on the 8th April, 1942. The executors obtained a probate of the will on the 10th August, 1942. The testator during his lifetime carried on a business of shipping agents and the first question that arises on this reference is at what period of time succession to that business took place within the meaning of Section 25 (4) of the Indian Income Tax Act.

The provision in the will with regard to the carrying on of the business is contained in clause 13 and that directs the executors to carry on the business of the testator as a going concern after his death with power to make fresh contracts and discharge the existing and future liabilities and all other usual and necessary powers unless special circumstances arise which in the opinion of the executors make it expedient to sell the business earlier. This business was to be carried on for a period not exceeding 12 months and then it was to be sold to one of his nephews, failing them to an outsider. The business was sold to one of the nephews on the 1st January, 1943, and the executors carried it on from the 10th April till that date. According to the assessee the succession to the business took place on the 1st January, 1943, and the executors carried it on from the 10th April till that date. According to the

assessee the succession to the business took place on the 1st January, 1943, when the business was sold to one of the nephews. According to the Commissioner the succession took place on the 9th April, 1942, when the testator died.

Section 25 (4) gives certain concessions to an assessee in respect of a business where tax has been paid under the provisions of the Indian Income Tax Act, 1918, and this concession is given when the business is discontinued or is taken over by another person. The language used in sub-clause (4) is :-

"Whether the person who was at the commencement of the Indian Income Tax (Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income Tax Act, 1918, is succeeded in such capacity by another person....."

It is clear that the expression "succeeded" is not used in this sub-section in its technical sense. "Succeeded" means that there is a transfer. The transfer may be by an act inter vivos or it may be by inheritance. It only means that someone else steps into the shoes of the original owner of the business, but this someone else must succeed to his predecessor in such capacity which according to me means that the successor must have the same capacity as to carrying on the business which his predecessor enjoyed.

In this case it is contended by Mr. Kolah that the executor did not carry on the business in the same capacity as the testator. It is said that u/s 21 of the Succession Act the executor is merely the legal representative for all purposes of the testator and the property vests in him only as such. There can be no doubt that on the death of the testator the legal owners of the business were the executors. It is perfectly true that they could not carry on the business for their own benefit or their own advantage and that in carrying on the business they represented the estate and the income and the profits belonged to someone else. On the death of the testator the business either continued or discontinued. If it continued, then it must be continued by a person who is the owner of that business. In this case it is not suggested that the business was discontinued. The business was continued by the executors with all the power and authority that the testator had. If that be so, then undoubtedly the executors succeeded to the testator in carrying on the business. If they did not carry on the business, then there must be a discontinuance, but there cannot be a stage which is neither a discontinuance of the business nor succession to the business by another owner having the same right to carry on that business.

Mr. Kolah has relied on a decision of the Madras High Court reported in *Jupudi Kesava Rao v. Commissioner of Income Tax, Madras*. In that case the Officiating Chief Justice Mr. Madhavan Nair has construed the expression "succession", which also occurs in Section 26 (2), and there can be no doubt that that expression has the same meaning in that section as it has in sub-clause (4) of Section 25, and the learned Judge says at p. 343 :-

"Succession connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner."

With respect, I entirely agree with that view. But it is important to note in what connection and in what setting of facts this observation was made by Mr. Justice Madhavan Nair. In that particular case an undivided Hindu family was carrying on business and it was suggested that the surviving co-parcener of that undivided Hindu family had succeeded to the business of the family. Mr. Justice Madhavan Nair rejected that contention on the ground that the surviving co-parcener was himself the part owner of the business as a member of the joint family and therefore there was no transfer of ownership when he survived to that business. In this case there can be no doubt that there is a transfer of legal ownership. It may be that the executor is not the beneficial owner, but I do not read Section 25 (4) to mean that it is only when a beneficial owner succeeds to the previous owner that a succession takes place within the meaning of that section. In my opinion, therefore, the executors succeeded to the business on the death of Dubash on the 9th April, 1942, and the succession did not take place on the 1st January, 1943, when the executors sold the business to one of the nephews of the testator.

The other question that is raised on this reference is with regard to a certain annuity that is to be paid to the widow of the testator under clause 5 of the will. By that clause the testator bequeathed to his wife Nadeja for the period of her life a sum of one thousand pounds and he further directed that the sum of one thousand pounds should be paid to her by four equal quarterly payments, the first of which should be paid at the expiration of three calendar months after the date of his death. He further directed that the trustees should purchase and appropriate promissory notes of 3 1/2 per cent. Government paper of such an amount as would be sufficient to produce a clear income of one thousand pounds for being paid to the widow. Pursuant to this clause and by reason of an agreement arrived at between the widow and the executors, the executors paid a sum of Rs. 20,811 to her and the question that arises is whether Section 41 (1) of the Indian Income Tax Act applies to this amount. It is contended by Mr. Kolah that this amount was received by the executors as trustees on behalf of the widow and therefore Section 41 (1) applies. Under that sub-clause it is only when there is a declaration of trust and that trust is contained in a writing whether testamentary or otherwise and the trustees under that trust receive an amount on behalf of any person that the section comes into operation. It is well established that a mere executor without more is not a trustee. It may be that after he has administered the estate and ceased to be an executor for certain purposes he may become a trustee. It is also possible that a testator may create trusts by his will and may appoint his executors as trustees to carry out those trusts. The question therefore that arises is whether the testator had created any trust with regard to the payment of this sum of Rs. 20,811 to his widow. Under

clause 5 the initial payment is merely in the nature of a legacy. The testator advisedly uses the expression "bequeath". It is only after this amount is paid and the executors invest in Government paper sufficient amount to produce the yearly income of one thousand pounds that it could possibly be said that the executors hold the Government paper as trustees to pay the income there out to the widow. But at the stage with which we are concerned, when Government promissory notes have not yet been purchased and all that the executors have done is to carry out the direction of the testator and pay the bequest to the widow, I fail to see how it could possible be contended that this amount was received by the executors on behalf of the widow. It is not in discharge of any trust that the executors paid this amount to the widow : it is in the course of their administration of the estate which the executors were under an obligation to pay and therefore in my opinion the Tribunal was right in coming to the conclusion that Section 41 did not apply to the facts of this case. I would therefore answer question No. 1 : 9th April, 1942, and question No. 2 in the negative. The assessee to pay the costs.

TENDOLKAR, J. - This reference arises out of an assessment for the year 1943-44, the accounting period being the 10th April, 1942, to the 31st December, 1942. The assessees are the executors of the will of one J. K. Dubash who died on the 9th of April, 1942. By his will the testator directed that his business should be carried on by the executors for a period not exceeding 12 months and thereafter sold in the manner indicated in the will. The business was accordingly carried on by the assessees and sold by them on the 1st of January, 1943. Upon that, a question arose within Section 25 (4) of the Indian Income Tax Act as to whether there was succession to the business on the death of the testator on the 9th of April, 1942, or upon the sale of the business on the 1st of January, 1943. The Tribunal held that the succession took place on the 9th of April and the assessees contend that the succession took place on the 1st of January, 1943. Under the said will, there was a bequest of an annuity in favour of the wife of the testator. In respect of this bequest a sum of Rs. 20,811 was paid by the executors during the accounting year to the widow; and the question that was raised before the Tribunal was whether this amount should not be taxed in the hands of the executors as trustees u/s 41 (1) of the Indian Income Tax Act. The Tribunal held that Section 41 (1) did not apply.

Taking the first question, the relevant words of Section 25 (4) which are have to interpret are "where the person who was..... carrying on any business..... is succeeded in such capacity by another person." These identical words appear in Section 26 (2). The words so appearing in the latter section were interpreted by the Madras High Court in Jupudi Kesava Rao v. Commissioner of Income Tax, Madras. Madhavan Nair, Officiating Chief Justice, delivering the judgment said :-

"It appears to us that the word succession as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which

he after the succession carries on in such capacity, that is, the capacity as owner."

I respectfully agree with that interpretation of the section; and the same interpretation must be placed on the identical words appearing in Section 25 (4). But I do not think their Lordships of the Madras High Court, when they referred to an owner in this connection, require that the owner should also be the full beneficial owner of the business. It may well happen that a business is purchased by trustees who are entitled to carry it on on behalf of beneficiaries. In that event, the trustees can well be the owners of the business, although the beneficial interest may be in the beneficiary. What is meant by ownership is, that in so far as complete control of the business is concerned, the person who succeeds should have all the indicia of ownership; and it has, to my mind, nothing whatever to do with beneficial ownership. Applying that interpretation to the facts of the case before us, the question is whether the executors succeeded to the business as owners. u/s 211 of the Succession Act it is quite clear that the property of a testator vests in the executor. No doubt section 211 (1) says "vests in him as such", but that can only mean that the beneficial interest in the property does not vest in the executor but the property vests in him as the legal representative of the deceased. None the less, the executor is the owner of the business subject to any beneficial interests that have been created by the will in that business. In my opinion, therefore, the executors succeeded to the business within the meaning of Section 25 (4) on the death of the testator on the 9th of April, 1942.

With regard to the second question, Section 41 (1) applies where any income etc. is receivable by a trustee on behalf of any person, and the question in the present case is whether the executors could be considered to be trustees entitled to receive the income, to the extent of the amount paid to the widow, on behalf of the widow. No doubt, under the will, the executors are described as both executors and trustees; but it is quite clear that ordinarily, apart from any words in the will creating a trust, an executor does not become a trustee until he has fully administered the estate. A mere executor is in my opinion not a trustee for the legatees, and he does not become entitled to receive any income on behalf of the legatees. In the present case, clause 5 of the will uses the words "I bequeath", which clearly shows that what was given to the wife was a legacy and no more. The clause further proceeds to provide that the executors shall purchase and appropriate Government promissory notes of 3 1/2 per cent. loan sufficient to produce the annuity and hold them. Such promissory notes were not purchased during the accounting year; but if and when such Government promissory notes are purchased and held by the executors for the purpose of giving the interest thereon by way of annuity to the widow, they may well become trustees for the widow in respect of such investments. The payment that was made was the very first payment made after the death of the testator under the provisions of clause 5 of the will; and in respect of this payment I am clear in my mind that the executors were not trustees and were not entitled to receive any amount on behalf of the widow. The Tribunal was therefore right in holding that

Section 41 (1) did not apply to this income and that this income was not taxable in the hands of the executors as trustees. I therefore agree that the questions should be answered in the manner indicated by my Lord the Chief Justice.

Reference answered accordingly.