BOMBAY HIGH COURT

Commissioner of Wealth-Tax

Vs

Vasudeva V. Dempo

(M Chandurkar, C.J. S Desai, J.)

01.03.1979

JUDGMENT

Desai, J.

1. This is a reference at the instance of the Commissioner of Wealth-tax, Bangalore, Karnataka, under s. 27(1) of the W.T. Act, 1957 (hereinafter referred to as "the said Act"). The following question of law has been referred to us :

> "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 ?"

2. The facts lie within a narrow compass and may be briefly noted. The assessee before us is one Vasudeva V. Dempo of Goa governed by the Portuguese Civil Code. He was married according to the custom of the country (a phrase utilised by the said Code) and without having any ante-nuptial agreement to keep the properties of himself and his wife separate. In this reference we are concerned with the wealth-tax assessments for the years 1971-72 to 1973-74. For these years, the WTO first calculated the value of the movable properties consisting mostly of shares in limited companies, deposits in bank and loan to a company. Thus, the movable properties were taken by the WTO as belonging to the body of individuals consisting of the assessee and his wife, Shrimati Neela V. Dempo. In working out the net wealth of the communion of the husband and the wife, the WTO gave a deduction of Rs. 1,50,000 on account of exemption under s. 5(1)(xxiii) read with s. 5(1A) of the said Act. After allowing this exemption and deducting the liabilities of the communion, he arrived at the net wealth of the communion and took fifty per cent of the same as the wealth of the assessee. Copies of the assessment orders of the WTO for each of these three years are annexed to the statement of the case as annexs."A", "B" and "C", respectively. These assessments were challenged in appeal by the assessee before the AAC, who, however, agreed with the computation made by the WTO and dismissed the appeals for all the three years.

The assessee thereafter went up in further appeal to the Tribunal. A number of other points were also gone into by the Tribunal, but we are not concerned with the same in this reference. The only contention of the assessee which requires mention relates to the exemption claimed by the assessee under s. 5(1)(xxiii) read with s. 5(1A) of the said Act. It was claimed before the Tribunal that the exemption and/or deductions under s. 5 should be allowed in the assessee's assessment against his share in the assets of the communion of himself and his wife and not while computing the net wealth of the communion itself. The Tribunal, following its earlier decision, upheld the contention. A copy of the earlier decision of the Tribunal on which reliance was placed in the assessee's case has been annexed to the statement of the case as annex. "F". In that decision, it had been held that the husband and the wife were owners in common and not joint owners. In the view of the Tribunal, therefore, there was no association of persons which had come into existence and hence s. 4(1)(b) of the said Act or r. 2 of the W.T. Rules, 1957, on which reliance was placed by the department, were not applicable to the facts of the case. Further, according to the Tribunal, it was clearly provided by s. 5 of the said Act that the exemption was to be calculated or deduction made as provided in the section at the stage of the assessment of the individual who was the assessable entity and not at the stage of calculating the net wealth of communion. It is from this decision of the Tribunal that the reference has been made to us at the instance of the Commissioner.

3. According to Mr. Joshi, who appears on behalf of the Commissioner, the communion between the consorts created by the Portuguese Civil Code which is established as a result of the provision of the Code, but in the absence of ante-nuptial agreement to the contrary, constituted in association of persons. It was submitted that this position was recognised by Parliament itself, and our attention was drawn to ss. 80C(g), 80CC and 80L(1)(c) of the I.T. Act, 1961. Starting from the premise that the communion of the consorts was an association of persons, then, according to the learned counsel for the revenue, the net wealth of the communion will be required to be calculated or computed in accordance with s. 4(1)(b) of the said Act read with r. 2 of the W. T. Rules, 1957. In his view, it was at that stage that the exemption or deduction under s. 5 of the said Act was allowable and not at the later stage of the individual assessment as claimed by the assessee. Accordingly, it was submitted by the learned counsel that the WTO was right in his computation and we were required to uphold the calculation of the net wealth made by the WTO in his assessment orders.

4. On the other hand, the learned counsel for the assessee submitted that the communion between the husband and the wife constituted as a result of the Portuguese Civil Code was not an association of persons known to either the I.T. Act or the W.T. Act. It was further submitted that even if the communion be considered to be an association of persons, this would not warrant the exemption or deduction under s. 5 being allowable at the stage of determination of the net wealth

of the communion. In the submission of the learned counsel, the clear language employed by the Legislature showed that the exemption under s. 5 was to be considered at the stage of the assessment of the individual. Finally, reliance was placed on Instruction No. 897 contained in C.B.D.T. Bulletin. The said instruction was issued by CBDT under Reference No. F. 320/157/75-WT dated November 19, 1975.

5. In our opinion, although a brief reference may be made to the said instruction subsequently, it is unnecessary to consider whether the assessment of the assessee before us is to be controlled by this instructions. This is because we find the statutory provision quite clear, and in the view we take thereof, the contentions urged before us on behalf of the assessee would be required to be upheld.

6. In order to deduce the clear implication of the statutory provision, the necessary sections and rules may first be extracted. Under the W.T. Act the definition of "assessee" is found given under s. 2(c), and the assessee has been therein defined to mean a person by whom wealth-tax or any other sum of money is payable under the said Act. Counsel for the revenue in particular relied on the definition of "net wealth" to be found in s. 2(m), and the relevant portion of the definition reads as under :

> "'Net wealth' means the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth..."

7. The charge of wealth-tax is provided by s. 3, and under that section the charge of tax is to be made in respect of the net wealth on the corresponding valuation date of every individual, HUF and company. Section 4 of the said Act indicates the manner in which the net wealth is to be computed, and we may set out fully s. 4(1)(b) since great reliance was placed on this provision by the counsel on behalf of the Commissioner. It reads as follows :

> "4. (1) In computing the net wealth of an individual, there shall be included, as belonging to that individual-....
>
> (b) where the assessee is a partner in a firm or a member of an association of persons (not being a co-operative housing society), the value of his interest in the firm or association determined in the prescribed manner."

8. Our attention was then drawn to r. 2 of the W.T. Rules, 1957. It provides for the valuation of interest in a partnership or an association of persons.

9. Now, the first question which arises for our determination in this reference is whether the communion between the consorts created by the provisions of the Portuguese Civil Code brings into being an association of persons as understood either under the I.T. Act or the W.T. Act. It was submitted by the learned counsel for the Commissioner that in the I.T. Act, Parliament had, at the time of introduction of ss. 80C(g), 80CC and 80L(1)(c), recognised that the husband and wife, governed by the system of community of property in force in Goa, Daman and Diu, would constitute an association of persons. Now, when these three statutory provisions of the I.T. Act are properly scrutinised, it is found that far from supporting the submission of Mr. Joshi, the Legislature has given indication that the husband and the wife governed by the system of community of property in Goa would not be an association of persons but only a body of individuals for which special provision was required to be made in the three sections above noted. On this aspect of the matter, it may be apposite to refer to an earlier decision of this court in *CIT v. Purushottam Gangadhar Bhende*[1] where the provisions of the Portuguese Civil Code as well as art. 10 of the Commercial Code were considered. However, in that decision, the Division Bench, to which one of us, namely, myself, was a party, was not required to give its conclusion as to whether the husband and the wife who constituted the communion by reason of the provisions of the Portuguese Civil Code could be regarded as an association of persons or not. The short question which fell for determination in the said decision was whether the shares of the two could be regarded as definite and ascertainable. If the answer to the question was in the affirmative, as it was ultimately found to be by the Bench, then it did not matter whether the two constituted an association of persons or not, since 2. 26 of the I.T. Act, 1961, contained express prohibition against the income from property being taxed in the hands of the husband and the wife as an association of persons. However, Vimadalal J. (who delivered the principal judgment in *Bhende's case*[2] on a careful consideration of the various provisions of the Portuguese Civil Code as well as art. 10 of the Commercial Code, extracted certain legal propositions, which are set out at p. 940 of the report of In *Bhende's case*[3] The four propositions are as under :

> "(i) During the subsistence of a marriage celebrated as per the custom of Goa, the ownership and possession of 'the common estate', immovable as well as movable, vests in both the husband as well as the wife. This is laid down in express terms in article 1117. Articles 1118 and 1119 as well as 1766 are also consistent with that legal position;
>
> (ii) Proposition No. 1 applies to the corpus as well as the income of all communion property, immovable as well as movable. The unique para (proviso) to article 1109 lays down that even the income of property excluded from the communion is communion property. A fortiori the income from the communion property itself must be communion property;

(iii) Under articles 1117 and 1189, the husband has only a right of management, but even that right is not an absolute right so as to amount to the 'ownership' of the income, in view of the provisions of articles 1118, 1119, 1191 and 1219. Moreover, under the very articles 1117 and 1189, even the wife can be in management in certain contingencies, her right being similarly fettered under the provisions of article 1193;

(iv) In the corpus as well as the income of communion property, immovable as well as movable, the husband and the wife each have, during the subsistence of a marriage celebrated as per the custom of Goa, a fixed and certain half share which can be ascertained on the termination of the communion by divorce, separation or death (articles 1921, to 1124, 1203, 1204, 1210, 1216, 1220 and 1226). What is most important in this connection is that it is an admitted position that on the death of one of the spouses, communion property does not devolve by survivorship, but the half share of the deceased spouse goes by succession to his or her own heirs or legatees by virtue of articles 1122 and 1123. There is a consistent reference to the half share of each of the consorts throughout the different articles dealing with various situations (vide articles 1112 to 1114 of the Portuguese Civil Code, and article 10 of the Commercial Code dealing with the incidence of debts, and Portuguese Civil Code article 1118, dealing with the disposal of the movable property as well as articles 1120, 1123, 1220, 1463 and 1471)."

10. In connection with this aspect of the matter the Tribunal has referred to three decisions of the Supreme Court, of which one was considered fully in *Bhende's case*[4] The said decision is CIT v. Indira Balkrishna . The expression "association of persons" occurring in the I.T. Act has been examined in India Balkrishna's case and it has been observed by S. D. Das J., speaking for the court, that "an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce in come, profits or gains". In India Balkrishna's case , the test indicated by Costello J., in In *re B. N. Elias*[5], has been cited with approval. According to Costello J., the expression "association of persons" connotes a combination of individuals engaged together in some joint enterprise, a combination of persons formed for the promotion of a joint enterprise...' In view of the fact that in Indira Balkrishna's case , the expression has been given the above meaning by the Supreme Court, it appears to us unnecessary to advert further to the concept of association of persons.

11. But a brief reference may be made to *Smith v. Anderson*[6] where James L.J., has observed :

"Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or several interest in something which is to be divided between them."

12. Reference has often been made to the discussion to be found in the judgment of Cotton L.J., in this every case (at p. 282 of the report) where he has observed :

> ".... that it (expression) might have been intended to hit the case which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it..."

13. It is true that joint rights in the properties of the spouses come into being as a result of the marriage under the provisions of the Portuguese Civil Code in the absence of an ante-nuptial agreement providing for their separate holding of respective property. From this it does not follow that the prospective husband and wife are associating (or getting married) with the purpose, object or motive of constituting themselves as joint holders of the property. On a proper view of the provisions of the Code, the communion of property would be a necessary incidence of the marriage but cannot be regarded as the object or purpose of the marriage. Mr. Joshi rightly stressed that the definition of "association of persons" in which the aspect of earning profit or income was emphasized to be considered under the W.T. Act. But by accepting his caveat it would not follow that the basic approach indicated in the judgments earlier referred to has to be totally abandoned. In order to constitute an association of persons, there must be, for the purpose of the W.T. Act, an association or coming together for the purpose of owning, holding or acquiring wealth. That is not the character of the communion formed as a result of the marriage under the Portuguese Civil Code. As earlier observed, even the Legislature seems to have accepted this position when it referred to this as a body of individuals rather than as an association of persons in the three sections under the I. T. Act earlier referred to.

14. In our view, therefore, the Tribunal was entirely right in observing that no association of persons could have come into existence as a result of the marriage of the assessee with his wife. If that be so, then s. 4(1)(b) of the said Act or r. 2 of the W.T. Rules would not be available to the revenue for bringing about the result which was ought to be brought about.

15. The further submission of Mr. Mehta, the learned counsel for the assessee, namely, that the exemption under s. 5 of the said Act is not to be considered at the stage of determining the net wealth of the communion is equally sound, and this would be so even if the communion can be regarded, though in our opinion, it cannot be so regarded, as an association of persons. Section 5, which provides for exemption in respect of certain assets, in its opening words under sub-s. (1), indicates that exemption is to be considered at the stage of assessment of net wealth of an assessee. We have already seen how under s. 3 of the said Act, charge of wealth-tax is made on the net wealth of an individual, HUF and company, which would mean that the assessee contemplated under s. 5(1) would be an individual and not the communion, whether a communion be regarded as a body of individuals or an association of persons. In this view of the

matter, the stage at which exemption is to be considered and allowed is the stage after the share of wealth from the communion is brought to the individual's assessment. We find that this clearly borne out by the statutory phraseology employed by the Legislature, and in this view we find considerable support from the two decisions of the Karnataka High Court and one of the Orissa High Court, to which reference may now be made. The first of these is a decision in *CWT v. Purushotham Pai*[7] In this case, the assessee held one-third share as a tenant-in-common with two others in a coffee estate, and the value of one-third share in the estate was added in the computation of his net wealth. The WTO deducted the exemption allowable under s. 5(1)(iva) from the total value of the estate and thereafter determined the value of the interest of the assessee by dividing the net wealth by three. This, in the view of the Karnataka High Court, was an erroneous procedure, and the exemption allowable under s. 5(1)(iva) of the said Act was, in the opinion of the Karnataka High Court, required to be given in its entirety to the assessee. Observations to a similar effect are to be found in *CWT v. Mrs. Christine Cardoza*[8] It has been observed by the Karnataka High Court that the deduction contemplated by s. 5(1)(iva) of the said Act is in the computation of the net wealth of an individual who is an assessee and not the firm of which he may be a partner. Observations in a similar vein are also to be discovered in a decision of the Orissa High Court in *CWT v. I. Butchi Krishna*[9] In the said decision it has been observed that a firm is not an assessable entity under the said Act as would appear from s. 3 thereof. In the view of the Orissa High Court, the stage at which exemption under s. 5(1) has to be given effect to is at the stage of computation of the net wealth of the assessee. The fallacy of the approach of the department has been pointed out by the Orissa High Court at p. 13 of the said judgment. We need not advert to the same here, as, in our opinion, the statutory provisions are clear and do not admit of any further or more elaborate discussion.

16. Thus, in our view, the Tribunal's decision was totally justified inasmuch as the husband and the wife did not constitute an association of persons. Further, the exemption was allowable at the stage in view of the clear provisions contained in s. 5 of the W. T. Act read with s. 3 thereof and the definition of "assessee" contained in s. 2(c) of the said Act.

17. In passing, we may refer to Instruction No. 897 contained in Pt. VII of the CBDT Bulletin (October-December, 1975) at p. 55, on which reliance was placed by the learned counsel for the assessee. The said instruction, namely, CBDT F. No. 320/157/75-WT, dated November 19, 1975, reads as follows :

> "Attention is invited to the Board's letter No. 1/36/68-ED dated the December 12, 1969, wherein it was stated that a married individual in Goa, Daman and Diu, who is governed by the system of community of property and who has not entered into an ante-nuptial agreement of the nature referred to therein, should be assessed separately in respect of his

> or her share of the property for the purposes of Wealth-tax Act. The Board are further advised that the exemption under section 5 of the Wealth-tax Act are admissible to each one of the spouses as individuals.

2. The instructions may be brought to the notice of the officers working in your charge."

18. As indicated earlier, the date of the instruction is November 19, 1975. In the assessments under refer the WTO completed the assessments for all the three years under consideration on February 28, 1974. Thereafter, the appeals were disposed by the AAC by his common order dated February 11, 1975. It is true that the Tribunal's decision is dated January 23, 1976, that is, after the date of the said instruction. But, in the circumstances, it would be a debatable point whether the decision of this case should rest only on the said instructions. In our opinion, the legal position is fairly clear, and we have though it advisable to base our decision and answer the question on the provisions as they appear to us rather than on the basis of the said instructions. The instructions then are mentioned in passing only.

19. In the result, the question referred to us in this reference is answered in the affirmative and in favour of the assessee. The department will pay to the assessee the cost of the reference.

Cases Referred.

1[1977] 106 ITR 932
2[1977] 106 ITR 932 (Bom)
3[1977] 106 ITR (Bom)
4[1977] 106 ITR 932 (Bom)
5[1935] 3 ITR 408 (Cal), at p. 417
6[1990] 15 Ch D 247 (CA), at p. 275
7[1978] 114 ITR 270 (Kar)
8[1978] 114 ITR 532 (Kar)
9[1979] 119 ITR 8 (Ori)