

NAGPUR HIGH COURT

Sodradevi N. Daga

Vs

Commissioner of Income-tax

Misc. Civil Case No. 71 of 1950. decided on 13.4.1954, Bombay in R.A. No.607 of 1949-50

(Mangalmurti and Deo, JJ.)

13.04.1954

JUDGMENT

Deo, JJ.

1. This is a reference under Section 66(1), Indian Income-tax Act, by which the following question is referred to this Court for decision:

"Whether on a true construction of the provisions of section 16(3)(a)(ii), Indian Income-tax Act, 1922, the income of the 3 minor sons of the assessee is liable to be included in her total income."

2. Prior to 18-10-1944 Rai Bahadur Seth Narsingdas Daga (now deceased), his 3 major and 3 minor sons formed a Hindu undivided family. On 18-10-1944 there was a partition between the father and sons and at that partition the assessee obtained a share. By this partition 'inter alia' the business of the Spinning and Weaving Mills and the agency shop at Hinganghat fell to the share of the assessee and her three major and three minor sons. A partnership of the assessee and her 3 major sons was thereupon formed for the purpose of carrying on the business and the three minor sons, who were sharers in the assets and good will of the business were admitted to the benefits of the partnership. The genuineness of this firm is not in dispute. The Income-tax Officer added the share income of the three minor sons to the total income of the assessee under Section 16(3)(a)(ii) of the Act and this order was confirmed by the Appellate Tribunal.

3. Under the Indian Income-tax Act, tax is payable on the total income of every individual, Hindu undivided family, company and local authority, and of every firm and other associations of persons or the partners of the firm or the members of an association individually. The word 'individual' is not defined in the Act or in the General Clauses Act; but it does not mean only a human being but is wide enough to include a group of persons forming a unit and includes a corporation created by a statute. The total income includes all income, profits and gains from whatever source derived which are received, accrued or arisen or deemed to be received, accrued, or arisen. Section 4 of the Act elaborately provides for the application of the Act to the

various classes of income. The taxable income of an assessee is to be computed in the manner laid down in the Act. Exemptions are provided in Sections 14, 15, 15A, 15-B and 15-C. Section 16 provides exemptions and exclusions in determining "total income" of an assessee. Incomes exempted from payment of tax are included in "total income" for the purpose of determining the rate payable on the taxable incomes. Sub-section (1) provides for much computation and inclusion of incomes which under the ordinary law may not be regarded as the income of the assessee. Sub-section (2) provides for grossing up of dividends. These two sub-sections were considerably amended in 1939. Sub-section (3) was added by Act 4 of 1937. It was modified in 1939. It provides for the inclusion, in specified circumstances, of incomes which have legally accrued to a wife or minor children of an assessee.

4. Government had appointed an Enquiry Committee to make an investigation of the income-tax system of this country in all its aspects and to report upon both the incidence of the tax and the efficiency of its administration. That report was submitted to the Government by the end of 1936. The recommendations of the Committee which led to the passing of Act 4 of 1937 within about 3 months thereafter were:

- (a) The income of a wife should be deemed to be, for income-tax purposes, the income of her husband; and if her income is derived from personal exertions and is unconnected with any business of her husband, her income from her personal exertions upto the limit of say Rs. 500/- should not be included in the husband's income.
- (b) The income of the minor should be deemed to be the income of the father.
 - (i) if it arises from the benefits of a partnership in a business in which the father is a partner; or
 - (ii) if being the income of a minor other than a married daughter, it is derived from assets transferred, directly or indirectly, to the minor by his or her father or mother; or
 - (iii) if it is derived from assets apportioned to a minor in the partition of a Hindu undivided family.
- (c) The committee was of the view that giving of a share in partnership profits to a wife or minor child was legal avoidance of the tax.

5. As stated in the statement of objects and reasons, this Act was passed to check the widespread practice of evading taxation by means of nominal partnerships between husband and wife or parent and minor child, or by the nominal transfer of assets to a wife or minor child, or to an "association" consisting of husband and wife when there was no substantial separation of the interests of the assessee and the wife or child. It was stated that the proposals in the report regarding the aggregation of incomes of husband and wife went beyond the immediate necessities of the case and to that extent their adoption would involve the admission of a new principle which the Government of India did not desire to establish in advance of the general public discussion of the report which had been arranged. Section 16(3) was thus designed to bring within the ambit of taxation, incomes of wives and minor children as income of husband or parent, which otherwise would escape the whole burden of taxation.

6. In the 5th Edn. (1939) of Sunderam's Income-tax Act, the commentary on this sub-section runs thus:

"The sub-section does not cover transfers from wife to husband. The position about transfers from a mother to a minor child is not clear. The word 'individual' in sub-Clause (iv) refers to the 'individual' at the beginning of the sub-section, which in the light of sub-cl. (i) and (iii) evidently refers to a male."

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"No matter how unimportant the interest (or professional skill) in the firm of the husband (or father) and how dominant that of the wife (or minor child), and no matter wherefrom the wife or child derived the assets in the partnership, their income from the firm will be included in that of the husband (or father)."

This was repeated in his sixth edition published in 1947 at pp.780 and 782. Kanga in his editions published before and after the publication of the decision in - '*Chanda Devi v. Commissioner of Income Tax, U.P., C.P. and Berar, Lucknow*', AIR 1951 Allahabad 586 has said:

"It is not clear whether the Legislature intended the word 'individual' in this sub-section to include females and whether the cases of a gratuitous transfer of assets by a mother to her minor child or the admission of a minor child to the benefits of partnership in a firm of which the mother is a partner would fall within this sub-section."

Sampath Aiyangar in his 1952 Edn. states as under:

"Sub-clauses (i) and (ii) are inapt to apply to a mother who is a partner along with her minor child in the business. The 'individual' referred to in the opening part of Sub-Section (3) is any individual and would include a minor, a man or a woman, married or unmarried, or a father or mother. The expression "such individual" in clause (a) refers to the 'individual' in Sub-Section (3) which would include undoubtedly a father or a mother. But in referring to the income of the dependants or relations of such individual for inclusion with the income of that individual the phrase used in clause (a) is not "income of a wife, husband, or minor child" but is "income of a wife or child". So on the principle of 'expressio unius est exclusio alterius' the correct connotation of the term 'individual' would have to denote an individual who would be the husband."

After stating that AIR 1951 Allahabad 586 was wrongly decided and requires re-examination the learned author proceeds:

"For the same reason, where the wife and husband are both partners the wife's income can be included in the income of the husband so as to tax him on such income; the contrary may not be done. The husband's income cannot be included in the wife's income so as to tax the wife on a husband's income."

7. The learned counsel for the assessee relies on these commentaries and submits that on a true interpretation of the sub-section, in the light of the surrounding circumstances, the word 'individual' means a male person and does not include a female. It is argued that it was the

intention of the Legislature to include in the income of the father or husband the income of the minor children or wife. Reliance was also placed on - '*Chorlton v. Lings*¹', - '*Pharmaceutical Society v. London and Provincial Supply Association*²', - '*Beresford-Hope v. Lady Sandhurst*³', and - '*Nairn v. University of St. Andrews*⁴', The learned counsel for the Commissioner on the other hand relies on AIR 1951 Allahabad 586 which was followed by the Punjab High Court in - '*Commissioner of Income Tax v. Damayanti Sahni*⁵', and by the Allahabad High Court in - '*Musta Quima Begum, In re*', 1953-23 ITR 345 (All) (G). If these cases are correctly decided, the answer to the question must be in favour of the Commissioner.

8. The question really turns upon the construction of the particular words of Sub-Section (3) of Section 16. It runs thus:

"In computing the total income of any individual for the purpose of assessment, there shall be included-

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly-

(i) from the membership of the wife in a firm of which her husband is a partner;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart; or

(iv) from assets transferred directly or indirectly to the minor child not being a married daughter, by such individual (otherwise than for adequate consideration); and

(b) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both."

9. The 'maxim expressio unius est exclusio alterius' which means "the express mention of one thing implies the exclusion of another" relied on by the counsel for the assessee and by Sampath Aiyangar, does not appear to be applicable here. As stated in Broom's Legal Maxims at page 444, great caution is necessary in dealing with this maxim for it is not of universal application but depends upon the intention of the parties as discoverable upon the face of the instrument or upon the transaction. By mere express mention of "such individual" in sub-Clause (a)(ii), a woman cannot be said to be excluded. No doubt an ambiguity is created by use of the words "such individual" in this subclause. Consequently, the words must be examined in the light of surrounding circumstances and constitutional principle and practice. We can, therefore, legitimately refer to the circumstances which led to the passing of the Act. In - '*Thomson v. Lord Clanmorris*⁶', Lord Lindley M.R. said:

"In construing any statutory enactment, regard must be had not only to the words used, but to the history of the Act and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided."

Lord Goddard, C.J., quoted these words with approval in - '*R. v. Paddington and St. Marylebone Rent Tribunal*',

10. Four things have to be borne in mind in interpreting a statute: (1) what was the law before the making of the Act; (2) what was the mischief and defect for which it did not provide; (3) what was the intention of the Legislature to cure the defect of the existing Act; and (4) the true reason of the remedy. It is the duty of all Judges to make such construction as shall suppress the mischief and advance the remedy according to the true intent of the makers of the Act.

11. In 1880-5 AC 857 it was held that whether the word "person" in a statute can be treated as including a corporation must depend on the consideration of the object of the statute and of the enactments passed with a view to carry that object into effect.

12. In 1909 AC 147 their Lordships were interpreting the word "person" in Section 27, Representation of the People (Scotland) Act, 1868, taken with the Universities Election Amendment (Scotland) Act, 1881, and the Ordinance made under the latter Act. The appellants were the women graduates of the Scottish Universities and were claiming Parliamentary franchise. By section 27 of the former Act a vote was given to "every person whose name was for the time being on the register, who was of full age and not subject to any legal incapacity." The appellants were persons whose names were on the registers and no legal incapacity of voting was imposed on women graduates by any particular law. The case turned mainly on the meaning of the word "person" in Section 27. Lord Ashbourne stated:

"It is an ambiguous word, and must be examined and construed in the light of surrounding circumstances and constitutional principle and practice."

Under the common law prior to the Act of 1868, the right of voting was confined to men and the disability of women to vote was taken for granted. This legal disability could be removed by an Act of Parliament. Lord Loreburn, L.C., observed:

"It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process." (p.161).

Lord Ashbourne said (p.163):

"If it was intended to make a vast constitutional change in favor of women graduates, one would expect to find plain language and express statement."

The other sections of the Act confined the franchise described in those sections to men. It was, therefore, argued that by adopting the word "person" in section 27 the intention was to include women as voters. Though women were not voters in 1868, they became voters by the Act of 1881. This argument of the appellants was repelled by the Lord Chancellor thus:

"It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used

in statutes is so precisely accurate that you can pick out from various Acts this and that expression and skillfully piecing them together, lay a safe foundation for some remote inference."

Their Lordships followed the earlier decision in (1868) 4 CP 374. That decision was also followed in (1889) 23 QBD 79. Section 4 of Lord Brougham's Act (13 and 14, Vict. c21) provided:

"In all Acts of Parliament, words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided."

Even so it was held that in the Representation of the People Act, 1868, the word "man" or "person" did not include a woman.

13. As already observed, there was a widespread and growing avoidance of tax by nominal partnerships between husband and the wife, father and minor children. In case of Hindu undivided trading families, a partition by metes and bounds was resorted to and wife and minor children were admitted to the family business as partners. Such devices being apparently valid according to the general law, the income-tax Officer was rarely in a position to prove that the alleged partition, or the participation of the minors in the benefits of partnership, and the alleged partnership with wife were unreal. Tax was also sought to be avoided by transferring directly or indirectly the father's or husband's assets in the name of his children or wife. The enquiry report did not mention cases in which women assessee avoided taxation by these methods. Their observations referred to male assessee. As stated in the Objects and Reasons of the Amending Act, the Government did not want to wait till the report was fully discussed and its principles accepted. To check immediately the avoidance of tax, Act 4 of 1937 was enacted. It would, therefore, be legitimate to infer that it was the intention of the Legislature in enacting Section 16, Sub-Section (3), to suppress the mischief of the avoidance of tax by male assessee. It is no doubt possible for a woman assessee to admit her minor children to the benefit of the partnership in which she is a partner or to take her husband as a partner in her business, whether or not he contributes capital, skill, or labour and thus try to avoid the proper taxation on her income. If avoidance of tax by women assessee had been noticed or was of any considerable extent, the Legislature would have provided for counteracting that avoidance. But sub-Clause (a) (i) and sub-Clause (a)(iii) of Section 16(3) unmistakably show that this was not the intention of the Legislature. Otherwise, they would have used the word "spouse" for "wife" in sub-ss. (a), (i), (iii) and (b) and "such individual" for "her husband" in (i), (iii) and would have made consequential drafting changes. There seems to be no logical reason why the alleged avoidance of tax by a woman assessee by admission of her husband to the partnership should be tolerated and the alleged avoidance of tax by admission of her minor children to the benefits of the partnership should be penalised. The fact that no provision was made to include the income of the husband in the income of the wife is an indication that no such avoidance was brought to the notice of the Legislature or that such avoidance was not to such a great extent as to invoke the drastic remedy of taxing the income of A in the hands of B though B does not derive any benefit from that income.

14. Express and unambiguous language appears to be absolutely indispensable in taxing statutes. In - '*Partington v. Attorney-General*'⁸, Lord Cairns said:

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

It is a cardinal principle of interpretation of taxing statutes that in case of ambiguity it should be construed in favour of the subject and not against the subject: 'In re, Har Krishna Das', AIR 1931 Allahabad 401. In - '*Sunder Das v. Collector of Gujarat*'⁹, Sir Shadi Lal, C.J., observed:

"It is a sound principle that the subject is not to be taxed without clear words to that effect; and that in dubio, you are always to lean against the construction which imposes a burden on the subject."

It is said income-tax and equity are strangers. Equitable considerations have, therefore, no place in construction of Section 16, Sub-Section (3), Clause (a)(ii) to determine whether the income of a minor is to be included in the total of income of the mother.

15. Section 16(3)(a) provides that in computation of an income of an individual the income of the wife or a minor child of such individual shall be included firstly from partnership of the wife in a firm of which her husband is a partner, and secondly from the admission of the minor to the benefits of the partnership in a firm of which 'such individual is a partner'. For inclusion of the income of the wife and minor child it is immaterial whether either has or has not contributed any share capital or whether the wife has contributed her labour or skill. Even in a case in which the wife has contributed capital, labour or skill and the husband has not, the income receivable by the wife from the partnership will be deemed to be the income of the husband irrespective of whether he is a dormant or an active partner. If the wife has various sources of income, she will get relief in taxation by this provision. If, on the contrary, the husband and wife both furnish capital, labour and skill, still her income will be deemed to be the income of the husband, thereby imposing a heavier burden on the husband and giving an undeserved benefit to the wife. The suggestion made by the Enquiry Committee of taxation of husband and wife in accordance with the rules obtained in England was not accepted. This may be because the cases in which wives had brought their own money into partnership or were independent assesseees were not common in this country. As noticed by the committee, it was a widespread practice of men assesseees to admit minors to the benefit of partnership with or without capital. If a Hindu undivided trading family is disrupted, the minor is given a share in the partnership firm formed after disruption and he contributes his share of business assets as his share capital. There may be genuine disruptions of families or there may be disruptions or partitions legally effected obviously with a view to reduce the tax liability. Such avoidance being within legal rights could not be ignored by income-tax authorities without an express provision. Where it is desired to impose a new burden by way

of taxation, it is essential that this intention should be stated in plain terms.

Sub-clause (ii) of clause (a) of Sub-Section (3) aims at preventing avoidance of tax liability by allotting a share to a minor. No doubt the income of a minor received as a result of a genuine partition is also included in the income of his father. The use of the ambiguous words "such individual" in sub-Clause (ii) appears to be inadvertent or unguarded. This new burden of taxation cannot be imposed on the mother without express language. In view of all these circumstances we are of the opinion that it was not the intention of the Legislature to impose additional tax on a mother assessee by including in her income the income of her minor children arising from the benefits of partnership of a firm in which the mother and the minors are partners.

16. The learned counsel for the Commissioner submits that the word "individual" must be literally construed and that there is no warrant for the restricted meaning suggested by the learned counsel for the assessee. He relies on three reported decisions already referred to. In 'Chanda Devi's case' their Lordships of the Allahabad High Court found no difficulty in interpreting the word "individual" in the generic sense to mean both man and woman though in some parts of the sub-section it means only a man. According to their Lordships the word "individual" is used in this subsection as a unit for the purpose of income-tax in contradistinction to a Hindu undivided family, firm, company etc. As already observed, the word "individual" in its generic sense includes a corporation. The word is not used in that generic sense in Section 16(3). It refers only to human beings. Their Lordships were not prepared to accept the interpretation of the assessee, which was accepted by the Appellate Tribunal on the ground that the word "father" did not appear in sub-Clause (ii). Had that word appeared, there would have been no necessity for any interpretation. By the use of the word "individual" it cannot necessarily be understood that the Legislature intended to include women assesseees though the circumstances may indicate otherwise. Their Lordships refused to refer to the report of the Enquiry Commission as according to them the language of the sub-section did not create any real difficulty. Their Lordships did not say that the word "individual" was unambiguous. If we may say so with all respect, their Lordships apparently were not prepared to follow the rule laid down by Lord Lindley, M.R., above referred to and the basic principles of interpretation of a taxing statute. The other Allahabad decision merely follows this decision. The Punjab High Court also followed this case without much discussion.

17. Taking all this into consideration, we are of the opinion that it was not the intention of the Legislature to include in the income of the mother the income of her minor children arising from the benefits of partnership of a firm in which the mother is a partner.

18. We, therefore, answer the question referred to us in the negative.

19. The assessee will have the costs of the reference. Counsel's fee Rs. 250/-. The respondent will also pay the costs of the paper book. Answer in the negative.

Cases Referred.

¹(1868) 4 CP 374

²(1880) 5 AC 857

³(1889) 23 QBD 79

⁴1909 AC 147

⁵ AIR 1953 Pun 199

⁶1900-1 Ch 718 at p.725
⁷(1949) 65 TLR 200 at p.203
⁸(1869) 4 HL 100 at p.122
⁹ AIR 1923 Lah 14 (FB)