(1948) 03 BOM CK 0044

Bombay High Court

Case No: Income-tax Reference No. 13 of 1947

PRINCE KHANDERAO GAEKWAR OF BARODA		APPELLANT
	Vs	
COMMISSIONER OF Income Tax, BOMBAY CITY.		RESPONDENT

Date of Decision: March 16, 1948

Acts Referred:

- Income Tax Act, 1961 - Section 12, 7

Citation: (1948) 16 ITR 294

Hon'ble Judges: Chagla, C.J

Bench: Division Bench

Judgement

CHAGLA, C.J. - The assessees before us are the grandsons of H. H. the Maharaja Sir Sayaji Rao Gaekwad of Baroda. Sir Sayaji Rao created a family trust in April, 1905, and he executed a deed of variation on 13th April, 1928. Under clause 6 of the deed of variation each of his two grandsons, the assessees, gets an eighth share in the income of the trust subject to a condition that if their mother Princess Kamaladevi should live separate from them or either of them then and in such a case the trustees should pay Rs. 9,000 per year if she shall live separate from either of them and the sum of Rs. 18,000 if she shall live separate from both of them, and such sums of Rs. 9,000 or Rs. 18,000 as the case may be shall be deducted by the trustees from and out of the income or incomes of the said assessees, from whom Princess Kamaladevi may live separate. Princess Kamaladevi began to live separately from both the assessees from 1st April, 1941. On 5th November, 1942, both the assessee executed two separate indentures by which they both agreed to pay a sum of Rs. 15,000 each to their mother and each of the assessees by their respective indentures gave a charge on his own private property in respect of these sums of Rs. 15,000 which they had agreed to pay to their mother. In this reference we are not concerned with the sum of Rs. 9,000 which was payable to the Princess under

the provisions of the deed of trust. We are only concerned with the excess amount of Rs. 6,000 which each of the assessees agreed to pay and in respect of which a charge is created on their private property.

Now the assessees contention as put forward by Sir Jamshedji is that this sum of Rs. 6,000 is a permissible allowance u/s 9(1)(iv) of the Indian Income Tax Act. He says that this is an annual charge not being a capital charge and that the amount of such a charge is an allowance permitted u/s 9(1)(iv) from the income which falls under the head of "Income from Property."

The Tribunal held that the payment of Rs. 6,000 by the assessees to their mother was a voluntary payment, that they were under no obligation to make this payment and that, therefore, the annual charge created by them in respect of this payment is not a charge which falls u/s 9(1)(iv). The advocate-General has also taken up the same contention. Now a payment may be voluntary in the sense that before the creation of the charge there was no obligation on the person who created the charge to make the payment. It may be voluntary in the sense that the charge being without consideration it may not be enforceable in law. Now in this case there can be no doubt, looking to the two deeds executed by the assessees, that the charge created by them is a charge which Princess Kamaladevi can enforce in a Court of law. It is perfectly true that for the agreement to pay the sum of Rs. 6,000 there is no consideration, but looking to the relationship between the assessees and the lady who has benefited under these indentures there can be no doubt that this amount was agreed to be paid for natural love and affection and Section 25(1) of the Indian Contract Act makes it clear that an agreement without consideration is void unless it is in writing and registered and is made on account of love and natural affection between parties standing in near relation to each other. This agreement to pay Rs. 6,000 is in writing and the document is registered. But the Advocate-General goes further and his contention is that the annual charge contemplated in Section 9(1)(iv) must be an overriding charge; a charge which prevents the amount of the charge becoming income of the assessee and diverts the income from the hands of the assessee to the person who is the charge holder. I am unable to accept that construction placed on Section 9(1)(iv) because the whole scheme of that sub-section is that certain allowances are permitted to the assessee out of the income which he derives from his property. Therefore, with regard to these allowances we must proceed on the assumption that they are all the income of the assessee. They all constitute his income, and it is because of the allowances which are given to him that no tax is payable on certain portion of his income. Under the other parts of sub-clause (iv) interest on mortgage or capital charge is an allowance, ground rent an allowance, interest paid on borrowed capital for acquiring, constructing, repairing, renewing or reconstructing the property is an allowance and all these allowances from part of the income of the assessees. Whether originally the assessee was bound or not to pay this amount to his mother, once he enters into this agreement and an enforceable charge the property ensues, then the

assessee is entitled to the allowance under sub-section (iv) of Section 9(1). The test to be applied is, is the property subject to a charge which is a valid and legal charge which can be enforced in a Court of law under which the assessee is bound to pay a certain amount recurring annually, and if we apply that test to the facts of the present case, there can be no doubt that the assessees are under a legal obligation to pay to their mother Princess Kamaladevi a sum of Rs. 6,000 each every year, failing which it would be open to her to enforce the charge on their respective properties.

Reliance was placed on the decision of the Privy Council in Bejoy Singh Dudhuria v. Commissioner of Income Tax, Calcutta. That decision was given before the Act was amended in 1939 and the present provision was introduced with regard to certain burdens on the property. In that case the assessee had succeeded to the ancestral family estate on the death of his father. Then a step-mother brought a suit for maintenance against him in which a consent decree was obtained directing the assessee to make a monthly payment of a fixed sum to his step-mother and declaring that the maintenance was a charge on the family estate in the hands of the assessee. The assessee claimed that the amounts paid by him to his step-mother under the decree should be excluded. The Privy Council held that the liability of the assessee under the decree did not fall within any of the exemptions or allowances conceded in Sections 7 to 12 of the Indian Income Tax Act. But they held that this sum was to the income of the assessee at all because the decree of the Court had diverted that income from the hands of the assessee and had directed it to the step-mother and, therefore, to that extent the assessee received that amount on her behalf and it was not his income. As their Lordships pointed out, it was not a case of the application by the assessee of part of his income in a particular way; it was rather an allocation of a sum out of his revenue before it became income in his hands. In this case the Advocate-General is perfectly right that the is not diversion of the income of the assessee by any overriding factor, but, as I have stated before, we are not considering a case of an assessee receiving income from his property and that income being subject to certain allowances permissible under the statute. The Advocate-General has also relied on the decision of Hira Lal, In re. In that case widows were granted maintenance allowances under an award in lieu of their share in the family property and the payment of allowances was made a charge on the property of the assessee and his brothers. The Court held that the payments made by the assessee in discharge in his share of the liability to the windows could not be taxed as income but must be excluded from his assessment as the payments were obligatory and subject to an overriding charge. The learned Advocate-General relied on a passage in the judgment of the Court where they described the ratio decidendi of the cases of this character to be that, if the payment is voluntary, it must be included in the income of the assessee; but if the charge is obligatory, i.e., subject to an overriding charge such as a decree, the sum so charged must be excluded from the income of the payer. Now, with great respect to the Court, all that they were

called upon to decide was whether on the facts before them the particular payment to the widows was a charge on the property and, therefore, permissible deduction u/s 9(1)(iv) of the Act, and on the facts before them there can be no doubt that there was a permissible allowance. The ratio decidendi which the Court laid down did not strictly arise out of the facts before them and is of a very wide application. It is a well established principle of interpretation of judicial decisions that a case is an authority only for what it decided and nothing beyond that. Therefore, while we agree with the decision itself, we feel that the so called ratio decidendi is merely an obiter to which the Lahore High Court has given expression. To the same effect is the decision in Estate of Lala Shankar v. Commissioner of Income Tax, where also the Lahore High Court has given expression to the same ratio. To my mind the payment of this sum of Rs. 6,000 by the assessees to their mother ceased to be a voluntary payment as soon as they entered into the agreement which the law could enforce as being sufficiently supported by adequate consideration. It is not disputed by the Advocate-General that if the charge was supported by adequate consideration, undoubtedly the assessee would be entitled to the allowances under sub-section (4). If so, why is natural love and affection not an equally good consideration ? Law looks upon it as a good consideration, and if in this case it can be supported by that consideration, the payment of Rs. 6,000 stands on the same footing as if there was pecuniary consideration for the payment of this amount by the assessees.

We, therefore, do not agree with the Tribunal when they take the view that the payment of Rs. 6,000 is not a permissible allowance, and we would, therefore, answer question submitted to us in the affirmative.

The Commissioner must pay the costs of this reference.

Reference answered accordingly.