

Commissioner of Income-Tax, Bangalore

Vs

Vasudeo V. Dempo

Civil Appeal Nos. 1596-1598(Nt) of 1980 and 5267-5268 of 1990

(R. M. Sahai, Dr. A. S. Anand JJ)

10.03.1992

ORDER

1. Facts and circumstances giving rise to this appeals filed by the Commissioner of Wealth Tax against the assessee in appeals of 1980 and wife of the assessee in appeals of 1990 are as follows. They were governed by the Portuguese Civil Code. They were married according to custom, without having any ante-nuptial agreement to keep the property separately. For assessment years 1971-72 to 1973-74 the wealth tax officer calculated value of the moveable properties consisting mostly of shares in limited companies, deposits in bank and loan to company of the husband as belonging to the body of individuals comprising of the husband and wife. He then worked out the net wealth of the communion by deducting from it Rs 1,50,000 under Section 5(1)(xxiii) read with Section 5(1-A) of the Wealth Tax Act. After allowing the exemption and deducting the liabilities of the communion the net wealth of the communion was arrived and fifty per cent of it was determined as net wealth of the husband. The order was maintained in appeal. The Tribunal allowed the appeals of assessee against which the department moved an application under Section 27(1) of the Act. The reference was heard and decided by the High Court of Bombay by answering the question against the department and in favour of assessee. Against this order the department did not move any application under Section 27(3) but approached this Court under Article 136 as the High Court had relied on a decision of Bombay High Court in which certificate of fitness to appeal had been granted and the appeal was pending in this Court. The special leave petition was allowed and leave was granted by this Court after hearing learned counsel for parties. These are Appeal Nos. 1596-1598 of 1980.

2. In the other set of appeals the Wealth Tax Officer passed assessment orders for assessment years 1972-73 and 1973-74 against wife in 1973. But by the time the appeals came up for hearing before the Appellate Assistant Commissioner, the judgment of the High Court in the case of the husband had been pronounced. Consequently the appellate authority allowed the appeals. The order was maintained by the Tribunal. The applications filed under Section 27(1) before the Tribunal and Section 27(3) before the High Court were rejected. The appellant, therefore, approached this Court under Article 136 in which notice was issued as similar matter was pending.

3. All these appeals are being disposed of by this common order.

4. The question of law which was referred for the opinion of the High Court in Wealth Tax Reference No. 44 of 1977 out of which the appeals of 1980 were filed was as under :

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that each of the spouses married under the Portuguese Civil Code is

entitled to deduction under Section 5 of the Wealth-Tax Act, 1957, separately ?"

The High Court after elaborate discussion of provisions of law and various decisions under Income Tax Act on construction of the expression, 'association of persons' held that even though joint rights in the properties of the spouse came into being as a result of marriage under the provisions of the Portuguese Civil Code, but in absence of any antenuptial agreement providing for their separate holding of respective property it did not follow that prospective husband and wife get married with the purpose or object or motive of constitution themselves as joint holders of the property. The bench held that under the Portuguese Civil Code the communion of the property was a necessary incidence but it could not be regarded as the object or purpose of marriage. The bench further held that in order to constitute an association of persons there should have been for purposes of the Wealth Tax Act, an association or coming together for the purposes of wealth or acquiring wealth. But the character of communion formed as a result of marriage under Portuguese Civil Code did not have that character. Consequently no association of persons could have come into being as a result of the marriage of the two assesseees and they could not be assessed under Section 4(1)(b) of the Act read with Rule 2 of the Wealth Tax Rules. The bench also referred to an instruction issued by the department in 1975 inviting attention to the Board's letter dated December 12, 1969 where it was stated that a married individual in Goa, Daman and Diu who was governed by the system of community of property and who had not entered into an ante-nuptial agreement of the nature referred to therein, was required to be assessed separately in respect of his or her share of the property for purposes of the wealth tax. It was mentioned that the Board was further advised that the exemptions under Section 5 of the Wealth Tax were admissible to each one of the spouses as individual. The bench however felt that the instructions having been issued in 1975 it was debatable if the decision could be based only on it.

5. We have heard the learned counsel for parties at length. We do not propose to express any considered opinion as the learned counsel appearing for the department fairly accepted that the Act had been amended on April 1, 1989 and what was provided in the circular has now been incorporated in the Schedule itself. That lends support to the view taken by the High Court. Further the department, as is clear from the circular at all point of time, intended that the spouses in Goa should be treated as individual and granted exemption accordingly. We however consider it necessary to observe that the circular issued by the department are normally, meant to be followed and accepted by the authorities. We do not find any justification for the officers not following it nor was the department justified in pursuing the matter further in this Court.

6. In the result all the appeals fail and are dismissed. But there shall be no order as to costs.

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