BOMBAY HIGH COURT

Seth Motilal Manekchand

Vs

Commissioner of Income-Tax

(Chagla, C.J. Tendolkar , J.)

11.02.1957

JUDGMENT

Chagla, C.J.

1. There was a joint family consisting of Motilal Manekchand and his son Maganlal. Motilal, Maganlal and Motilal's wife Bhagirathibai were appointed managing agents of the Pratap Mills at Amalner and the father and son were appointed managing agents of the New Pratap Mills at Dhulia. It is common ground that the managing agency belonged to the joint and undivided Hindu family. This Hindu family was partitioned on the 1st July, 1948, and a document was drawn up on the 29th June, 1949, to give effect to that partition. There are three schedules to this deed of dissolution allocating joint family properties to the three parties who were entitled to equal shares on the partition of the joint Hindu family, viz., the father Motilal the son Maganlal, and the wife or the mother Bhagirathibai. There was a provision with regard to the managing agency commission and the provision was that Motilal and Maganlal were entitled to equal shares in this managing agency commission of the two mills, but they both undertook to pay to bhagirathibai 2 annas and 8 pies share each our of their respective 8 annas share, and when we turn to the three schedules we find that in the schedules dealing with the father's and the son's property, what is credited to them is 8 annas share of the managing agency commission of both the mills less 2 annas and 8 pies, and when we turn to the schedule dealing with Bhagirathibai's properties we find that the 2 annas 8 pies share in each of the managing agency commission is credited to her, and it is significant to note that in each schedule the total properties allocated comes to Rs. 13,03,646 and this amount is arrived at after taking into consideration the managing agency commission. After the dissolution of the family the father and son constituted a partnership and acted as the managing agents of these two mills, and the contention was put forward both by the firm and by each individual partner that the managing agency commission received by them and in respect of which they were liable to pay tax was not the full 16 annas received by them but 16 annas less the amount which went to Bhagirathibai. This contention was rejected by the Department and the Tribunal accepted the view of the Department. The assessee had now come before us.

2. Now, the real question that we have to consider is this. What is the real income of each of the two partners, viz., the father Motilal and the son Maganlal ? Is his income 8 annas in the managing agency commission of the two mills, or is part of that income diverted so that the real income of the partner is not 8 annas but 8 annas less the amount which is diverted so that the real income of the partner is not 8 annas but 8 annas less the amount which is diverted in favour of Bhagirathibai ? Now, it is necessary to remove one or two misunderstandings that might have been caused by certain contentions put forward by the assessee before the Tribunal. In the first place, this is not a case where a claim is made in respect of any deduction under the provisions of the Income-tax Act. If such a claim had been put forward, then we would have to consider the various sections of the Act in order to determine whether the deduction is justified. But is clear position in law, as we shall presently point our, that even though an assessee may not be allowed to claim a particular amount as a deduction falling within the provisions of the Act, he would be entitled to urge that his real income should be considered and if a certain amount is to be deducted in order to ascertain his real income, such deduction would have to be made notwithstanding that the Income-tax Act made no provision for such a deduction. In all cases or tax, what has got to be considered is what is the income of the assessee, and when that question arises what has got to be considered is the real income and not any artificial income, and for the purpose of ascertaining that real income every part of that income which May seem to be his income, if in fact its not his income, if that part has been diverted and never constituted his real income, has got to be excluded. The other misunderstanding that was caused was by the claim made by the partnership that in the assessment of the partnership which is a registered firm this deduction should be allowed. Now, the partnership which constitutes the managing agency did no enter into any agreement with Bhagirathibai. The deed of dissolution to which attention has been drawn was between the three members of the joint family and it was as individuals that they were partitioning the joint family property, and therefore the Tribunal was right when it took the view that as far as the partnership was concerned it could not contend that its income as managing agents was in any way diverted by a certain amount having to be paid to Bhagirathibai. But we have held that even though a registered firm may not be entitled to claim deduction, when we come to the assessment of the partners constituting that firm, it would be open to a partner to contend that in order to determine his real income qua the share which he has received from the firm, and legitimate deduction should be taken into consideration. Therefore, even though the amount to be paid to Bhagirathibai May not be considered in the assessment of the firm, that would not prevent the two partners from claiming that their real income as partners is not 8 annas share in the managing agency commission but 8 annas less the amount which Bhagirathibai was entitles to receive. See our observations in Shanti Kumar's case

3. Turning, therefore, to the question as to whether a partner who is before us on this assessment, viz., Motilal Manekchand, is entitled to relief in respect of the amount which he is liable to pay to Bhagirathibai, the first question that we have to consider is as to the nature of Bhagirathibai's claim against Motilal. It is obvious that Bhagirathibai has an overriding title to 2 annas and 8 pies

share in the commission against Motilal. There was some controversy as to whether the provision is the deed of dissolution that Bhagirathibai was entitled to this share out of the 8 annas share managing agency constituted a charge on this commission in favour of Bhagirathibai. We are inclined to accept the submission of Mr. Kolah that it does constituted a charge, but in our opinion it is unnecessary to decide this question because this question can only have relevance and significance if we were considering a claim made for deduction under section 9 (1) (iv) of the Income-tax Act where a claim is made in respect of immovable property where the immovable property is charged or mortgaged to pay a certain amount. It is sufficient for the purpose of this reference is we come to the conclusion that Bhagirathibai had a legal enforcible right against the partner in respect of her 2 annas and 8 pies share and that the partner was under a legal obligation to pay that amount.

4. Now, it is necessary to consider a what was the real nature of the transaction that took place when the parties divided and distributed the joint family property and drew up the document of the 29th June, 1949. What they were dividing and distributing were the assets of the joint family and all the income received by the joint family, and there cannot be the slightest doubt that under this deed of dissolution what the parties agreed to was that only a portion of the managing agency commission should be the income of the two male parties, Motilal and Maganlal, and that a portion of the commission should also be the income of Bhagirathibai. If that is the true nature of the transaction, then it is clear that the income of the joint family property, to the extent that it was represented by the managing agency commission, was divided between the three members of the joint family, the father, the son and the wife. Therefore, when we ask ourselves the question as to what is the real income of the two partners, the clear answer to that question must be in view of this deed of dissolution that the real income is not 8 annas each in the managing agency commission but 8 annas less 2 annas and 8 pies and that the balance of the managing agency commission is the income of Bhagirathibai and not the income of the father and the son. The Advocate-General has emphasised the fact that what was sought to be done was the application or allocation of the income of the partners after they had received the income and after the managing agency commission had become their income. It is true that if this managing agency commission constitutes the income of the partners, then the Taxing Department is not concerned with how the partners apply or allocate this income. But the whole question before us is, looking to the true nature of the transaction, can it be said that the whole of the managing agency commission ever became the real income of the two partners, and in our opinion the answer must be against the contention of the Advocate-General.

5. Turning to the cases that were cited at the Bar, the first and the leading case is the decision of the Privy Council in Raja Bejoy Singh Dudhuria v. Commissioner of Income-tax, Bengal. In that case the assessee succeeded to the family ancestral estate on the death of his father. After that his step-mother brought a suit for maintenance against him and in that suit a consent decree was made 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 ancestral estate in the hands of the assessee,

and the assessee claimed that in computing his income the amount paid by him to the step-mother under the decree excluded. The Privy Council agreed with the view of the Chief Justice from whose judgment this appeal had been preferred that the assessee's liability to his step-mother did not fall within any of the exemptions or allowances set out in the Income-tax Act. But what the Privy Council points our is that the sums paid by the appellant to his step-mother were not income of the appellant at all and they say :

> "In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother had to that extent diverted his income from him and had directed it to his step-mother; to the extent what he received for her was not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum our of his revenue before it becomes income in his hands."

6. This passage can be applied to the facts of this case, if we were to substitute in place of the consent decree the deed of dissolution. As in the case before the Privy Council it was the consent decree which had diverted the income from the son to his step-mother, in this case it is the deed of dissolution that had diverted the income from the assessee to his wife Bhagirathibai, and to the extent that this income had been diverted the assessee has merely received the amount for her and it has never become his income.

7. This case came to be considered by a Division Bench of this Court consisting of Sir John Beaumont and Mr. Justice Wadia in Commissioner of Income-tax, Bombay v. D. R. Naick. In that case the income of the assessee from an immovable property was subject to certain payments which he had to make under a decree of the Court to widows of a joint family and these payments were claimed by the assessee not to constitute his income, and the Commissioner rejected the claim on the ground that they were not deductions which fell within section 9 of the Act, and Sir John Beaumont states at pages 368 :

> "But, in my opinion, the answer the learned Commissioner's view is to be found in the decision of the Privy Council in Bejoy Singh Dudhuria v. Commissioner of Income-tax, Calcutta. Their Lordships there were dealing with a very similar case, in which the assessee's income, derivable in part from immovable property, was subject to charge in favour of a widow, and their Lordships held that although those charges could not be deducted under section 9, the question really was whether the income of the assessee was the whole income of the immovable property, or the income of the immovable property less the deduction, and they held that the real income, which was liable to tax, was the income subject to the deductions in respect of the charges."

8. And Sir John Beaumont applied that test to the case before him.

9. In a more recent case, Prince Khanderao Gaekwar v. Commissioner of Income-tax we applied

this principle to a voluntary settlement made by two sons in favour of their mother, and the test we laid down was whether the property was subject to a valid and legal charge which could be enforced in a Court of law under which the assessee was bound to pay a certain amount recurring annually. In our opinion, the test would be the same even though there may not be a specific charge so long as there was an obligation upon the assessee to pay which could be enforced in a Court of law.

10. The Advocate-General has relied on another Privy Council case, P. C. Mullick v. Commissioner of Income-tax, Bengal. The case is rather interesting because it correctly brings out the principle underlying the earlier Privy Council case. In this case a testator had directed his executors to pay Rs. 10,000 out of the income of his property on the occasion of his addya sradh for expenses to perform the sradh, and the executor claimed this sum of Rs. 10,000 as an amount which he was bound to pay under the direction of the testator and contended that this sum of Rs. 10,000 never constituted the real income and therefore was not liable to tax, and the privy Council dismissed this claim in once sentence saying :

> "It is simply a case in which the executors having received the whole income of the estate apply a portion in a particular way pursuant of the directions of their testator, in whose shoes they stand."

11. They also point our that the position might have been different if the residuary legatee was making this claim, but inasmuch as the executors who represented the estate of the testator made the claim, it was obvious that the claim was untenable inasmuch as what had been paid had been paid our of the estate under the directions of the testator himself.

12. In our opinion, therefore, the sum paid by the assessee partner to Bhagirathibai did not form part of his income and therefore his income should be reduced to that extent.

13. The question that has been referred to us does not clearly bring out the contention which has been put forward by Mr. Kolah before us. We will therefore reframe the question to read : "Whether on the facts and in the circumstances of the case, the amount paid by the assessee partner of Bhagirathibai is to be deducted before ascertaining his taxable income ?", and the answer to the question as framed will be in the affirmative.

14. The Commissioner to pay the costs.

15. Question answered in the affirmative.