REFERENCE UNDER THE INCOME-TAX ACT.

1937

Jan. 26, 27; *Mar.* 4.

Before Costello and Panckridge JJ.

In the matter of KESHAR DEO CHAMARIA.*

Income-tax—"Owner"—Income-tax officer to decide who is—"Association of individuals"—Members of formerly undivided Mitâkshará *family after decree for partition not such association—Manager on behalf of another—Indian Income-tax Act (XI of 1922), ss. 3, 9, 30, 31, 41.*

The decision, whether an assessee is the "owner" of property within the meaning of s. 9 of the Indian Income-tax Act, 1922, rests with the income-tax officer subject to the assessee's right of appeal under ss. 30 and 31.

The members of a formerly undivided *Mitâkshará* family after the passing of a preliminary decree for partition are not an association of individuals within the meaning of s. 3 of the Act.

To come under s. 41 of the Act a person must not only "manage" property but must also manage it on behalf of another.

Commissioner of Income-tax, Madras v. *Mrs. Saldanha* (1) and *Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust* v. *Commissioner of Income-tax, Bombay* (2) considered.

REFERENCE and RULE under s. 66(2) of the Indian Income-tax Act.

The facts of the case and the arguments in the Reference appear sufficiently in the judgment.

K. P. Khaitan and *A. C. Sen*, with them *S. N. Banerjee*, for the assessee.

Sir A. K. Roy, Advocate-General, *Radha Binode Pal* and *Ramesh Chandra Pal* for the Commissioner of Income-tax, Bengal.

Cur. adv. vult.

PANCKRIDGE J. This Reference under s. 66 (2) of the Indian Income-tax Act arises out of circumstances of some complexity.

*Income-tax Reference No. 2 of 1936, under s. 66(2) of the Indian Income-tax Act.

(1) (1932) I. L. R. 55 Mad. 891.

(2) (1934) I. L. R. 58 Bom. 317; L. R. 61 I. A. 209.

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The assessee, Keshar Deo Chamaria, instituted a suit in 1929 on the Original Side of the Court, for a declaration that he had been validly adopted by one Amloke Chand deceased, and was accordingly entitled under *Mitâkshará* law to certain immoveable properties jointly with the defendant Ram Pratap, Amloke Chand's brother. There was also a prayer for partition.

Ram Pratap filed a written statement denying the adoption, and also denying that the properties alleged by the assessee to be joint family properties were in fact such with the exception of one No. 23, Cullen Place, Howrah.

On May 23, 1930, a decree was made by consent. Unfortunately the decree has been drawn up in somewhat ambiguous language, and still more unfortunately the Commissioner of Income-tax appears to be under a misapprehension as to its effect.

It was agreed under the terms of settlement annexed to the decree that the assessee was the validly adopted son of Amloke Chand. The decree further declared that the assessee was entitled to one equal half part or share of the residue of the joint estate mentioned in the terms, after setting apart eleven *lakhs* of rupees for allotment to Ram Pratap, and also after setting apart certain of the premises in suit for religious and charitable purposes.

Ram Pratap was then declared entitled to the remaining equal half part or share. Commissioners of partition were appointed and directions given for accounts and for mutual conveyances on the basis of the award to be made. Now from the language of the decree one would expect to find a list of admitted joint properties in the terms of settlement and, on the other hand, if no properties were admitted to be joint, one would expect in the body of the decree directions on the commissioners to enquire what the joint estate consisted of.

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In fact there is no list of joint properties nor any direction for such an enquiry. Indeed it is admitted that the consent decree did not settle the dispute, in so far as the alleged joint nature of the properties claimed in the plaint was concerned, and we have been told that the present commissioner of partition is in fact holding an enquiry of the sort indicated. Unfortunately the Commissioner of Income-tax states more than once in his letter of reference that the consent decree declared the assessee and Ram Pratap to be the owners of the properties in suit in equal shares.

On July 28, 1930, the Official Receiver was appointed receiver of the properties (described in the order as " the immoveable properties belonging to the parties "to this suit ").

An important order was made by consent on April 2, 1931. The Official Receiver was discharged in respect of the properties, and the assessee and Ram Pratap were jointly given liberty to realize the rents thereof on joint receipt and to meet the necessary expenses thereout, and to file rent suits. The documents of title were to be kept in the joint custody of the assessee and Ram Pratap. Ram Pratap and the assessee were given liberty to invest the money which would come into their hands or divide the same equally. There was also liberty to either party to apply for the re-appointment of the Official Receiver, who in point of fact was re-appointed under an order of the Court dated August 23, 1933. The Commissioner of Income-tax states that the Official Receiver did not obtain possession until the latter part of February, 1934.

The income-tax officer has in these circumstances disregarded the order of August, 1933, and has treated the financial years 1932-33 and 1933-34 on the basis that the order of April 2, 1931, was effective throughout.

No objection has been taken to this way of treating the assessment, the assessee's complaint being that on the basis of the 1931 order the department should have applied s. 41 of the Indian Income-tax Act.

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During the years in question the assessee and Ram Pratap in exercise of the liberty given them under the order have been collecting the rents of the properties and dividing them equally.

The income-tax officer in these circumstances has treated the rents collected subject to the statutory deductions as the *bona fide* annual value of the properties within the meaning of s. 9 of the Income-tax Act, and the assessee and Ram Pratap as the "owners" of the properties in equal shares. He has accordingly included half the annual value in the assessable income of the assessee under the head "property," the actual amounts being Rs. 33,920 out of a total income of Rs. 48,628 for 1932-33 and Rs. 28,177 out of a total income of Rs. 54,558 for 1933-34.

The assessee appealed against the orders of the income-tax officer made in the two assessments, but the Assistant Commissioner dismissed the appeals and confirmed the orders of the income-tax officer.

The matter was then taken to the Commissioner of Income-tax, before whom the assessee formulated certain questions of law [see appendices B and B (1) to the statement of the cases.]

The Commissioner has taken the same view as the Assistant Commissioner and the income-tax officer, but has referred the following question of law to this Court:—

Whether in the circumstances described above the present assessee and Rai Bahadur Ram Pratap Chamaria were the managers of the properties appointed by or under any order of a Court within the meaning of s. 41 of the Indian Income-tax Act and whether in the facts and circumstances given above the income-tax officer acted illegally in assessing the present assessee in respect of his share of the property ?

If I understand the assessee aright he maintains first that for purposes of assessment he is not the owner of the property within the meaning of s. 9.

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Alternatively it is said that if the assessee is in any sense the owner, he is only so as a member of an "association of individuals" within the meaning of s. 3.

Next it is argued that whether he is the owner or not the provisions of s. 41 apply and are mandatory. In other words, at the time that the income was received, it was received by the assessee and Ram Pratap as managers appointed by or under an order of the Court, and they can only be assessed in that capacity.

It will be noticed that most of these submissions are not directly connected with the question formulated by the Income-tax Commissioner, but at the same time it is, I think, necessary for us to express our views upon them.

It may not at first sight be apparent in what respect the assessee has been prejudiced by the suggested failure of the department to apply s. 41, because if the tax had been deducted while the rents were in the hands of the assessee and Ram Pratap as joint managers, although the money available for division would have been less, the dividend presumably would not be liable for tax.

The assessee, however, suggests that, if all or any of the disputed properties are found not to be joint, he will be called upon to refund to Ram Pratap what he has drawn in respect of that property without any allowance for the income-tax paid.

I do not think it necessary to speculate as to the position which will arise in such a case, for I cannot see that such considerations can affect the construction of the section.

Now with regard to the ownership of the property, the position is that the assessee has been assessed in respect of property, of which at the time of assessment

he alleged he was the owner, and of which he still alleges himself the owner, for he does not object to the assessment on the ground that he is not the owner.

He points out, however, that his title is disputed, and that to establish it he has been compelled to institute a suit which may terminate in part at any rate in favour of Ram Pratap, who until the Official Receiver was appointed on July 28, 1930, was in possession of the disputed properties.

To adopt the language of the assessee's counsel, the law says owners shall be taxed, it does not say that claimants shall be taxed.

Now it is clear that before an assessee can be taxed as an "owner" under s. 9 it must be decided that he is in fact the owner of the property in question, and in my opinion this decision rests with the income-tax officer, subject to the rights of appeal under ss. 30 and 31. The mere existence of a dispute as to title, even where a suit has been filed, cannot of itself hold up an assessment, otherwise it would be open to an assessee to delay assessment indefinitely by arranging for the institution of collusive proceedings.

This difficulty is not met by pointing to s. 41, because as often as not in a suit for declaration of title and ejectment no receiver is appointed, and the possession of the party remains undisturbed.

It appears, therefore, that the income-tax officer had *prima facie* the power to decide that the assessee was the owner of a half share in the properties without waiting for the final determination of the High Court suit.

It is hard to see in this case how the decision, if it is to be called a decision, of the income-tax officer could have been other than it was. The assessee has throughout asserted ownership and has never

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appealed against the assessment on the ground that he is not the owner. It is true that the Commissioner appears to be in error in considering that the assessee's ownership has been declared by the partition decree, but having regard to the assessee's assertion of ownership and the arrangements embodied in the order of April 2, 1931, it is impossible to say that the decision of the income-tax officer was wrong.

With regard to the contention that the owners are an association of individuals within the meaning of s. 3, it is enough to say that this point is not raised in the letter of reference. In my opinion, however, the words "other association of individuals" must be construed according to the *ejusdem generis* rule with reference to the word "firm" preceding it and they do not cover the members of a formerly undivided *Mitâkshará* family after a preliminary decree for partition has been made. The members of such a family appear to me to be in the same position as the members of a *Dâyabhâga* family, and it has never been suggested, as far as I know, that members of such a family cannot be individually assessed in respect of their shares.

As regards the provisions of s. 41, the section with which this reference is directly concerned, the assessee's contentions are first that the income, profits and gains, represented by the annual value of the immoveable properties, have been received by him and Ram Pratap as "Managers" within the meaning of the section and secondly that the provisions of the section are mandatory, and that where its conditions are fulfilled the department can only look to the manager, and has no recourse to the person, upon whose behalf the income, profits and gains are received. On the other hand the Crown maintains that the section cannot apply in the circumstances of this case, and further submits that, even if the section is applicable, it merely provides machinery for collection, which is available to the department, and which the department is not compelled to employ.

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For the latter contention the Crown relies on the observations of the Madras High Court in *Commissioner of Income-tax, Madras* v. *Mrs. Saldanha* (1). There a widow was assessed under s. 10(*1*) of the Income-tax Act in respect of a business carried on by her and belonging partly to her and partly to her children. It was contended that the tax should be separately assessed on the various owners of the business and levied on the widow as guardian under s. 40. Dealing with s. 40 the Court states at p. 898 :—

> Now the argument based on s. 40 may first be disposed of. Section 40 and the following sections have been held to be not charging sections but only machinery sections. Section 40 provides that the trustees or guardians shall be assessed in a like manner and to the same extent as the beneficiaries or wards may be assessed. Apart from the fact that these are not charging sections it may also be observed that they are enabling sections, *i.e.*, the income-tax officer can take steps to assess the trustees or guardians as representing their separate beneficiaries or wards as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them. The question in the case before us is not whether the income-tax officer can proceed under s. 40 or not, but, where he has not chosen to proceed under s. 40 but proceeded to assess on other basis, s. 40 can be relied upon as preventing him from doing so. It is clear that the section cannot be so utilised.

The assessee questions the soundness of the observations made by the Madras High Court on the authority of the *Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust* v. *Commissioner of Income-tax, Bombay* (2) where the Judicial Committee held that in the circumstances of the case the interest on securities was "receivable" by the trustees within the meaning of s. 8 and that the property was "owned" by them within the meaning of s. 9.

Neither case appears to me to be a direct authority on the question, whether the application of the sections (including s. 41) grouped under Chap. V of the Act is mandatory or discretionary.

Even on the assumption that the sections are mandatory when the conditions specified in them are fulfilled, the assessee and Ram Pratap are not in my opinion within the purview of s. 41.

(1) (1932) I. L. R. 55 Mad. 891, 898.

(2) (1934) I. L. R. 58 Bom. 317; L. R. 61 I. A. 209.

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The order of April 2, 1931, does not specifically appoint them to be receivers or managers, although having regard to the previous order and to the duties and powers conferred I should hold that they could properly be described as "managers."

But to bring them within s. 41 it is not enough that they should be appointed to "manage" the property, they must manage it "on behalf of another."

The assessee maintains that he and Ram Pratap are managing the property on behalf of that one of them who will ultimately be found, as a result of the suit, to be entitled to the property.

In my judgment the income-tax officer, having found, as he was entitled to do, that the assessee and Ram Pratap are mere owners of the property in equal shares, was at liberty, if not bound, to treat them as managing, not on behalf of an unascertained owner, but on behalf of themselves.

It follows that they have been rightly assessed and taxed directly. The answer to the question referred by the Commissioner will accordingly be that the assessee and Ram Pratap were not managers of the properties appointed by or under any order of a Court within the meaning of s. 41 of the Indian Income-tax Act, and that the income-tax officer did not act illegally in assessing the assessee in respect of his share of the property. The assessee must pay the costs of the Reference.

The Rule stands discharged with costs—10 gold mohurs.

COSTELLO J. I agree.

Reference accepted. Rule discharged.

Advocate for assessee: *A. C. Sen.*

Advocate for Income-tax Department: *Ramesh Chunder Pal.*

G. S.