GUJARAT HIGH COURT

Ramjibhai Hansjibhai Patel

Vs.

Income-Tax Officer

Income Tax Reference No. 11 of 1961

(K.T. Desai, C.J. and P.N. Bhagwati, J.)

01.11.1962

JUDGMENT

K.T. Desai, C.J.

1. This is a reference under section 66(I) of the Indian Income-tax Act, 1922. The assessee, Ramjibhai Hansjibhai Patel, is assessed to income-tax as an individual. The assessment year with which we are concerned is the year 1948-49, the accounting year being Samvat Year 2003, i.e., the period from 25th October, 1946, to 12th November, 1947. The assessee had been living in Johannesburg in Africa for a long time. He came to India in April, 1946, and left for Africa in September, 1948. He was at the material time a coparcener in a Hindu undivided family which owned and maintained a house at Varad in Surat District. The expenses for maintaining this house were met by the Hindu undivided family out of its own resources. In connection with this house, the Appellate Assistant Commissioner found as under :

> "Here was a house in British India where the appellant was, by right, entitled to stay whenever he liked. He is a full-fledged member of the Hindu undivided family and would not stay at the Hindu undivided family house as anybody's guest, but as a part-owner. The expenses at this establishment at Varad are met out of Hindu undivided family income, and as such, the appellant has right to stay in there without obligation. He has, so as to say, a legal right to stay in the ancestral Hindu undivided family house and he actually does stay there whenever he wants."

2. This finding of the Appellate Assistant Commissioner has in fact not been disputed before us. The assessee, when he visited India, stayed for some time at this ancestral family house at Varad. The assessee submitted a return in response to a notice issued against him under section 34. In the return he showed his status as that of a "non-resident". The Income-tax Officer came to the conclusion that the assessee was a resident, as, in his view, the requirements of both clauses (i)

and (ii) of sub-section (a) of section 4A of the Income-tax Act, 1922, were satisfied. He held that the assessee, though resident, was not ordinarily resident. The assessee preferred as appeal to the Appellate Assistant Commissioner, contending that he was a non-resident. This contention was also rejected by the Appellate Assistant Commissioner. The matter was carried further to the Income-tax Appellate Tribunal. The Tribunal took the view that the requirements of section 4A (a)(ii) were satisfied and that the assessee was rightly treated as a resident. The assessee, being aggrieved by this decision of the Tribunal, required the Tribunal to refer to us three question of law which, according to the assessee, arose from the order of the Tribunal. The Tribunal took the view that only one question of law arose from the order of the Tribunal and the Tribunal accordingly referred the same to us for our decision. The question referred to us is the following :

> "Whether, on the facts of this case, the assessee was properly assessed as a resident because of (a) maintenance of a dwelling place in the taxable territories by the Hindu undivided family of which he is a coparcener, and (b) the assessee's stay therein for some time during the previous year ?"

3. The answer to the question depends on the application to the facts of the case of section 4A(a)(ii) of the Income-tax Act, 1922. At the relevant time, that section ran as under :

> "Residence in British India. - For the purposes of this Act, -
> (a) any individual is resident in British India in any year if he . . . . . .
> (ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty two days or more in that year, and is in British India for any time in that year."

4. It is not disputed that during the relevant accounting year the assessee was in British India. It is also disputed that the ancestral family house situate at Varad was in existence for a period exceeding one hundred and eighty-two days in that year. The only question that has been debated before us is whether by reason of the existence of the ancestral family house, it could be said on the facts of the present case that the assessee maintained or had maintained for him a dwelling place. The house in question belonged to the joint family of which the assessee was a coparcener. The joint family was not merely the owner of the house, but the house was being used by the joint family for the purpose of residence of the members of the joint family and was, in the true sense, a dwelling place within the meaning of section 4A(a)(ii) of the Act. The expenses in connection with the maintenance of this dwelling place were defrayed out of the joint family funds. It was the joint family which maintenances this dwelling place for the benefit of the members of the joint family. The assessee himself took the benefit of this dwelling place whenever he wanted to do so and actually stayed there. He had a legal right to stay in this dwelling place. It was urged on behalf of the assessee that as the assessee was being assessed as an individual, in order that the provisions of the section might be satisfied, it was request that, as an individual nor was it maintained a for him such dwelling place. It was strongly urged that as

the dwelling house in question was not maintained by him as an individual nor was it maintained for him as an individual but it was maintained for him and other other members of the joint family by the joint family, the requirements of the section were not satisfied. We cannot accept this submission. The mere fact that the assessee is an individual would not of necessity require that the dwelling place must be maintained by him or for him as an individual. If he is a member of a Hindu undivided family and that family has maintained a dwelling place for him and other members of the family, the requirements of the section could be said to be satisfied. It was also urged that if a dwelling place was maintained for the assessee without his consent or against his will, it could not be said that he had maintained for him a dwelling place. It is however not necessary for us to go into this question on the facts of the present case inasmuch as there is nothing on the record which would show that this joint family dwelling place was being maintained by the joint family without the consent or against the will of the assessee. On the contrary, the finding is that not mere this dwelling place maintained by the joint family out of joint family funds, that not merely had the assessee a legal right to use this dwelling place for himself, but that he in fact took the benefit of this dwelling house and stayed therein whenever he wanted. In the light of these facts, it is not possible for us to hold that he has not maintained for himself a dwelling place within the meaning of the section.

5. Our attention was drawn to a decision of the Bombay High Court in *Commissioner Of Income-tax v. Fulabhai Khodabhai Patel*[1], Chief Justice Chagla, in the course of his judgment, whilst analysing the provisions of section 4A(a)(ii), observed at page 777 that the vital fact to determine in order to decide whether a case fell under section 4A(a)(ii) or not was not the ownerships of the property but the right of the assessee to reside in a building which was ready and fit for occupation and was intended to be used by him as his own and that the building or a portion of the building must be available to him and must be at his disposal and he must be in position to go and occupy it without the permission or leave of any one. We are in respectful agreement with the test laid down in this case and the test so laid down has, in our opinion, been satisfied on the facts of the present case.

6. We are supported in the conclusion to which we have arrived by the observations of Justice Viswanatha Sastri in the case of *S. N. Zackariah Sahib v. Commissioner of Income-tax*[2], In the course of the judgment the learned judge observed as follows :

> "The further question is whether it can be said that the assessee 'has maintained for him a dwelling place at Sathankulam'. In our opinion, the expression 'has maintained for him' would certainly cover a case where the assessee has a right to occupy or live in a dwelling place during his stay in British India though the expenses of maintaining the dwelling place are not met by him in whole or in part. A member of an undivided Hindu family or of a Malabar Tarwad or of a Aliyasanthana family has a right to live in the family house when he goes there, though the house is maintained by the manager of the family and not by the assessee from his own funds. If the undivided family is sufficiently affluent or if

> the members are large enough a separate dwelling house might be set apart by the manager for the occupation of one or more members of the family as a matter of convenience. In such cases it can be said that the assessee has a dwelling place maintained for him by the manager of the family for he has a right to occupy the house during his visits to British India".

7. These observation lend considerable support to our view that the case of the assessee falls within section 4A(a)(ii) of the Income-tax Act, 1922.

8. In the result, out answer to the question is in the affirmative. The assessee will pay to

[1]31 ITR page 771

[2]22 ITR page 359

the Commissioner the costs of the reference.

9. Questions answered in the affirmative.

Order Accordingly.