

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1924.
March 6.

THE COMMISSIONER OF INCOME TAX *v.* PHILLIP SEDDON
MELLOR^c.

*Indian Income Tax Act (XI of 1922), sections 2 (15), 16, 55—Super-Tax—
Assessee a partner in a registered firm—Actual income in the previous year
calculated on the assessee's then share in the firm—Subsequent increase in
the share at the time of assessment forms no basis.*

The assessee was a partner in a registered firm under the Indian Income Tax Act of 1922. For the purpose of assessment of income tax for the year 1922-23, the basis of assessment was the profits for the year ending September 30, 1921. During that year assessee's share in the partnership was three-sixteenths. At the time, however, of the actual assessment for the year 1922-23, the constitution of the firm had changed and the assessee had become entitled to three-eighths share. The Income Tax Commissioner decided that, because the assessee's share in the firm at the time of assessment for the year 1922-23 was three-eighths, he was liable to be assessed for super-tax on three-eighths of the profits of the firm for the year ending September 30, 1921. On a reference to the High Court,

Held, that the actual share held in the firm by the assessee in 1922-23 had nothing to do with his assessment for super-tax for that particular year, the only correct basis for such assessment being his total income for the previous year, which so far as his partnership profits were concerned, would only include the profits actually received, according to the share he had in the firm during that year.

CIVIL reference made by the Commissioner of Income Tax under section 66 (2) of the Indian Income Tax Act, 1922.

The reference arose out of the super-tax assessment for the year ending March 31, 1923 of P. S. Mellor, a partner in the firm of P. Chrystal & Co.

The previous year, for the purpose of the firm's 1922-23 assessment under the Act, was the year ending September 30, 1921. For this period Mellor's share as

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a partner in the profits of the firm was three-sixteenths.

Owing to a change in the constitution of the firm during the year 1922-23 Mellor's share was enlarged and was three-eighths at the time of the actual assessment.

The firm was a registered firm as defined in the Act and was therefore assessed to income tax only, super-tax being levied from the individual partners on their total income under section 55. Mellor was accordingly assessed to super-tax in respect of his share in the profits of the firm together with his other personal income. The amount actually received by him as his share in the profits for the accounting period was Rs. 70,787, but he was assessed at three-eighths of the profits for the accounting period on the ground that his share in the firm at the time of making the assessment was three-eighths and not three-sixteenths. The share thus calculated, amounted to Rs. 1,41,574. The assessee objected and required a reference to the High Court.

The reasons stated by the Commissioner of Income Tax for his assessment were as follows :—

“ Under section 55, super-tax is to be levied ‘in respect of the total income of the previous year of any individual’. Under section 56, total income for the purposes of super-tax is to be the same as the total income for the purposes of income tax. The words ‘total income’ are defined in section 2(15) of the Act as meaning the total income ‘computed in the manner laid down in section 16’. The latter (section 16) states that in computing the total income of an assessee sums exempted under sub-section (2) of section 14 shall be included. Section 14 (2) (b) refers to ‘such an amount of the profits or gains of any firm which have been assessed to income tax as is proportionate to his share in the firm’. Hence in calculating the total income of an individual we have to include such an amount of the profits or gains of his firm as is proportionate to his share in the firm. Mr. Mellor's share in the firm was three-eighths at the time his total income was being computed and hence, three-eighths of the profits earned by the firm was taken

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into account. If, in section 14 (2) (b), instead of the words 'as is proportionate to his share in the firm', the Legislature had used the words 'as was proportionate to his share in the profits of the firm' there would have been some force in Mr. Mellor's contention. A partner's share in the firm at any particular time may be quite different from his share in the profits earned by the firm in a preceding year. Also section 26 lays down that when a change takes place in the constitution of a firm the new owners become liable to the tax even though they may not have been owners for the whole or any part of the period during which the profits taxed were earned. Hence if any individual succeeds another in any business, profession or vocation, he becomes liable for the tax due. In the present case, the assessment was made on the firm of Messrs. P. Chrystal & Co. as constituted at the time of making the assessment, viz., December 6, 1921. The constitution then, as stated above, was as under :—

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| 1. | Mr. P. S. Mellor | ... | three-eighths. |
| 2. | Mr. W. G. McKee | ... | eleven-twenty-fourths. |
| 3. | Mr. A. D. M. Clarke | ... | one-sixth. |

The firm constituted as above with Mr. P. S. Mellor having a share of three eighths is to be taken as assessed under section 26 and hence the partners under the above constitution can alone be deemed to have received the profits assessed to income tax. No cognizance can be taken of any one who was not a partner at the time of making the assessment.

The above interpretation may appear at first sight to be somewhat anomalous as requiring that tax be levied not on the actual income of a man, but on some hypothetical figure worked out as above, but it seems that as difficulties were experienced under the previous Act regarding the assessment and collection of tax in cases in which there were changes in partnerships and firms of the nature referred to in section 26, it was purposely put in the present Act to make it easy for the State to collect its dues in such cases. Every one who succeeds to a business, profession or vocation is supposed to settle with his predecessor the question of tax payable to Government before taking up the concern as now under the present Act he alone is held responsible for this payment.

Mr. Mellor's contention is that section 26 alters or affects not the amount of the assessment but the persons from whom the assessment is to be collected, 'that it affects the debtors but not the debt and that the above interpretation would act most unfairly in the case of incoming partners'. As regards the first part of this argument, section 26 states that 'the assessment shall be made on the firm as constituted...at the time of making the assessment'. This making of the assessment includes both the debtors and the debt as it means ascertaining the amount to be levied as also the person or

persons from whom it is to be collected. Besides there is section 14 (1) (b) which has also to be taken into account. As regards the alleged hardship to incoming partners, there will be none if the latter come to an understanding as regards the tax payable with the outgoing partners."

The reference was heard.

Kanga, Advocate General, with *A. Kirke-Smith*, Government Solicitor, for the referor.

Campbell and Kania, with *Crawford, Bayley & Co.*, for Mr. Mellor.

MACLEOD, C. J. :—This is a reference by the Commissioner of Income Tax under section 66 (2) of the Indian Income Tax Act of 1922 in the matter of the assessment for super-tax of Mr. P. S. Mellor. The assessee was a partner in Messrs. P. Chrystal & Co., a registered firm. For the purpose of income tax for the year 1922-23 the basis of the assessment was the profits of the year ending September 30, 1921. During that year Mr. Mellor's share in the partnership was three-sixteenths. At the time of the assessment for the year 1922-23, namely December 6, 1922, the constitution of the firm had changed, and Mr. Mellor had become entitled to a three-eighths share. For the purpose of assessment for income tax, the change in the constitution of the firm made no difference. The firm was liable to pay income tax on the profits of the year ending September 30, 1921. If the firm had not been registered then it would also have been liable to pay super-tax under section 55 of the Act, and consequently any new member who might have come into the firm since September 30, 1921, would be liable as a member of the firm to pay super-tax. But as the firm was registered, the firm as a firm had nothing whatever to do with the payment of super-tax by the individuals who constituted the firm. They would pay the super-tax on their total income for the year ending September 30, 1921. The Commissioner has decided that because Mr. Mellor's share in the firm at the time of assessment for the year 1922-23

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was three-eighths he is liable to be assessed for super-tax on three-eighths of the profits of the firm for the year ending September 30, 1921, although for that year his share was only three-sixteenths.

Under section 56 the total income of an individual shall for the purpose of super-tax be the total income as assessed for the purpose of income tax. By section 2 (15) total income means the total amount of income, profits and gains from all sources computed in the manner laid down in section 16. That section only lays down that on computing the total income certain exemptions allowed in previous sections shall be included, and dividends shall be increased by the amount of income tax payable by the Company concerned. In other words although under the exemptions tax is not payable by an assessee on certain receipts which are included in the term income, profits and gains, those receipts must be included, while certain other receipts must be increased, when calculating the *total* income.

Under section 14 (2) an individual shall not be taxed in respect of such an amount of the profits or gains of any firm which have been assessed to income tax as is proportionate to his share of the firm. Mr. Mellor, therefore, when paying income tax for the year 1922-23 on his income for the previous year would exclude such an amount of the profits in the firm of P. Chrystal & Co., as was proportionate to his share in the firm. I should have thought it clear that he would exclude three-sixteenths of the profits and not three-eighths. But if the Commissioner's contention for the purpose of calculating super-tax were to be allowed, it must also hold good for the purposes of calculating the amount to be excluded for the purposes of assessing to income tax.

The Commissioner, however, has omitted to notice that the provisos to sub-section (1) of section 7, the provisos to section 8 and sub-section (2) of section 14

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and section 15, which contain the exemptions referred to in section 16, are rendered by section 58 inapplicable to the charge, assessment, collection and recovery of super-tax. Nor can section 26 be relevant to the question in issue, as it only relates to the question on whom the assessment is to be made when there has been a change in the constitution of a firm, or when a person has succeeded to any business, profession or vocation. We are, therefore, thrown back on the question: what was Mr. Mellor's total income for the previous year? It is unfortunate that the drafting of the Act has rendered it possible for the most ingenious argument to be raised on the question how an individual partner in a registered firm is to compute his total income for the purpose of super-tax. The definition of total income in section 2 (15) is as inexact as a definition possibly can be. Total income has to be computed in the manner laid down in section 16; but as I have already pointed out, section 16 gives no direction how the total income has to be computed. All that we can say is that "total income" means the total amount of income, profits or gains from all sources, including (1) certain receipts on which an assessee is exempt from paying income tax, and (2) the amount of tax deducted at the source by companies when paying dividends. The result must be that Mr. Mellor in calculating his total income for the previous year was bound only to include the profits which he actually received from the firm.

No question is propounded in the reference by the Income Tax Commissioner but we may take it that we have to decide whether his decision included in the following words: "Hence in calculating the total income of an individual we have to include such an amount of the profits or gains of his firm as is proportionate to his *share in the firm*" is correct. In our opinion the actual share which Mr. Mellor held in the firm in 1922-23 has nothing whatever to do with the

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assessment for super-tax for that particular year, since it could only be based on his total income for the previous year which would only include the profits which he actually received for the year ending September 30, 1921, according to the share he had then in the firm.

Costs will follow the event.

Costs to be taxed as on the Original Side. Only one counsel is certified.

J. G. R.

CRIMINAL REVISION.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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EMPEROR v. SHIVPUTRAYA DURDUNDAYA AND ANOTHER (ACCUSED)^a.

April 2.

Criminal Procedure Code (Act V of 1898), section 439—Conviction by Magistrate under section 326 of the Indian Penal Code—Alteration, on appeal, to conviction under section 323—Effect—Power of High Court in revision.

The accused was convicted by a Magistrate of an offence punishable under section 326 of the Indian Penal Code; but the Sessions Judge, on appeal, altered the conviction to one under section 323 of the Code. The Government of Bombay having applied in revision for restoration of the conviction under section 326,

Held, that the order of the Sessions Judge must be taken as an acquittal of the accused of the offence under section 326 of the Indian Penal Code, and the High Court could not, therefore, under section 439 of the Criminal Procedure Code, convert that finding of acquittal into one of conviction.

THIS was an application under criminal revisional jurisdiction against conviction and sentence passed by C. B. B. Clee, Sub-divisional Magistrate, F. C., at Belgaum, varied on appeal, by C. E. Palmer, Sessions Judge of Belgaum.

The accused were convicted by a Magistrate for an offence punishable under section 326 of the Indian

^a Criminal Application for Revision No. 329 of 1923.