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PARVATIBAI v. VINAYAK BALVANT

Broomfield J.

On the same principle the respondents are not bound to prove that they have actually been prejudiced. But there is little doubt that they have been, because the record of the case shows that on August 27, 1935, the proceedings against the judgment-debtor himself were abandoned on the ground that he had no moveable property.

I hold, therefore, that no good grounds have been shown for interfering with the decision of the lower Court, and the appeals must be dismissed with costs.

MACKLIN J. I agree.

Appeals dismissed.

Y. V. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Kania.

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March 23

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN, REFERROR *v.* THE NEW INDIA ASSURANCE COMPANY LTD. OF BOMBAY, ASSESSEES.*

Indian Income-tax Act (XI of 1922), s. 4—Assessee Company—Interest received on foreign investments—Income taken into account by company in ascertaining profits for the year and in determining the amount to be paid in dividend—Actual income not applied in payment of dividends—Income not received in, or brought into, British India.

Where income received by an assessee company on foreign investments has not been actually received in British India, but on the contrary has been invested, and remains invested, outside British India, the investments retain their character of interest received abroad and interest cannot be said to have been received in British India within the meaning of s. 4 of the Indian Income-tax Act, 1922. The mere fact that the amount of income has been brought into account in ascertaining the profits for the year and has been taken into account also in determining the amount to be paid in dividend is irrelevant unless it is proved that this actual income has been received in India and applied in payment of dividends.

Gresham Life Assurance Society v. *Bishop*,[1] applied.

REFERENCE made by the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan.

*Civil Reference No. 12 of 1937.

[1] [1902] A. C. 287.

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The Head Office of the assessee company was in Bombay and the company carried on fire, marine and accident insurance business in India and other parts of the world, viz. United States of America, England and Africa. For the financial year 1935–36, it was assessed by the Income-tax Officer, Companies Circle, Bombay, to income-tax on a total income of Rs. 5,07,970 and to super tax on a total income of Rs. 7,80,028, the total amount of tax payable being Rs. 1,15,802-11-0 including the surcharge.

Before the Income-tax Officer the assessee company claimed that two sums, viz. Rs. 79,231 and Rs. 2,32,216, being interest on Sterling and Dollar securities, be excluded from assessment on the plea that it was earned outside British India and was not income or profit received in British India. The Income-tax Officer rejected the claim by giving reasons as follows :—

"Mr. Shroff claims Rs. 3,01,448 the interest on Sterling and Dollar Securities for its exclusion from the assessment on the plea that it is earned outside British India and is not brought to British India. Says they have to keep deposit of about Rs. 20,00,000 in U. S. A. according to American Laws and accordingly they had raised a loan of an equal amount there in the beginning and purchased securities and paid it off subsequently by remitting various amounts out of premiums earned from 1920 to 1925. Similarly they have sent money to London out of premiums received for investments there. Proves that the interest realized on foreign securities has been kept there and is utilised for reinvestment. Further states that the claims, etc., payable for foreign risks have been settled by remitting money from here and hence he claims exemption for the interest on foreign securities. I do not agree to his view. The foreign investments represent "Fire and other funds" which are created out of premiums, etc., and the interest earned thereon has to be utilized for paying off claims, commission, management expenses, etc. Thus the question of excluding the said amount for assessment purposes does not arise."

The company appealed to the Assistant Commissioner of Income-tax, B Division, Bombay, who considered the assessment levied by the Income-tax Officer to be in order and confirmed it.

Being dissatisfied with this decision, the company moved the Commissioner of Income-tax to state a case for High Court's opinion under s. 66 (2) of the Act. The

Commissioner submitted the following questions for decision :—

"1. Whether the two sums of Rs. 79,231-10-0 and Rs. 2,22,216-9-6, being interest accruing without British India on dollar securities and sterling securities respectively, were in the circumstances of the case received in, or brought into, British India ?

2. Whether, if so, the assessee company is liable to be assessed in respect thereof ?"

The Commissioner answered both the questions in the affirmative giving reasons as follows :—

"From the above, it will be seen that taking into account every pie of the interest income *wherever earned* and the balance of profit of the preceding year amounting to Rs. 2,15,322-6-9, the balance for disposal was only Rs. 8,31,822-7-10 out of which Rs. 5,93,421 were utilised in paying a dividend to shareholders and the balance of Rs. 2,38,401-3-10, was carried forward to the following year. Excluding the balance of Rs. 2,15,322-6-9 carried forward from the preceding year, the profit for the year in dispute in which the interest income was included was Rs. 6,16,500 and almost the whole of it, viz. Rs. 5,93,421, was utilised in paying dividends. Now the only ground on which the assessee company wants an exemption in respect of the two sums of Rs. 79,231-10-0 and Rs. 2,22,216-9-6 aggregating in all to Rs. 3,01,448 is that the said interest has not been brought to British India but held outside British India where it was received. If that were so, as the amount actually distributed here in Bombay to the shareholders did undoubtedly include the said interest amount of Rs. 3,01,448, how could it have been so distributed here ? Excluding the amount from the profit of Rs. 6,16,500 for the year, the balance available for distribution would be Rs. 3,15,052 only and as much as Rs. 5,93,421 could certainly never be distributed out of that much amount. Only the said amount of Rs. 3,15,052 could have been distributed here in that case and the balance distributed in London and New York, but that is not the case, as every pie has been distributed here. Moreover, the accounts of the assessee company do not at all show that the said interest income has been accumulated abroad and would be available for distribution in future. The said interest items disappeared altogether from the foreign accounts, the moment they were brought to account in the Bombay account books and they ceased to exist in any shape whatever, the moment the above dividend was paid. If the interest earned had not been paid away by way of dividend as argued by the assessee company, surely it would be available for distribution in the following year or years. Is it so available for distribution a second time ? The company cannot but admit that it is not so available and in that case, the income has to be taken as utilised in paying dividend and as it has been so utilised here in Bombay, it must be taken to have been brought here."

The reference was heard.

M. C. Setalvad, Advocate General, with *C. M. Eastley*, Government Solicitor, for the referror.

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Taraporewala, with Messrs. *Payne and Co.*, for the assessees.

BEAUMONT C. J. This is a reference by the Commissioner of Income-tax under s. 66 (2) of the Indian Income-tax Act in which he raises the question, whether two sums of seventy-nine thousand and odd rupees and two lacs and odd rupees respectively being interest accruing without British India on dollar securities and sterling securities respectively, were, in the circumstances of the case, received in, or brought into, British India.

The learned Advocate General has contended in the first instance that this is really a question of fact which ought not to have been referred to us. No doubt, the question, whether or not the sums were actually received in British India, is a question of fact, but, if the sums were not actually received, the question whether they ought to be treated as constructively received, is a question of law. Unfortunately the learned Commissioner of Income-tax has not stated the facts of the case very clearly in this reference. The reference in part concerns a question as to the construction of r. 29, which eventually was not raised, and the material facts as to this interest on foreign investments are not found with clarity. However, the learned Advocate General has admitted, for the purposes of this reference, that the income on these foreign investments has not been actually received in British India, but, on the contrary, has been invested, and remains invested, outside British India. His contention, which is also the contention of the Commissioner of Income-tax in the reference, is, that this income must be treated as having been brought into British India by reason of the way in which it was dealt with in the accounts of the company. In the accounts of the company the total profits were shown at a sum of eight lacs and odd rupees and in those total profits is undoubtedly included the interest on foreign investments. Then the profits are dealt with by a declaration of dividend, which, in the words of the directors, "will absorb" an

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amount of nearly six lacs of rupees leaving a sum of over two lacs of rupees to be carried forward to the next year's account. Now, the contention of the Commissioner is that inasmuch as this interest on foreign investments was included in the profits of the company for the year, and as these profits were applied largely in payment of a dividend in India, the foreign income must be treated as having been brought into India, because otherwise it could not have been applied in payment of the dividend in India. On the other hand it seems clear that if in fact this interest was not received in British India, it could not have been applied towards payment of a dividend in British India. The explanation put forward by the assessees, which is not disputed by the Commissioner of Income-tax or the Assistant Commissioner, is that the dividend was in fact paid by raising a loan on the security of the reserve fund which was available for payment of dividend, and that in point of fact although this foreign interest was taken into account for the purpose of ascertaining the amount of profits and the sum which should be applied in payment of dividend, the actual sum was not used in payment of dividend.

The answer to the question raised really depends on the construction of s. 4 of the Indian Income-tax Act, which provides that the Act shall apply to income, profits or gains accruing or arising or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received into British India. It is to be noticed that the profits which are to be deemed to be received are only those deemed to be received under the provisions of the Act. There are provisions in the Act, for example, in s. 7 (2), s. 11 (3) and s: 42, under which income not in fact received in British India is to be deemed to be received in British India, but those provisions do not cover the present case. What we have to determine is whether the foreign interest was received in British India. No doubt, foreign income may be received in British India in a variety of forms. Income

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need not be transmitted to British India in specie or in the form in which it was actually received abroad. It may be transmitted by any method recognised in the commercial world as appropriate for the transmission of money, and I think further, that it might be received in account, by means of cross entries. If, for example, it were shewn that a sum representing income received abroad had been exchanged, by appropriate book entries, for an asset in India, and had then been applied as income in India, I should say that the foreign income had then been received in India. But, so long as income is invested and remains invested outside British India, and the investments retain their character of interest received abroad, I cannot see how the interest can be said to have been received in India. The mere fact that the amount of the income has been brought into account in ascertaining the profits for the year and has been taken into account also in determining the amount to be paid in dividend seems to me irrelevant, unless it be proved that this actual income has been received in India and applied in payment of dividends, and that is not shown. The case seems to me to be covered in principle by the decision of the House of Lords in *Gresham Life Assurance Society* v. *Bishop*.[1] The proviso to s. 4 (*2*) of the Indian Income-tax Act also supports this view. In my opinion, therefore, we must answer the question raised in the negative. The assessees should get their costs from the Commissioner of Income-tax taxed on the original side scale.

KANIA J. I agree. The short point for consideration is the construction of s. 4 of the Indian Income-tax Act. Under that section income from whatever source derived, accruing, arising or received in British India, or deemed under the provisions of the Act to accrue, arise or to be received in India, is liable to be taxed. The latter part of the section which consists of income deemed under the provisions of the

[1] [1902] A. C. 287.

Act to be received in India is not applicable here, because it is conceded that the present case does not cover that situation. The only question, therefore, is whether the income in question was received in India.

Before the income-tax authorities the assessee company produced their accounts kept by Messrs. Coutts & Co. of investments and interest. Although those accounts are not included in the printed paper book, it is common ground, and now admitted by the learned Advocate General, that the assessee company kept a separate account with Messrs. Coutts & Co. of their investments and interest thereon. Interest on that fund was again reinvested and retained either in the United Kingdom or America. It is, therefore, clear that the interest on those securities was not in fact remitted to India.

It was urged that from the report of the directors and the balance-sheet of the company that foreign income should be considered or treated as received in British India. For this purpose the learned Advocate General relied only on two facts. That the interest earned on those foreign securities and retained by Messrs. Coutts & Co. was included in the total interest shown in the balance-sheet. This does not go against the assessees, because the explanation to s. 4 clearly provides that the mere inclusion of such interest in the balance-sheet does not make the amount as received in British India.

The next fact relied upon was the statement in the directors' report that after taking into consideration the interest on those securities the total profit was determined and the dividend would absorb a certain amount. In my opinion the fallacy underlying this argument is that it is treated as if this profit was received in India. The report of the directors and the statements contained therein, in my opinion, do not amount to an admission that the foreign income was received in India. In considering the words "received in the United Kingdom" under the English Income-tax Act of 1842, it was further pointed out in *Gresham*

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Life Assurance Society v. *Bishop*[1] that the fact of profits (shown in the account) having been distributed amongst shareholders of the company did not carry the case any further. Therefore the fact, that relying on the profits, arrived at by including the interest earned on foreign investments, a dividend was paid to shareholders, did not make the interest on foreign investments as received in India.

I agree that the questions should be answered as stated by the learned Chief Justice.

Answer accordingly.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Macklin.

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March 25

DASO VENKATESH KULKARNI, A MINOR BY HIS GUARDIAN AD LITEM COURT OF WARDS, BELGAUM (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* RAMCHANDRA RANGO KULKARNI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS Nos. 2 AND 3), RESPONDENTS*.

Hindu law—Adoption—Deshastha Brahmins—Custom of adoption of sister's son—Custom judicially recognised—Adoption valid.

Among the Deshastha Brahmins in the Belgaum District in the Bombay Presidency, there exists a custom by which the adoption of sister's son is valid.

Rama Rao v. *Raja of Pittapur*,[2] followed.

Bhau v. *Hari*,[3] distinguished.

Chimabai v. *Mallappa*,[4] referred to.

FIRST APPEAL against the decision of B. S. Kembhavi, First Class Subordinate Judge at Belgaum.

Suit for partition.

*First Appeal No. 206 of 1935.

(1) [1902] A.C. 287 at p. 297.
(2) (1918) L. R. 45 I. A. 148 s. c. 41 Mad. 778.
(3) (1923) 25 Bom. L. R. 411.
(4) (1922) 46 Bom. 946.