

PATNA HIGH COURT

S. C. Mazumdar, Receiver

Vs

Commissioner of Income-Tax

(Manohar Lall, J.)

29.08.1947

JUDGMENT

Manohar Lall, J.

1. This is a reference under Section 66 (1), Income-tax Act, at the instance of the assessee by the Income-tax Appellate Tribunal. The question referred to us is : Whether, in the facts and circumstances of the case, the amalgamated assessment on the receiver as the principal officer of an association of persons is valid in law ?"

The facts found are the Trigunait are governed by the Mitakshara school of Hindu law in which the plaintiffs as representative of Janardan Trigunait have one-third share, the representatives of Sham Lal Trigunait one-third share, and the remaining one-third belongs to the representatives of Santustamoni Trigunait. Bhubneshwar Trigunait and Mukteshwar Trigunait as representatives of Janardhan Trigunait instituted title suit No. 139 of 1906 for partition of the family estate consisting of certain collieries and royalty bearing lands. The Subordinate Judge of Purulia on the 15th of February, 1907, passed an interlocutory order for the appointment of a receiver, but as the parties did not agree to the person to be appointed as receiver, he on the 25th of February tentatively appointed one Tewari as receiver, and after obtaining sanction of the Judicial Commissioner he appointed Tewari as a permanent receiver on the 9th of April, 1907. It was directed by that order that the parties should deliver to the receiver all the stock-in-trade, books of accounts etc., including coal-fields and mines and all other properties of the estate, and further that the tenants and occupiers of the estate "do attorn and pay their rents, royalties, price of coals in arrear" etc., to the receiver. The appeal to the High Court was dismissed, and a preliminary decree for partition was passed in July, 1908, by which inter alia it was decreed, after defining the shares of the parties as aforesaid, that "the colliery at Angerpathra and the coal-lands at Angerpathra be kept ijmal under the management of the receiver and the distribution of profits by him to the parties in respect of their shares till such time as the parties may mutually agree to the division or any other course to adopted in the matter." Against the preliminary decree there was an appeal to the High Court, but the parties entered in to a compromise on the 4th of May, 1909. The relevant terms of this compromise are that certain coal lands in Angerpathra which

were in the occupation of the Union Coal Company should be taken out of the management of the receiver, but in other respect the decree of the trial Court was confirmed. The final decree in the partition suit was made on the 16th of February, 1910, and this arrangement continued till the 11th of April, 1931, when Mr. Mazumdar was appointed the receiver in place of Mr. Tewari, and since then the colliery at Angerpathra and other royalty bearing lands have been in his possession and management. The income from these lands and collieries is the subject-matter of the assessment in the present case. From 1925-26 right up to 1939-40 the assessments have been made on the Trigunait Brothers estate through the receiver, but the total income was being distributed among the beneficiaries proportion to their respective shares, and the tax applicable to each was recovered from the receiver in accordance with the provisions of Section 41 of the Income-tax Act. In the year 1940-41 the assessment was made treating the assessee as an unregistered firm but on appeal by the assessee the Appellate Tribunal cancelled the assessment and remitted the proceedings to the income-tax Officer for the further investigation of the question as to what was the true status of the assessee and specially his objection that "the assessment should be done as in the past on defined shares." The Income-tax Officer after investigation made the assessment treating the Trigunait as an association of persons through the receiver, Mr. Mazumdar, but unlike the preceding assessment, he assessed the entire income in the hands of the receiver as one unit, and, therefore, necessarily as a higher rate. The assessment was made similarly for the year 1941-42.

The assessment year in the present case is 1942-43. The assessee raised the same contention that as the shares of the beneficiaries were defined and the collieries were kept ijmāl or under the management of the receiver, as division by metes and bounds as in practicable and there was no jointness of interest as between the shareholders and the parties had no voice in the management of the receiver, the tax should be held to be recoverable from the receiver separately for each of the beneficiaries in proportion to his share of the total income. These contentions were overruled by the Income-tax Officer who found the taxable income to be Rs. 69,797, that is to say Rs. 21,747, the amount paid by the lessees to the receiver as royalty and Rs. 48,050 as the amount of profits made by the receiver who employed contractors to carry on the business of coal cutting and raising it on the pit-head. The Income-tax Officer says in his order that he gave Mr. Mazumdar, the receiver an opportunity to show cause why he should not be treated as the principal officer of the association. The receiver made an objection in writing that he was subject to the control of the Court who appointed him and was independent of the co-owners in all respects. The Income-tax Officer observed at page 9 : "That may be so, it is apparent that he is in charge of the management, competent to enter into contracts, to receive and pay cash and responsible for correct accounting and in fact for everything that is necessary for proper conduct of the business. I think there is no better person who can be treated as the principal officer. Under Section 2 (12) of the Act he is so treated." Against this decision there was an appeal to the Appellate Assistant Commissioner who while reducing the income by a sum of Rs. 4,523 affirmed the order of the Income-tax Officer in the main. The matter was then taken to the Appellate Income-tax Tribunal who by an order dated the 19th of August, 1944, dismissed the appeal and observed at the end of the judgment that although the receiver was originally

"appointed by the Court, but it appears that he has since been kept on by consent of parties. It is open to the parties to divide the estate by fixing valuation of shares but they have agreed to continue management through the receiver who is appointed by consent for the future management." The Appellate Tribunal, who have now made the reference, have pointed out while stating the facts of the case at page 4 : "It is not a fact that the parties agreed before the High Court that Babu Suresh Chandra Tewari be appointed a receiver" - they have shown that this is the correct position by referring the various order of the subordinate Judge and the High Court. It must, therefore, be taken that the receiver in the present case is in possession not with the consent of the parties but under the orders of the Court. The crucial question, therefore, to decide is whether the assessee is an association of persons and whether the provision of Section 41 cannot be applied to the present assessment. To begin with it, may be at once stated that Rs. 21,747, which is the amount paid by the lessees, cannot be taxed as a lump sum as being the profits of any business carried on by an association of persons. Letting out property is not carrying on a trade or business, the business would be carried on by the lessees to whom the property is let. The previous conflict of case law is now solved so far as income from property is concerned by the insertion of sub-clause (3) to Section 9 where it is clearly stipulated that where property is owned by two or more persons and their shares are definite and ascertainable, they cannot be assessed in respect of the income from such property as an association of persons. On this being pointed out, the learned standing counsel, as was to be expected, conceded the position. With regard to the remaining sum, the question is whether the assessee can be treated as an association of persons. There has been a conflict of decision in the various High Courts as to whether the expression "association of persons" should be construed *ejusdem generis* with the previous words which occur in the charging section, namely Hindu undivided family, company, local authority and firm, or whether it should be construed in its ordinary plain meaning. In support of the latter view reference is made to the Oxford Dictionary where it is said that associate means "to joint in any purpose or to join in an action" and, therefore, it was held that the persons can only be called an association of persons if they join together and remain so jointed with the purpose of buying and holding properties. It is unnecessary to express a final view upon this difficult question in the present case. All the High Courts are agreed that the question whether the assessee is an association of persons depends upon the facts and circumstances of each case. Now, what are the facts which have been found in the present case ?

(1) that the receiver appointed by the civil Court is in possession of the collieries; he is employing contractors for coal cutting and all the raising costs are paid by him, and (2) that the Trigunait have no hand whatsoever in the business which produces royalty.

On these admitted facts the inference that the Trigunait are an association of persons is not warranted in law - indeed the Trigunait have dissociated themselves from each other because a partition such as it is pending between the parties in which each party may well be treated as a plaintiff. That being the position it follows that this is one of those cases in which the receiver is carrying on a trade or business on behalf of the estate of which he has been appointed the receiver by the order of the civil Court. The assessment, therefore, should have been made and

could only be made on the receiver see the Privy Council case of Trustees of Currimbhoy Ebrahim, where the true effect of the decision in the well known House of Lords case of Williams v. Singer was explained and it was observed that there may be circumstance in which the assessment must be made upon the trustee. The present case, however, is unlike the Privy Council case of Keshardeo Chamria, where their Lordships found as a fact that no receiver was appointed by the Court, but the co-owners were allowed to realise their rents on giving joint receipts.

The learned standing counsel correctly argued that Section 41 was a machinery section, and the department is not bound to resort to it - this is now specifically provided by Section 41 (2) which entitles the department to assess a person on whose behalf income, profits or gains are receivable. But the facts found here are that the Trigunaitis are not in possession of the estate, are not carrying on any trade or business themselves, are not an association of persons, and the profits and gains of the business are receivable and received by the receiver himself on account of the business which he himself carries on though he is ultimately accountable to the parties, through the civil Court, who appointed him. The department may if they like assess the individual Trigunaitis separately for his share of the profits in the colliery business. For these reasons, I am of opinion that in this case the assessment should have been made upon the receiver or upon each of the Trigunaitis separately for his share as there is no association of persons as contemplated by the Act. The learned Advocate for the assessee then relying upon Section 41 (1) contended that the tax should be levied upon the receiver only to the same amount as it would be leviable upon and recoverable from each of the Trigunaitis. In support of his contention he relied upon the case of Khan Bahadur M. Habibur Rahman, where the mutwalli of the trust consisting of twenty-four beneficiaries was held taxable on the basis of the profits falling to the share of each of the beneficiaries and not on the footing of all the beneficiaries constituting an association of persons. In this case the profits were derived from a distillery belonging to the wakif of which he made a wakf constituting himself as the sole mutwalli. In my opinion, the contention of the learned Advocate is well founded, and I would hold that the assessment should be made under Section 41 (1). For these reasons, the answer to the question is that on the facts and circumstances of this case the amalgamated assessment on the receiver as the principal officer of an association of persons is invalid. The assessee having succeeded is entitled to the costs of this reference which are assessed on a consolidated sum of Rs. 350.

Ramaswami, J.

I Agree.

Reference answered accordingly.

