CALCUTTA HIGH COURT

Birendra Kumar Datta

Vs.

Commissioner of Income-tax

Income-tax Ref. No. 45 of 1954 and Income-tax Ref. No. 106 of 1964

(S.C. Lahiri C.J. and R.S. Bachawat, J.)

22.12.1959

JUDGMENT

Bachawat, J.

1. Reference No. 45 of 1954 relates to the assessment year 1945-46. Reference No. 106 of 1954 relates to the assessment years 1947-48 and 1948-49. Both references arise out of the assessments of one Birendra Kumar Datta in respect of income from house properties under Section 9 of the Indian Income-tax Act.

2. By a Trust Deed dated 5-2-1944, Birendra conveyed to himself and his mother Sudhamukhi as Trustees the house and premises Nos. 8/3 and 8/10 Alipore Park Road and 37 Syed Ameer Ali Avenue within the municipal limits of the town of Calcutta. The several beneficiaries mentioned in the Trust Deed are Birendra and his brothers Suprovat Jyotsna and Indrajit, his mother Sudhamukhi and his father Kiran Chandra Datta. Clause 1 of the Trust Deed is as follows:

> "The Trustees shall realize the rents of the said Trust Properties and pay the rates, taxes and other impositions in respect thereof and the balance after such payments shall be received by the said Birendra Kumar Datta for the benefit and expenses in the manner following, that is to say, one-third thereof for the said Srimati Sudhamukhi Datta in her personal capacity and one-sixth each for himself, Suprovat Kumar Datta, Jyotsna Kumar Datta and Indrajit Kumar Datta. The said Srimati Sudhamukhi Dutta shall receive her said share from the said Birendra Kumar Dutta. In the event of her death her husband Kiran Chandra Datta shall receive the said share. The latter three however shall receive their said shares as soon as they attain majority respectively.

In the event, however, God forbid, of the death of any of the said male beneficiaries the widow and/or the child or children if any, shall receive such sums of money out of his said one-sixth share as the Trustee Srimati Sudhamukhi Datta or her husband Kiran Chandra Datta shall decide."

3. Clause 2 of the deed provides that on the death of both the parents, the Trustees are to convey to Suprovat and Jyotsna each an undivided half share in premises No. 8/3, Alipore Park Road and to Birendra and Indrajit each an undivided half share in premises No. 8/10, Alipore Park Road. Clause 2 also provides that the widow of any of the brothers shall have no interest in any of the properties except the right to receive one-third of the net income arising out of the property allocated to her husband. Clause 3 provides that on the expiry of six years from the dale of the Deed the trustees are to convey premises No. 37, Syed Ameer All Avenue to the mother and if she be dead to the father and if both be dead to Birendra and his three brothers in equal shares. Clause 4 empowers the trustees to sell the trust properties with the consent of the father Kiran Chandra Datta and to re-invest the sale proceeds in immovable properties. Clause 5 empowers the father Kiran Chandra Datta to nominate a trustee in place of a dead trustee.

4. In his return for the assessment years 1945-46, 1946-47, 1947-48 and 1948-49, the assessee Birendra contended that he should be assessed only in respect of one-sixth of the income from the three house properties. The Income-Tax Officer rejected this contention. He held that the trust deed is invalid, that in the circumstances the assessee Birendra remained the full owner of the properties and that the whole income of the properties should be assessed in his hands. He passed separate orders of assessment for the several years on that basis. The Orders of assessment of the Income-Tax Officer in all the four assessment years were confirmed on appeal by the Appellate Assistant Commissioner. From these appellate orders there were four appeals before the Appellate Tribunal. In all the four appeals the Appellate Tribunal held that the Trust deed is valid. In the appeal relating to the assessment year 1946-47 the Appellate Tribunal by its order dated the 22nd January, 1953 held that one-sixth of the income which had been retained by the assessee himself should be assessed in his hands and directed that the balance five-sixth of the income should be assessed in the hands of the trustees. The assessment, for the assessment year 1946-47 is not the subject matter of the two references before us. Neither the Commissioner nor the assessee asked for any reference with regard to that assessment and the order of the Appellate Tribunal relating thereto has now become final. The appeals relating to the assessment years 1945-46, 1947-48 and 1948-49 were disposed of by the Appellate Tribunal by two separate orders dated the 28th September, 1953. In those three appeals the Appellate Tribunal held that the conclusion that the trust deed is valid does not assist the assessee and that the single assessment of the whole income on him is correct whether the assessment be upon him in his personal capacity or as a trustee. The reasoning of the Appellate Tribunal appears to be as follows: An assessment under section 9 has to be made on the owner of the house property and not on the person entitled to the income there from. The provisions of clauses 2 and 3 of the trust deed are not yet operative since both parents have not died and six years from the date of the deed have not expired. Until those provisions come into play the ownership of the properties is not disposed of, the beneficiaries have no sort of ownership, the beneficial ownership is vested in the settlor and that though the beneficiaries have shares in the income and are not hit by the proviso so far as it concerns such shares and they are not owners of the properties for purposes of section 9(3) and as such cannot bring themselves under the substantive provision of section 41.

5. In this view of the matter the Appellate Tribunal by two separate orders dismissed the three appeals relating to the assessment years 1945-46 1947-48 and 1948-49. On the application of the assessee the Tribunal has made two references under section 66(1) of the Indian Income Tax Act of the following question of law arising out of those two orders:

> "Whether on the facts and in the circumstances of this case and on a true construction of the Deed of Trust dated 5-2-1944, the assessment for 1945-40 was rightly made in a single sum upon the assessee in respect of the income from the house properties comprised in the said Deed."

6. It may be noticed that the assessee had not made any returns of income as a trustee and that the other trustee Sudhamukhi had not joined in the returns submitted by the assessee. Strictly the point in dispute before the Appellate Tribunal was whether Birendra on his own account and not as trustee was in receipt of the whole of the income of the trust properties or of only a part thereof and whether the whole or only a part of the income should be assessed in the hands of Birendra in his personal capacity. The Tribunal held that clauses 3 and 4 of the trust deed having not come into play during the relevant period there was no disposition of the ownership of the properties by the trust deed and that the beneficial ownership therein during that period was vested in the settlor Birendra and that the whole of the income under section 9 should be assessed in the hands of Birendra as the owner of the properties on that basis. So far no question of the applicability of section 41 could arise because the trustees were not before the Tribunal and Birendra was not being assessed as a trustee. But the Tribunal apparently without any objection from the assessee proceeded to discuss the question whether the assessment could be made upon the assessee in his capacity as trustee and whether the substantive part of section 41(1) was applicable and to hold that the single assessment on the assessee whether in his personal capacity or as a trustee was correct.

7. Obviously the main ground upon which the Appellate Tribunal upheld the assessment of the whole of the income of the three house properties in the hands of the assessee in a single sum cannot be sustained. As the trust deed dated the 5th February, 1944 is a valid and operative instrument, the ownership of the three properties is vested in Birendra and Sudhamukhi as trustees. The trust deed has completely disposed of the ownership. The trustees hold the trust property as owners for the benefit of the beneficiaries and upon the trusts declared by the trust deed. The Tribunal erred in holding that the beneficial ownership of the properties vested in the settlor Birendra. There is no question of any resulting trust in favour of the settlor under any of the sections of chapter IX of the Indian Trusts Act. Birendra as settlor was not the owner of the properties for purposes of assessment under section 9 and the whole of the income could not be assessed in the hands of Birendra on that basis. Indeed Mr. Meyer did not seek to justify the assessments on that ground or upon the footing that Birendra in his personal capacity is assessable in respect of the entire income. He sought to justify the assessments on the ground that Birendra in his capacity as a trustee is the owner of the trust properties and that the tax on the entire income is livable in a single sum upon Birendra in that capacity. Dr. Pal on behalf of Birendra then argued that if the present assesments are sought to be justified on that ground the assessments are invalid because then the assessments should have been made upon both the trustees Birendra and Sudhamukhi jointly and not upon Birendra alone. This contention of Dr. Pal raises a question which is separate and distinct from the question whether the assessment was rightly made upon the assessee in a single sum. There is no trace of this contention in the Tribunal's order or in the statement of case or in the assessee's application under section 66(1). These references have been made at the instance of Dr. Pal's client. In these references we are exercising an advisory and not an appellate jurisdiction and we cannot give our advice on a question which is not referred to us. We cannot, therefore, allow Dr. Pal to raise this contention.

8. I have, therefore, to consider the question whether the assessments in respect of the income of the trust properties was rightly made in a single sum upon the assessee Birendra in his capacity as trustee. Now the assessee is a trustee appointed under a trust declared by a duly executed instrument in writing and as such trustee is entitled to receive the income of the trust properties chargeable under the Indian Income-tax Act. Prima facie therefore section 41 applies and the tax must be levied upon the assessee in accordance with that section. Mr. Meyer, however, strenuously contended that section 41 cannot apply to this case and that the levy upon Birendra as trustee must be made independently of section 41.

9. Section 41 of the Indian Income-tax Act is as follows:-

> "41(1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrators-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by Or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913) are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee receiver or manager or trustee or trustees, in the like manner and to the same amount as it would be livable upon and recoverable from the person on whose behalf such income, profits or gains are receivable and all the provisions of this Act shall apply accordingly:
> Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons:
> Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.
> (2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such persons of the tax payable in respect of such income, profits or gains."

10. Mr. Meyer contended that in the eye of law a trustee is entitled to receive the income of the trust estate on his own account and not on behalf of other persons and therefore section 41 cannot apply. Now section 41 applies to income which a trustee is entitled to receive on behalf of any

person. Mr. Meyer contended that there cannot be a case of a trustee who is entitled to receive income on behalf of any person and consequently the section can never apply to a trustee. He urged that though the Legislature intended to apply the section to the case of a trustee, the words used in this section are such that the Legislature has failed to achieve that intention. I am totally unable to accept this, argument. When the section speaks of income which the trustee, receiver or manager "are entitled to receive on behalf of any person", the section is referring to income received by those persons in their representative capacity, that is to say, income received by them not on their own account hut as representing other persons. A trustee is entitled to receive the income of the trust properties in his representative character as trustee and is therefore entitled to receive the income on behalf of other persons. The point is brought out clearly in the judgment of Chakravarty, C. J., in *The Official Trustee of West Bengal v. Commissioner of Income Tax, West Bengal*[1], at p. 422. Mr. Meyer strongly relied upon the decision in *W. O. Holdsworth v. State of Uttar Pradesh*[2], In that case the trustees of certain immovable properties situated in Uttar Pradesh claimed that the income of the trust properties should be computed in accordance with section 11(1) of the U.P. Agricultural Income-tax Act, 1948. Now that section applied to the case of any person who held land us a common manager or a receiver, administrator or the like on behalf of persons jointly interested in such land or in the agricultural income derived therefrom. This claim was rejected. Their Lordships of the Supreme Court held that the section did not apply to a trustee. They observed that though a trustee holds the trust property for the benefit of the beneficiaries, he does not hold such property on their behalf. In my judgment the ratio of that decision has no application to the present case. It should be borne in mind that section 41 of the Indian Income-tax Act by its express language distinctly applies to the case of a trustee whereas there were no express words to that effect in section 11(1) of the U.P. Agricultural Income-tax Act. 1948. The language used in section 41 of the Indian Income-tax Act is very different from that used in section 11 of the U. P. Agricultural Income-tax Act, 1948. Though a trustee may not hold trust properties on behalf of the beneficiaries, he may be entitled to receive the income of the trust properties in his representative character as a trustee on behalf of the beneficiaries.

11. Mr. Meyer next contended that section 41 can apply only to income in respect of which the tax is directly livable upon the beneficiries and that the section cannot apply to the income accruing to the trustee from the ownership of house properties vested in him and assessable under section 9, for the beneficiaries are not the owners of those properties and no tax is livable upon them in respect of such income. He argued that it is impossible to apply section 41 to such an income, because if the section is applied to it no tax would be livable upon the trustee at all. I am unable to accept this contention. If the consequence of applying section 41 to an income which the trustee is entitled to receive on behalf of any person is that no tax is livable upon the trustee, that consequence must follow. The consequence may not be welcome to the Revenue but that is no ground for not applying section 41 to the income in question. But the objection to Mr. Meyer's contention is more fundamental. Section 41 applies to all incomes chargeable under the

[1](1954) 26 ITR 410

[2]1958 SCA 900 : AIR 1957 SC 887

Act which the trustee, receiver or manager is entitled to receive on behalf of any person. The tax must be levied upon the trustees in respect of all such incomes (a) where the substantive part of Section 41(1) is attracted in the like manner and to the same amount as it would be livable upon the person on whose behalf such income is receivable, (b) where the first part of the proviso to Section 41(1) is attracted at the maximum rate and (c) where the second part of the proviso is attracted as if the income were the total income of an association of persons. Now there is no

difficulty in applying Section 41 to an income in respect of which tax is directly livable upon the beneficiaries Take the case of an income accruing from the ownership of house properties of which the parties to a partition suit are the owners and which a receiver appointed by an order of the court is entitled to receive. It is not disputed that Section 41 applies to such an income. Mr. Meyer's argument is that Section 41 does not apply to an income in respect of which no tax is directly livable upon the beneficiaries such as an income accruing from the ownership of house properties of which the trustees and not the beneficiaries are the owners. Now there is no difficulty in applying Section 41 to such an income where either the first or the second part of the proviso to Section 41(1) is attracted. For then the levy is either at the maximum rate or as if the income were the total income of an association of persons and the question whether any tax would be directly livable upon the beneficiaries does not arise. and in my opinion Section 41 must be applied to such an income also in a case where the substantive part of Section 41(1) is attracted. I shall assume for a moment that no tax is directly livable upon the beneficiaries in respect of income accruing from a house property owned by a trustee and assessable under Section
9. For that purpose I shall assume that (a) the beneficiaries are not owners of the property for purposes of Section 9, (b) that the income assessable under Section 9 is a notional income which accrues and arises but it is not an income which is received on behalf of the beneficiaries and is not their income even applying the wide definition of income given in Section 4 and that (c) sub-sections (1) and (2) of Section 41 read together do not authorise a direct levy on the beneficiaries in a case where independently of that section there could be no such levy. On those assumptions when in the case of such income the section speaks of the tax which "would be livable upon" the beneficiary it obviously speaks of the tax which would be livable upon the beneficiary as if the income were his income. The expression "would be livable upon" covers not only the case where the tax is directly livable upon the person on whose behalf the income is receivable but also a case where the tax would be livable upon him if the income were his income.

12. Mr. Meyer next contended that assuming Section 41 applies, the case is governed by the first proviso to that section and as such the trustee should be charged in a single sum at the maximum rate. He contended that no portion of the chargeable income of the trust properties is specifically receivable by the trustee on behalf of any person because (a) the trust deed requires the trustees to pay the rates, taxes and other impositions out of the rents received in the first instance and to pay only the balance to the beneficiaries, (b) the chargeable income is the *bona fide* annual value which is a notional income and is not the actual rent realized from the tenants. I am unable to accept this contention. It is nobody's case that any of the male beneficiaries are dead or that the second paragraph of clause 1 of the trust deed has come into operation. Each of the beneficiaries is entitled to receive a definite share in the balance of the rent left after payment of the rates, taxes and other impositions. In other words each beneficiary is entitled to a definite share of the rent of the trust properties subject to the deduction on account of rates, taxes and other impositions. By Section 55 of the Indian Trusts Act the beneficiary has subject to the provision of the instrument of trust a right to the rents and profits of the trust property. Having regard to the provisions of the instrument of trust in this case each beneficiary has subject to the deduction of the amount of rates, taxes and other impositions a right to determinate portions of the rents and profits of the trust properties. Definite portions of the rent are specifically receivable on behalf of the different beneficiaries even though deductions have to be made out of the rent before payment is made to the beneficiaries. The deduction does not change the character of the receivability of the income. Now the chargeable income under section 9 is the *bona fide* annual

value of the property. This income is a notional income and may be more or less than the actual rents realized from the property. The notional income is deemed to arise or accrue from the ownership of the property. But the income whether actual or notional is receivable by the trustee in his representative capacity. and in a case where definite portions of the actual income are specifically receivable by the trustee on behalf of different beneficiaries it may well be said that definite portions of the notional income are also specifically receivable by the trustee on behalf of those beneficiaries. The section speaks of income which is receivable or which the trustee is entitled to receive and an income which is not actually received by the trustee may be such an income.

13. Mr. Meyer next contended that even assuming that the case is governed by the substantive part of section 41(1) the entire income is receivable on behalf of Birendra alone as clause 1 of the trust deed requires payment of the whole income to Birendra and therefore the tax on the income must be levied in a single sum. In my opinion there are at least two answers to this contention. Firstly clause 1 of the trust deed properly read means that the beneficiaries under the trust are Sudhamukhi, Birendra Suprovat, Jyotsna and Indrajit and that instead of both trustees making the payments to those beneficiaries the duty of making those payments is delegated to one trustee namely Birendra. In other words Birendra is not the sole beneficiary on whose behalf the rents are receivable. The persons on whose behalf the income is receivable are Sudhamukhi Birendra, Suprovat, Jyotsna and Indrajit. Secondly assuming for a moment that the entire income is receivable by the two trustees on behalf of Birendra alone the tax must be levied on the two trustees in the same manner and to the same amount as it would be livable upon Birendra. Now by the very same trust deed the entire income in the hands of Birendra is impressed with a trust in favor of the beneficiaries, Sudhamukhi, Birendra, Suprovat, Jyotsna and Indrajit and definite portions of the income are specifically receivable by Birendra as a trustee on behalf of those beneficiaries. In view of Section 41 the tax would then be livable upon Birendra in separate sums. It follows that the tax must be levied on the two trustees in the same manner and in separate sums.

14. Mr. Meyer next contended that assuming Birendra is not the sole beneficiary, the case is governed by the proviso. He contended that where there are several beneficiaries it must be held that the income, profits or gains or any part thereof are not specifically receivable on behalf of any one person. There is no substance in this contention. The maximum rate cannot be charged if the income "or any part thereof" is specifically receivable on behalf of any one person. In this case definite portions of the income are specifically receivable on behalf of different beneficiaries and each, of such portions is specifically receivable on behalf of one person alone. Though the whole income is not specifically receivable on behalf of any one person each and every portion of the income is so receivable and consequently the proviso does not apply.

15. I think that I have dealt with all the contentions advanced by Mr. Meyer. In my opinion the assessment upon the assessee Birendra in his capacity as trustee must be made in accordance with the substantive part of Section 41(1) in separate sums and not in a single sum. It is also plain that the assessment of the entire income in a single sum cannot be made upon the assessee in his personal capacity.

16. I therefore propose that the question in both References be answered in the negative. The assessee do get the costs of Reference No. 45 of 1954 from the Commissioner of Income-tax,

West Bengal. This Reference is certified for two counsel. There will be no order as to the costs of Reference No. 106 of 1954.

Lahiri, C. J.

16. I agree.
Answer accordingly.