Commissioner of Income-Tax, Bangalore

Vs

R. Hanumanthappa and Son

Civil Appeal No. 704 of 1968

(K.S. Hegde, A.N. Grover JJ)

10.08.1971

JUDGMENT

GROVER J. -

This is an appeal by special leave and is directed against the judgment of the Mysore High Court rendered in its advisory jurisdiction on a case stated by the Commissioner of Income-tax, Mysore, under section 66(2) of the Mysore Income-tax Act, 1923, hereinafter called the "Mysore Act."

The facts are not in dispute. The family of R. Hanumanthappa and Son was being assessed in the status of Hindu undivided family with late R. Hanumanthappa as its karta till there was a partition and all the family assets including the cotton business were divided after the disruption of the joint family which took place on November 2, 1948. The division took place among the following three coparceners, (1) R. Hanumanthappa, karta, (2) R. Rama Setty, his son, and (3) R. R. Sreenivasa Murty, his grandson. After the disruption of the family the partnership firm was formed on November 2, 1948, the partners being the aforesaid erstwhile three coparceners of the Hindu undivided family (hereinafter referred to as "H. U. F.") and R. Gopamma, a widowed daughter of R. Hanumanthappa. The partnership worked under the name and style of R. Hanumanthappa and Son, cotton merchants. It is common ground that it did the same business which was being done by the H. U. F. The business assets and liabilities falling to each coparcener's share were entered in their personal accounts and then retransferred to the partnership firm as contribution of capital with the exception of a few trade debts. In the deed of partnership it was stated in paragraphs 2 and 3 as follows :

(2) "WHEREAS the aforesaid R. Hanumanthappa, R. Rama Setty and R. R. Srinivasamurthy were carrying on, as members of a Hindu undivided family, a family business as cotton merchants, till they became divided on November 2, 1948, and the said three parties desire to continue the family business constituting themselves into a partnership.

(3) WHEREAS it is agreed that the aforesaid Sreemathi Gopamma shall also be admitted into the partnership constituted for the purpose of the carrying on of the family business after the partition of the family as aforesaid.

NOW IT IS AGREED BETWEEN THE FOUR PARTIES HERETO;

(1) That the partnership shall carry on, as a successor to the business, originally carried on by the Hindu undivided family of Cotton Merchants Ginners and Pressers."

The assessment for the assessment year 1949-50 was completed on December 29, 1949, on the Hindu undivided family. The previous year was the Deepavali year, i.e. November 30, 1947, to November 1, 1948. This assessment was sought to be reopened under the provisions of section 34 of the Mysore Act and an additional demand of Rs. 2,25,942, was raised by the order of the Income-tax Officer dated September 23, 1959. Before the Income-tax Officer an exemption had been claimed on behalf of the distriputed Hindu undivided family under section 25(3) of the Mysore Act. This provision, which was in the same terms as section 25(3) of the Indian Income-tax Act, hereinafter called the "Indian Act", as it stood before the amendment of 1939, was as follows :

> "Where any business, profession or vocation.... on which tax was at any time charged under the provisions of the Mysore Income-tax Act, 1920, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end date of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

The Mysore Income-tax Act, 1920, referred to in the above provision was in pari materia with a similar provision in the earlier Indian Income-tax Act of 1918. Under those Acts the income-tax was paid for each income-tax year in respect of the income of that year. As pointed out by the High Court the position was changed with the introduction of the Indian Income-tax Act, 1922, in British India and the Mysore Act, 1923, in the erstwhile State of Mysore according to which during each assessment year tax was paid in respect of the income earned during the previous year. A situation, therefore, arose that upon the introduction of the new Acts the assessee had to pay tax in respect of the income of the same year both under the earlier statute and under the later enactment. It was with a view to removing this hardship and saving the assessees from double taxation that provision was made in sub-section (3) of section 25 of the new Act to give relief to the assessees to the extent possible. The assessee in the present case, was being assessed under the Mysore income-tax Act, 1922, and it could certainly claim the benefit of section 25(3) of the Mysore Act, provided it could prove discontinuance of the business within section 25(3).

In support of the contention that there had been discontinuance of the assessee's business as contemplated by section 25(3) of the Mysore Act it was urged, inter alia, before the income-tax authorities that on partition the business had disintegrated into several parts which had been allotted individually to each coparcener thereby connoting discontinuance of the business. The assets which had been acquired by the firm were of the divided members and did not belong to the Hindu undivided family and a fourth partner had joined the partnership. This showed that the partnership had not succeeded to the business of the Hindu undivided family. The Income-tax Officer rejected these contentions. Apart from other matters, he relied on the clause in the partnership deed which showed that the business which was being carried on by the Hindu undivided family continued to be carried on by the partnership firm and that the cash balance, bank account and the stocks of the family business had been transferred from the books of the family to that of the firm.

In appeal, the Appellate Assistant Commissioner upheld the view of the Income-tax Officer. It may be mentioned that the appellate authority under the Mysore Act was designated as Deputy Commissioner but since the Act was no longer in force the appeal was heard by the Appellate

Assistant Commissioner. He took the view that the case was one of succession and not of discontinuance and affirmed the order of the Income-tax Officer. The Commissioner agreed with the reasons of the Appellate Assistant Commissioner. On application being made under section 66(2) of the Mysore Act the following question was referred for the opinion of the High Court :

> "Whether, on the facts and in the circumstances of the case, there was discontinuance of the business within the meaning of section 25(3) of the Mysore Income-tax Act, 1923, on November 1, 1948."

The High Court answered the question in favour of the assessee and against the revenue.

There are numerous decisions relating to the question as to what is meant by business being discontinued as also of there having been succession with reference to section 25(3) of the Indian Act. The language of section 25(3) of the Mysore Act was different and was the same as of the Indian Act before its amendment in 1939. We have to ascertain the correct scope and ambit of the words "business is discontinued" which would mean discontinuance of business for the purpose of section 25(3) of the Mysore Act.

In Commissioner of Income-tax v. P. E. Polson it was observed as follows :

> "Before the amending Act came into force the words 'discontinued' and discontinuance'in section 25 of the 1922 Act had been the subject of numerous decisions in the courts of India, amongst them Commissioner of Income-tax v. Sanjana Co. Ltd., Kalu Mal Shori Mal v. Commissioner of Income-tax, and Hanutram Bhuramal v. Commissioner of Income-tax and it has been uniformly decided that these words did not cover mere change of ownership but referred only to a complete cessation of the business. Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain meaning of the section and to be in line with similar decisions upon the English Income Tax Acts. Nor has their correctness been challenged in the judgment under appeal or in the argument before their Lordships."

It was pointed out that under the Indian Act before it was amended in 1939, section 25(3) gave relief in the event of discontinuance. The amendment only introduced a qualification that if there was a succession in respect of which relief was given there should not be any relief upon discontinuance. It did not enlarge or alter the meaning of "discontinuance". In the first case referred to by their Lordships, a company went into voluntary liquidation and the liquidator transferred the business to a new company which continued that business. It was held that the business was not discontinued within the meaning of section 25(3) of the Indian Act. (This was before the amendment made in 1939). Macleod analysed the scheme of the Indian Act and emphasised the fact that under its provisions tax was chargeable on the profits of a business and it made no difference if there was any change in the persons who carried on the business so long as the business was continued. In the next case, i.e. Kalu Mal Shori Mal, there had been a partition of the Hindu undivided family. The assessee got the family business as its share. The other coparceners relinquished their rights therein and started separate business of their own. The assessee carried on the business under the old name and style. The assessee's contention was that the family firm had ceased to exist because the family had disrupted. This was rejected by the High Court on the ground that the business of the family firm had ceased to exist because the family had disrupted. This was rejected by the High Court on the ground that the business of the family could continue in spite of

its disruption. The question really was whether the business was discontinued or not in consequence of the breaking up of the family. It is unnecessary to refer to the third case as a similar principle was laid down therein. Grille and Niyogi J. discussed elaborately the case law relating to sub-sections (3) and (4) of section 25 of the Indian Act in Income-tax Appellate Tribunal v. Bachraj Nathani. The observations made there are pertinent for the purpose of the present case. This is what was said :

> "It must be observed that sub-section (3) is concerned with business, profession or vocation and sub-section (4) with person. When an owner of a business dies or transfers his business or when partners dissolve their partnership, there is discontinuance so far as the person dying or transferring or the separating partners are concerned but there may be no discontinuance of the business as such. Thus the word discontinuity is capable of a double interpretation according as it is vis-a-vis the owners or vis-a-vis the business. In the former case, the discontinuity is notional or jural and, in the latter case, it is real or factual."

All the above decisions proceed on the footing that the requirement of sub-section (3) of section 25 is that the business should be discontinued and not that the person or persons who own the business should cease to be the same. This discontinuity as pointed out in Bachraj Nathani case must be real and factual and it has to be of the business and not of its owner or owners of the business.

A great deal of emphasis has been laid on behalf of the respondent assessee on the integrity of the business carried on by the H. U. F. having been broken by the disruption of the family and it is claimed that the business of the family must be deemed to have totally ceased or discontinued on such disruption. Reliance has been placed on a number of decisions out of which mention may be made only of S. N. A. S. A. Annamalai Chettiar v. Commissioner of Income-tax, in which a Hindu undivided family consisting of a father and son carried on money-lending business under different vilasams. There was a partition in 1939 under which some of the vilasams were allotted to the father and the rest were allotted to the assessee. The Madras High Court held that as the assets of the Hindu undivided family were spilt up on the partition, the family business no longer continued its existence but was terminated and there was, therefore, a discontinuance within the meaning of section 25(3) of the Indian Act. It was observed by the court that the mere fact that the father continued the same books of account and the customers of the money-lending business were to some extent identical, would not make the business of the father a continuation of the old business when once what was a single unit was split up into various component parts. The parts separated were distinct and separate parts of a unified whole but the unity and integrity between parts were no longer possible unless there was a reunion or partnership. It is apparent that the facts of this case were different and clearly distinguishable from those of the present case. Here, apart from the circumstances and facts which have been found and established, the partnership deed itself made it clear that the three coparceners who had effected the partnership desired to continue the family business as partners after the partition of the family. Nothing could be clearer than the language used in sub- clause(1) of clause (3) of the partnership deed that the partnership shall carry on as successor to the business originally carried on by the Hindu undivided family of cotton ginners and pressers. Thus there was no factual cessation of business or its discontinuance. All that happened was that previously the owner of the business was the Hindu undivided family and subsequently the partnership became the owner. There was merely a change of ownership and the business as such continued. In other words, the business was never discontinued so as to attract the provision of section 25(3) of the Mysore Act. The judgment of the High Court cannot thus be sustained. The answer given by it in favour of the assessee will have to be discharged and in its place the question referred is answered in favour of the revenue.

We may mention a preliminary objection that was raised on behalf of the respondent. It was argued that the matter related to the Pre- Constitution period under the Mysore Act by which the Mysore High Court had been constituted as the highest court and no appeal lay to any higher court. The decision of the Mysore High Court, therefore, was final and no appeal could be entertained by this court. We find no force in this objection. By section 3 of the Finance Act, 1950, the Indian Act was amended. The following amendment is relevant for our purposes :

> "3. Amendment of Act XI of 1922. - With effect from the 1st day of April, 1950, the following amendments shall be made in the Income-tax Act, viz., -
>
> (a) for sub-section (2) of section 1, the following sub-section shall be substituted, namely :-
>
> (2) It extends to the whole of India, except the State of Jammu & Kashmir...."

The effect of section 13 of the Finance Act dealing with repeals and saving was that the Mysore Act cased to have any effect except to the extent mentioned in the section.

In the present case the judgment of the Mysore High Court was delivered on January 4, 1967, and the appeal which has been brought to this court is by leave granted under article 136 of the Constitution. We are unable to see how under article 136 special leave to appeal could not be granted against the judgment of the Mysore High Court when the language of article 136(1) is very wide and expressly covers any judgment, etc., passed or made by any court or Tribunal in the territory of India.

In the result the appeal is allowed and the question is answered as mentioned above. Owing to the previous order of this court dated February 2, 1968, the appellant shall pay the costs of the respondent in this court.

Appeal allowed.

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