INCOME-TAX ACT REFERENCE.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Bagnley, and Mr. Justice Sharpe.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

1939
Feb. 20.

v.

BAPORIA AND OTHERS.*

Income-tax Act, s. 3—Association of Individuals and Firm, not ejusdem generis—*Inheritance by a person—Forbearance or act necessary to create association of individuals—Mahomedan heirs—Retention of inherited property without division for a long period—One heir appointed agent to manage on behalf of all—Association of individuals by such acts.*

The words " association of individuals " in s. 3 of the Burma Income-tax Act are not *ejusdem generis* with the word " firm " preceding them. By merely inheriting a share of property no person can become a member of an association of individuals, unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status which he has been asked to receive.

In re B. N. Elias, I.L.R. 63 Cal. 538 ; *In re Commissioner of Income-tax, Bombay* v. *Laxmidas*, 39 Bom. L.R. 910 ; *In re Dwarkanath*, 5 I.T.R. 716, referred to.

Commissioner of Income-tax v. *Aslam*, I.L.R. [1937] All. 108 ; *In the matter of Keshar Deo*, I.L.R. [1937] 2 Cal. 358, distinguished.

For a period of 35 years the heirs of a Mahomedan couple did not divide or realize the inherited property, as they had the immediate right to, but retained it alike through times of general financial prosperity and depression. During all this period the heirs confided the management of the property to one of the heirs.

Held on the facts of the case that there was material for the Commissioner of Income-tax to come to the conclusion that the heirs constituted themselves an association of individuals within s. 3 of the Burma Income-tax Act.

Rauf for the assessee. Merely because the heirs of a Mahomedan ancestor do not divide the estate which vests in them under Mahomedan law in definite shares on the death of the deceased, but continue to enjoy it in common, it is not possible to hold that an " association of individuals " has been formed within the

* Civil Reference No. 7 of 1938.

1939

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* BAPORIA.

meaning of s. 3 of the Income-tax Act. The words "association of individuals" in s. 3 have no technical meaning; they are used in the sense in which they are ordinarily understood. See *Smith* v. *Anderson* (1). The Income-tax Manual at page 154 shows how the income-tax department itself contrues s. 3. An association of individuals is akin to a co-operative society or a chamber of commerce. It cannot, for instance, be contended that because two or three lawyers share a chamber and pay the rent in proportion to the space occupied by them they constitute an association of individuals.

In the present case the heirs have not divided the estate because it has not been convenient for them to do so. They were enjoying the property as co-owners, and this fact is not at all sufficient to make them an association of individuals. See *Neelamega Sastri* v. *Appiah Sastri* (2).

The decision in *In re B. N. Elias* (3) is distinguishable. It was a case where four persons joined together with a view to form an "association of adventurers" and to earn a profit. *In re Dwarkanath Harishchandra Pitale* (4) is difficult to follow because of the meagre reasons which are given for the decision. The correct view is that taken in *In the matter of Keshar Deo Chamaria* (5) where the Court construed the words "association of individuals" *ejusdem generis* with a company or a firm. The association must have some of the attributes of a company or a firm at least. *The Commissioner of Income-tax* v. *Muhammad Aslam* (6).

Thein Maung (Advocate-General) for the Crown was not called upon.

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(1) 15 Ch.D. 247, 275.
(2) I.L.R. 29 Mad. 477.
(3) I.L.R. 63 Cal. 538.
(4) 10 I.T.C. 414.
(5) I.L.R. [1937] 2 Cal. 358.
(6) I.L.R. [1937] All. 108.

1939

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* BAPORIA.

ROBERTS, C.J.—This reference under section 66, sub-section (*2*), of the Burma Income-tax Act comes before us for the determination of the following questions of law which have been propounded : first,

" Are the words ' Association of Individuals ' in section 3 of the Burma Income-tax Act to be construed with the word ' firm ' which precedes them according to the rule of *ejusdem generis* ? "

secondly,

" If the first question is answered in the negative, can an individual, by merely inheriting a share in property under Mohamedan Law and without committing any act or omission of his own volition, be a member of an Association of Individuals under section 3 of the Burma Income-tax Act ? " ;

and, thirdly,

" Is the omission of the nine co-heirs in the present case to realize the shares of the property left to them by their father and mother under Mohamedan Law and which they are free to realize at any time, and the appointment of one of their number as their agent, sufficient to constitute them an Association of Individuals within the meaning of section 3 of the Burma Income-tax Act ? "

The facts which give rise to these questions are that one A. M. Baporia died in the year 1904 leaving a widow and nine children. His widow died in 1935. The deceased gentleman had two houses in Rangoon, the rents of which, after his death, were divided amongst his children and widow until the latter's death. One M. A. Baporia, who resided in Rangoon, managed the property as the agent of those beneficially interested. One of the questions put before us deals with the application of the rule of *ejusdem generis* to certain sets of words in section *3* of the Income-tax Act.

In *In re B. N. Elias* (1), Derbyshire C.J. asked whether certain individuals joined in a common purpose,

(1) (1935) I.L.R. 63 Cal. 538, 542.

1939

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* BAPORIA.

ROBERTS, C.J.

or common action, and thereby became an "association of individuals", and he mentioned in that case three elements, namely, the joint purchase of the property at a time fifteen years before the suit, the continuance as owners during the period from the purchase to the date of the suit, and, thirdly, the joining together for the purpose of holding the property and using it for the purpose of earning an income to the best advantage of them all: and there was no difficulty in deciding in that case that the individuals concerned were associated together, within the meaning of the Income-tax Act. Costello J. said:

"Mr. Banerjee invited us to take upon ourselves the difficult, if not indeed impossible, task of laying down a general definition of the expression 'association of individuals'. In my opinion, that is not desirable from any point of view whatever. Each case must be decided upon its own peculiar facts and circumstances. When we find, as we do find in this case, that there is a combination of persons formed for the promotion of a joint enterprise banded together, if I may so put it, as co-adventurers—to use an archaic expression—then I think no difficulty whatever arises in the way of saying that in this particular case these four persons did constitute an 'association of individuals' within the meaning of both section 3 and section 55 of the Indian Income-tax Act, 1922."

With that passage I respectfully agree. It would be unfortunate indeed if a decision, which must necessarily depend in each particular case upon a different set of circumstances, were taken as being an attempt to define, or to lay down a hard and fast rule, as to what may amount to an association of individuals.

The only matter before us is whether in the present case the Commissioner of Income-tax had before him material from which he could draw the conclusion that such an association of individuals had been formed and was in existence and was therefore assessable to income-tax under the section mentioned. I am clearly of

opinion that he had before him such material. The members of the family, who enjoyed, each of them, a share of the rents of these two houses in Rangoon, had not, it is true, become members of the association by a joint purchase or any common enterprise, but they had become so involuntarily, being the recipients of the estate of their father. However, they continued in that relationship over a period of nearly thirty-five years. They retained the property alike through times of general financial prosperity and depression : when the price was low they retained it, and when it was high the property was still retained : and, in my opinion, the length of time during which they consented to the continuance of this association is strong evidence that they combined voluntarily together in order to obtain gain or profit from their association. The association, which originally came into being outside their own volition, was maintained, and that in itself, to my mind, was evidence upon which the Court might find in a particular case (though it would not be bound to find in any given case) that there was an association, within the meaning of the section.

Not only that, but we are informed that they had, for the purpose of managing these properties, confided their interest, each of them, to one and the same individual, Mr. M. A. Baporia, and in the case which Dr. Rauf cited to us in support of his contention that there was no real measure of agreement among the co-sharers of the property, the Bench carefully reserved from their consideration the existence of any such circumstances. In *The Commissioner of Income-tax* v. *Muhammad Aslam* (1) the judgment remarks :

" We express no opinion as to what the position would be if the co-owners of an income-producing property appointed one

(1) I.L.R. [1937] All. 108, 112.

1939

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. BAPORIA

ROBERTS, C.J.

or more persons, whether from among themselves or from outside, to perform all the functions of a common scheme of management."

There is, it is true, no express evidence of a common scheme of management here, but there is evidence that all the beneficial owners confided the business matters connected with this house property to one and the same gentleman, who managed it doubtless for them upon the same terms and with the same object in view.

There has been pressed upon us an apparent difference between the judgment of Panckridge J. in *In the matter of Keshar Deo Chamaria* (1) and the judgment of Beaumont C.J. in the case of *In re Dwarkanath Harishchandra Pitale* (2). I am in agreement with the views expressed by Beaumont C.J. who explained that they had already followed the decision in *In re B. N. Elias* (3), to which I have already alluded, in the case of *Commissioner of Income-tax, Bombay Presidency, Sind and Aden* v. *Laxmidas Devidas* (4). The learned Chief Justice remarked that the only distinction between that case and the present one was that the original association in the present case was not a voluntary act on the part of the assessees (they received it under a will), but as soon as they elected to retain the property and manage it as a joint venture producing income, it seemed to him that they became an association of individuals within the meaning of the Income-tax Act. In the case to which I have referred, which Panckridge J. decided, the question for decision was whether the members of a formerly undivided Mitakshara family were an association of individuals after the passing of a preliminary decree for partition, and Panckridge J. said :

" With regard to the contention that the owners are an association of individuals within the meaning of section 3, it is

(1) I.L.R. [1937] 2 Cal. 358.
(2) (1937) 5 I.T.R. 716.
(3) (1935) I.L.R. 63 Cal. 538.
(4) (1937) 39 Bom. L.R. 910.

enough to say that this point is not raised in the letter of reference."

His subsequent observations are, therefore, in the nature of *obiter dicta*. He continued :

"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 Mitakshara family after a preliminary decree for partition has been made."

This expression of opinion would have, no doubt, been stated in more meticulous language if the learned Judge had not been conscious that he was giving expression merely to an opinion which was not necessary for the decision of that case, and, in my view, he can by no means be held to have meant to say that the words "association of individuals" were to be construed with reference to the word "firm" preceding them only : and had his attention been drawn to the point he would doubtless have held that they should be construed *ejusdem generis* with all the other groups of persons mentioned, namely, Hindu undivided family, company, as well as firm. Accordingly, in my view, too much has been made of the alleged difference of opinion, and I am of opinion that the answer to the first question should be in the negative.

With regard to the second question, I also think that the answer should be in the negative. But the question is framed so as to put before us a proposition that an individual might, merely by inheriting a share, be a member of an association. The position as it appears to me is this. When he inherits a share in property he has the opportunity of deciding whether he will, by reason of having inherited that share, form an association of individuals or renounce such a relationship ; and if there is evidence that he has

1939

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* BAPORIA.

ROBERTS, C.J.

chosen the former alternative, it will be a matter upon which the Commissioner can base his ultimate decision. By merely inheriting a share of property, however, I am satisfied that no person can become a member of an association of individuals, unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status which he has been asked to receive.

With regard to the last question, I think the answer should be in the affirmative. The matter, as I have said before, in all these cases resolves itself in the last resort to a pure question of fact, provided there is any material upon which the Commissioner of Income-tax can come to a conclusion. It is not for us to say how many facts, or of what nature, in each particular case he should desire to see before arriving at the conclusion that there is an association of individuals within the meaning of this section : it is enough for our purpose if we say here that such facts were present.

Therefore, in my opinion, this reference should be answered accordingly. The applicant will have to pay the costs of the reference, fifteen gold mohurs.

BAGULEY, J.—I agree.

SHARPE, J.—I agree.