PRIVY COUNCIL.

P. C.*
1939
April 20 ;
May 9.

KESHAR DEO CHAMRIA

v.

COMMISSIONER OF INCOME-TAX, BENGAL.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Income-tax—*Hindu joint family—Decree for partition—Rents received by parties as joint managers pending division—Liability of members individually for income-tax—Appeal to Privy Council—Right to raise questions other than questions referred to the High Court under s. 66* (2)—*Indian Income-tax Act (XI of 1922), s. 41.*

By a consent decree in a partition suit, K was given a half-share in the joint family properties and the other half-share was given to R and R's grandson, but the decree did not specify what were the joint family properties. Commissioners were appointed to take an account and make a division of the joint family properties and the Official Receiver was appointed receiver to receive the rents and profits with liberty to divide the income and pay it in equal shares to K and R.

On an application by the parties, the Official Receiver was discharged by an order, dated April 2, 1931, and K and R were jointly given liberty to realise the rents and profits of certain properties of which a list was given and to invest the money realised or divide it equally.

They divided it equally, until, on a further application by them, the Official Receiver was re-appointed receiver and took possession on February 24, 1934. K returned his income from properties for the year ending March 31, 1934, as "Nil", stating that the properties were in the hands of the joint managers and the Official Receiver and were liable to be assessed in the hands of the Official Receiver under s. 41 of the Act.

The Income-tax Officer assessed K under s. 9 of the Act on his half-share of the rents and profits.

Held, affirming the judgment of the High Court, that, in the circumstances, K and R were not managers of the properties appointed by or under the order of a Court and the Income-tax Officer had not acted illegally in assessing K on his half-share of the properties.

In an appeal to His Majesty in Council under s. 66A(*2*) and (*3*) of the Act, the question to be determined was simply whether the question referred to the High Court was correctly answered by it.

The appellant, whose only objection before the Assistant Commissioner and in the reference to the High Court was one under s. 41 of the Act, could not, therefore, be permitted to raise further or other objection in the appeal from the High Court.

*Present : Lord Russell of Killowen, Lord Romer and Sir George Rankin.

APPEAL (No. 52 of 1938) from a judgment of the High Court (March 4, 1937) on a Reference under s. 66(*2*) of the Income-tax Act (February 15 and March 7, 1936).

The material facts are stated in the judgment of the Judicial Committee.

Sir Thomas Strangman, K. C., and *Pringle* for the appellant. We do not now contend that the appellant was a member of an association within s. 3 of the Act. He was assessed as the owner of the properties under s. 9, but there is no finding anywhere that he was the owner. It was not found by the Income-tax Officer or by the Assistant Commissioner that he was the owner. In the statement of the case by the Commissioner, there is a statement that he was the owner, but that statement, as was pointed out by the High Court, was based on an incorrect statement of the consent decree. He could be assessed under s. 9, only if he was the owner, which we submit he was not.

Pringle following. If the Income-tax Officer assesses a person under certain provisions of the Act, the person so assessed would be entitled to show he was not liable under those provisions. Here, the Income-tax Officer could have assessed the joint managers under s. 41, or he could have found the appellant was the owner and assessed him under s. 9. He has been assessed under s. 9, but nowhere is there a finding that he was the owner. Moreover he has been assessed on the actual profits of the properties and not on his drawings. There was a balance taken over by the Official Receiver. The appellant has thus been assessed on money which he has not received and may never receive.

Even if the appellant were entitled to a half-share of the properties, the assessment would be wrong, because :—

(*a*) The starting point is the joint family with some property and the question would be what profit

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was earned by the family. The institution of a suit for separation causes a severance of status, but the family would not cease to be a joint family for the purposes of tax till division of the property by metes and bounds. Sections 2(*9*) and 3 are worded to cover a Dâyâbhâga family. Where a family is in process of dissolution, as here, then the Income-tax Officer should make enquiries under s. 25A and assess the members separately, though the members are jointly and separately liable for the whole tax.

[LORD RUSSELL OF KILLOWEN. If this point was not taken in the High Court and not in your case, it cannot be raised now.]

It was raised, though not very clearly. It is not discussed in the judgment of the High Court. Perhaps it was not taken in the High Court.

(*b*) Where there are co-owners, it is not permissible to assess them separately. Here the joint managers would be liable under s. 41. There is a difference between "by" and "under" the order of a Court.

An association within s. 3 is a person, but it is different from the person who may be found ultimately liable. *Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust* v. *Commissioner of Income-tax, Bombay* (1).

Tucker, K.C. and *Hull* for the respondent. Under the decree, by consent, each party took a half-share in the properties. The appellant claimed to be the owner of a half-share and cannot complain if he is assessed on what he claimed. That the Income-tax Officer found him to be the owner is apparent from the order, for he assessed the appellant as owner of a half-share. Section 41 refers to a receiver appointed by or under the order of a Court. Here, power was given to the parties to invest. A receiver was subsequently empowered to divide the profits. He was in a special position. Further s. 41 is not

(1) (1934) I. L. R. 58 Bom. 317; L. R. 61 I. A. 209.

mandatory in the sense of precluding, in the case of income falling within its scope, any assessment made upon a person liable under any of the charging sections, ss. 3, 4, and 6 to 12. It does not affect the charging sections. Section 40 is also merely an enabling section. *Commissioner of Income-tax, Madras* v. *Mrs. Saldanah* (1) and *Hotz Trust of Simla* v. *Commissioner of Income-tax* (2).

There was evidence on which the Income-tax Officer could have found the appellant was the owner of the properties. The question whether he was the owner was not referred to the High Court and cannot, in our submission, be raised now.

Hull following. The appellant ought not to be allowed to travel outside s. 41. The right of the assessee under s. 66(*2*) is limited. The order of the Assistant Commissioner shows that the only question raised before him was one under s. 41. The Commissioner has full discretion to review the assessment. If the question of drawings had been brought to his notice he might have considered it. He treats the whole case as one under s. 41. Leave to appeal was given on the ground of the construction of s. 41. Assuming the appellant can now raise the question that there was no precise finding of fact that the appellant was the owner of the properties, the order of the Commissioner leaves no doubt that he had come to the conclusion that the appellant was the owner under s. 9 and that is sufficient. *The King* v. *Minister of Health.* Ex parte *Yaffe* (3), on appeal, *Minister of Health* v. *The King* (on the prosecution of *Yaffe*) (4).

Sir Thomas Strangman, K. C., in reply.

The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. In this case the appellant appeals from a judgment of the High Court

(1) (1932) I. L. R. 55 Mad. 891.
(2) (1930) I. L. R. 11 Lah. 724.
(3) [1930] 2 K. B. 98.
(4) [1931] A. C. 494.

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of Judicature at Fort William in Bengal on a reference to it by the respondent under s. 66 (*2*) of the Indian Income-tax Act, 1922.

The question referred was framed thus :—

Whether in the circumstances described above the present assessee and Rai Bahadur Ram Pratap Chamria 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 ?

The relevant facts and circumstances, which appear in the statement of case, must be stated.

In the year 1929 the appellant instituted a suit in the High Court at Calcutta (No. 183 of 1929) against one Ram Pratap, and a minor grandson of Ram Pratap, alleging that he was the adopted son of Ram Pratap's deceased brother Amloke Chand. By way of relief he claimed declarations that he was the son of Amloke Chand, and that he was entitled jointly with Ram Pratap to certain properties specified in a schedule attached to his plaint. He also asked for an enquiry as to what other properties were joint and for partition. On the 23rd May, 1930, a consent decree was made in the suit. The decree recited that the terms of settlement set forth in the schedule thereto had been agreed to by the adult parties and the guardian *ad litem* of the infant defendant, and that the Court was of opinion that it would be for the benefit of the infant defendant that the decree should be made. The operative portion of the decree, so far as relevant, ran thus :—

It is declared with the consent of the adult parties and the guardian-*ad-litem* of the infant defendant by their respective counsel that the said terms ought to be carried out and the same are ordered and decreed accordingly and it is further declared with the like consent that the plaintiff is entitled to one equal half part or share of the residue of the joint estate mentioned in the said terms after setting apart the sum of Rupees Eleven lakhs for allotment to the said Rai Bahadur Ram Pratap Chamria in terms of cl. 2 of the said terms and also setting apart premises No. 178, Harrison Road, and No. 71, Cross Street, in terms of cl. 4 of the said terms (the same into two equal parts or shares being considered as divided and hereinafter referred to as the said properties) AND that the defendant Rai Bahadur Ram Pratap Chamria is entitled to the remaining equal half part or share thereof. And

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it is further ordered and decreed with the like consent that a partition be made of the said properties with the appurtenances into two equal parts or shares and that a commission do issue directed to Rai Bahadur Badri Das Goenka and Radha Kissen Chamria both named in the said Terms for the purposes also mentioned therein and it is further ordered and decreed with the like consent that the said Commissioners do take an account subject to the conditions mentioned in the said terms of the joint properties (including the loss and profits of the business carried on by Rai Bahadur Ram Pratap Chamria) and submit a separate report along with the return hereinafter mentioned and make a division of the said properties into two equal parts or shares and as regards the immoveable properties make the same by metes and bounds where they shall see occasion with power to them to award compensation in money by way of equalising the said partition and all deeds and writings relating to the said properties in the custody or power of any of the parties are to be produced before the said Commissioners upon oath or solemn affirmation as the said Commissioners shall direct. And it is further ordered and decreed with the like consent that the said Commissioners be at liberty to examine witnesses upon oath or solemn affirmation and do take the depositions in writing and return the same with the said Commission. And it is further ordered and decreed and with the like consent that the said Commissioners do allot one equal half part or share of the said properties to the plaintiff to be held and enjoyed by him in severalty and the remaining one equal half part or share thereof to the said defendant Rai Bahadur Ram Pratap Chamria to be held and enjoyed by him in severalty.

In fact the scheduled terms of settlement did not mention any specific items of the joint estates, although they provided for partition "of the joint "properties as mentioned above".

On July 28, 1930, an order was made in the suit whereby the Official Receiver was appointed receiver "of the rents, issues and profits of the immoveable "properties belonging to the parties to this suit in the "plaint in this suit mentioned," with liberty to divide the income into two equal shares and to pay one equal share to the appellant and Ram Pratap respectively. The Official Receiver, however, never took possession under that order; and on April 2, 1931, an order was made on the appellant's petition in the following terms:—

It is ordered that the said order dated the 28th day of July last do stand varied in the manner indicated in the schedule hereunder written and it is further ordered without prejudice to the rights of either party to apply to the Court for the re-appointment of the said Official Receiver as the receiver of the properties mentioned in the said schedule (hereinafter referred to as the said properties) in the circumstances and on the conditions also mentioned in the said schedule and the said Official Receiver be and he is hereby discharged from further acting as the receiver of the said properties.

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The schedule to that order contained a copy of para. 5 of the appellant's said petition which stated that since the order of July 28, 1930, the parties had agreed as follows :—

(*a*) that the Official Receiver shall not take possession of the following immoveable properties and shall, without prejudice to the right of either party to apply for reinstatement of the receiver, be discharged from acting as receiver in respect of such properties :—[Then followed a list of the properties which included all the properties relevant to this appeal,]

(*b*) that the plaintiff (present assessee) and the defendant Ram Pratap are jointly given liberty to realise the rents of the above properties on joint receipts, duly to make the necessary expenses thereout and to file rent suits,

(*c*) that the documents of title be kept in joint custody of the plaintiff Keshar Deo and the defendant Ram Pratap,

(*d*) that Ram Pratap and Keshar Deo are also given liberty to invest the money which will come to their hands or divide the same equally,

(*e*) that liberty be given to either party to apply for an order for re-appointment of receiver of the rents, issues and profits of the abovenamed properties without any objection on the part of the other party in the event of their not being able to agree as to collections, disbursements, investments or distribution of the said rents, issues and profits and on such application being made by either party the other party shall consent to such appointment.

The arrangement so provided for remained in force until August 23, 1933, when on the application of the parties the Official Receiver was again appointed receiver. He did not, however, obtain possession until about February 24, 1934. The appellant and Ram Pratap, while in possession, divided the receipts between themselves in equal shares.

When called upon for a return of his income for the year ending March 31, 1933, for the purpose of assessment for the year ending March 31, 1934, the appellant (on July 31, 1933), under the head "Property" made a return of Nil, stating that "the "properties are in the hands of the Official Receiver "and Joint Managers appointed in suit No. 183 of "1929 from whom the petitioner has not obtained his "share"; and also that "the income from properties "………are liable to be assessed in the hands of the "receivers under s. 41 of the Act." The Income-tax Officer nevertheless assessed his total income at the figure of Rs. 48,628, which included a sum of

Rs. 33,920 under the head "Property" in respect of properties specified in the schedule to the plaint, and in the schedule to the order of April 2, 1931. The appellant appealed against this assessment, alleging that the assessment was wrong, as the properties "are in the hands of the Official Receiver appointed "in suit No. 183 of 1929," and further alleging that the assessment was wrong on the ground that his title, as claimed by him to the extent of a half-share in respect of the properties, was disputed by Ram Pratap.

In regard to the assessment of the appellant for the following year ending March 31, 1935, the same procedure took place. The appellant returned Nil under the head "Property," alleging that the assessment should be made under s. 41 of the Act and that his title was in dispute; his total income was assessed by the Income-tax Officer at Rs. 54,558, which included a sum of Rs. 28,177 under the head "Property" in respect of the same properties as before; and the appellant appealed against that assessment.

The Assistant Commissioner dealt with both appeals together, and confirmed both assessments. It is clear from the confirmation order, which contains the grounds of his decision, that the matter was throughout dealt with on the footing that the appellant was the owner of an undivided half share of the properties in question, and that the contention raised on behalf of the appellant was that the assessments in respect of the properties should have been made under s. 41 of the Act on the appellant and Ram Pratap in respect of the entirety, and not upon each separately in respect of a moiety. The contention of the appellant's pleader is stated thus—

That according to an order of the Honourable High Court the management of the properties in question were taken away from the Official Receiver and made over to the assessee and Ram Pratap whereby the two parties were authorised to collect rents jointly and meet the necessary expenses. It is therefore argued that the income was not allocated separately and should have been assessed on the managers and not on the parties separately,

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and it is subsequently stated that in this connection the appellant relied on s. 41 of the Act.

The appellant, by two petitions, required the respondent to refer to the High Court several questions as being questions of law arising out of the Assistant Commissioner's order. The respondent, however, was of opinion that the only contention of any substance was the appellant's contention that as the property in question was under the joint management of himself and Ram Pratap by or under the order of April 21, 1931, "the tax in respect of its "income can be levied only upon such managers by "virtue of the provisions of s. 41 of the Income-tax "Act," and that such matter would be covered by the question which he submitted for the Court's decision. The respondent stated as his own opinion that s. 41 had no application to the case. He thought that the decree of May 23, 1930, declared the appellant and Ram Pratap to be owners of the properties in equal shares, and that the question formulated should be answered, as to both parts, in the negative.

The appellant being dissatisfied with the question as framed by the respondent, obtained an order of the High Court, dated July 30, 1936, ordering the respondent to show cause why he should not be required to state a case on the questions as framed by the appellant in his petitions. The case and the rule were heard together on the 26th and 27th January, 1937, and on March 4, 1937, the High Court delivered judgment, their answer to the question referred being—

> 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 appellant now appeals to His Majesty in Council from that judgment. An order was also made on March 4, 1937, discharging the order of July 30, 1936, and ordering the appellant to pay the costs of the application. From that order the appellant has not appealed.

Their Lordships have thought it necessary to state the history of the case at some length in view of the course taken by the arguments before the Board. The question for decision on this appeal is simply whether the question referred to the High Court has been correctly answered; and it is not open to their Lordships to go beyond the question or to consider matters outside its limits.

Leading counsel for the appellant stated, in opening the appeal, that he did not contend that the assessment should have been made under s. 41, because (as he explained in his reply) the section even if applicable was not in his view mandatory or compulsory. His main argument was based upon the view that there was no finding that the appellant was "owner" of the property, that the decree of May 23, 1930, did not establish ownership in him, that the question of the ownership of the properties was still in dispute in the partition suit, and that he could not be assessed under the head "property" in respect of buildings and lands of which his ownership (as required by s. 9 of the Act) had not been established. Junior counsel for the appellant, however, took the unusual course for venturing upon ground which his leader had feared to tread, and relied whole-heartedly upon the provisions of s. 41 as being fatal to the assessment.

Counsel for the respondent, however, argued that the appellant should not be allowed to travel outside the contention under s. 41. This, they said, was the only contention raised before the Assistant Commissioner; and the case stated, which under s. 66(*2*) is limited to questions of law arising out of the order or decision of an Assistant Commissioner, treats the point involved as being merely the contention under s. 41. Further, it was pointed out that the High Court judgment, though touching on other points, treats s. 41 as the section with which the reference was directly concerned.

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Their Lordships are of opinion that this argument of the respondent's counsel is well founded. They feel no doubt that the only objection to the assessment which was urged before the Assistant Commissioner was that the assessment could only be made under s. 41, that the decision of the Assistant Commissioner was given on the assumption of ownership in the appellant, and that the question of law referred under s. 66 consists simply of the question whether on that assumption s. 41 operated to compel the authorities to assess in respect of the entirety the two persons who were alleged to be acting as managers, and to prevent them from assessing one of the co-owners in respect of his moiety.

In this view of the case the only question for their Lordships' consideration is whether the case falls within s. 41. That section provides as follows :—

41. In the case of income, profits or gains chargeable under this Act which are received by the Courts of Wards, the Administrators-General, the Official Trustees or by any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager in the like manner and to the same amounts as it would be leviable upon and recoverable from any person on whose behalf such income, profits or gains are received, and all the provisions of this Act shall apply accordingly.

In their Lordships' opinion the case does not come within the words of the section at all. The respondent and Ram Pratap were never appointed receivers or managers by or under any order of the Court. The order of April 2, 1931, did not do so, nor did it purport to do so. It follows, therefore, that the section has no application to the case, and that the question referred was correctly answered by the High Court.

It is unnecessary for their Lordships to express any opinion upon the various other points which were argued before them. If the appellant desired to enlarge the area of the question referred or to add

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other questions, so as to raise those points, it was open to him to appeal against the order which discharged the Rule. That he has not done.

Neither is it necessary to decide whether the consent decree operated to establish that the lands specified in the schedule to the plaint formed part of the joint estate, a question which, it was said, was still in dispute; although as at present advised their Lordships feel great difficulty in understanding how partition can have been ordered of parcels which were not ascertained and for the ascertainment of which no machinery was provided, or how under the orders of July 28, 1930, and April 2, 1931, the income of the properties therein mentioned was divisible in moieties, except upon the footing that those properties formed part of the joint estate.

For the reasons indicated, their Lordships are of opinion that this appeal should be dismissed and they will humbly so advise His Majesty. The appellant will pay the respondent's costs of the appeal.

Solicitors for appellant: *W. W. Box & Co.*

Solicitor for respondent: *The Solicitor, India Office.*

C. S.