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not be sufficient to show that both parties to the transactions in every case contemplated that delivery should neither be given or taken.

N. J. Wadia J.

The prosecution evidence fails to establish any case against the accused under s. 4 or 5. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Y. V. D.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice B. J. Wadia.

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March 20

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN, REFEROR *v.* D. R. NAIK, ASSESSEE.*

Indian Income-tax Act (XI of 1922), ss. 9, 34, and 35—Assessment completed—Tax paid—Whether can be reopened—Income arising from property—Allowable deductions—Widow's maintenance charge on property—Whether allowable to determine taxable income.

An assessment cannot, on payment of the tax assessed, be said to have become final and conclusive if the time limited under s. 34 or 35 for altering an assessment has not expired.

The words "If for any reason the assessment is too low" in s. 34 are wide enough to cover a mistake in the assessment which has arisen by reason of a mistake of law and would enable the commissioner to reopen the assessment.

Where the income of an assessee (not being a joint Hindu family) is derived from immoveable property which is charged with the payment of maintenance allowances, although the only deductions permissible in respect of the property are those specified in s. 9 of the Income-tax Act yet in arriving at the taxable income the maintenance allowances should be deducted.

Bejoy Singh Dudhuria v. *Commissioner of Income tax*,[1] followed.

* Civil Reference No. 15 of 1938.

[1] (1933) 33 Bom. L. R. 811.

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REFERENCE made by the Commissioner of Income-tax, Bombay, Sind and Baluchistan, under s. 66 (2) of the Indian Income-tax Act, 1922.

On July 1, 1936, the assessee was assessed to income-tax and super-tax on a total income of Rs. 1,66,690. As income from a property at Poona had escaped assessment he was re-assessed on February 10, 1937, on a total income of Rs. 1,67,260. He was assessed as a member of an undivided Hindu family and as such in computing taxable income a deduction of Rs. 75,000 was made from the total income. The tax under that second assessment was duly paid. Subsequent inquiries showed that he was the sole surviving male member of the family and as such was liable to be assessed as an individual in accordance with the decisions of the Privy Council in *Kalyanji Vithaldas* v. *Commissioner of Income-tax, Bengal*[1] and *The Commissioner of Income-tax, Bombay* v. *A. P. Swani Gomedalli Laxminarayan*.[2] On that basis he was only entitled to a deduction of Rs. 30,000 from his total income as against the Rs. 75,000 allowed and super-tax was assessed at too low a rate and Rs. 45,000 had escaped assessment to super-tax.

On September 27, 1937, the assessee was served with a notice under s. 34 re-opening the assessment to super-tax. In answer to the notice the assessee declared his total income and added that in case he was to be assessed as an individual a deduction from his total income, to the extent of Rs. 7,200, should be allowed on account of maintenance allowance payable under a decree of the High Court out of the income as constituting a charge on the property.

The Income-tax Officer held that barring Rs. 262, the whole of the income was derived from "property" liable under s. 9 of the Act and no deduction for maintenance allowances was admissible. From this decision there was

[1] [1937] I Cal. 653, P.C. [2] (1937) 39 Bom. L. R. 1010.

an appeal to the Assistant Commissioner on the ground that s. 34 was not applicable to an assessment to super-tax and that the deduction of Rs. 7,200 should have been allowed. The Assistant Commissioner dismissed the appeal and confirmed the order of the Income-tax Officer.

Being dissatisfied with this decision the assessee submitted a petition to the Commissioner of Income-tax requiring him to refer the case under s. 66 (2) of the Act to the Honourable the High Court. The Commissioner submitted the two questions set out in the judgment of the Chief Justice for decision by the High Court.

The reference was heard.

Sir Jamshedji Kanga, for the assessee.

M. C. Setalvad, Advocate General, for the Commissioner.

BEAUMONT C. J. This is a reference by the Commissioner of Income-tax under s. 66 (2) of the Indian Income-tax Act, raising two questions :—

"(1) Whether on the facts of the case, the Income-tax Officer was entitled to take action under s. 34 of the Act with a view to re-assess the assessee to super-tax as an individual.

(2) Whether the assessee is entitled to a deduction of Rs. 7,200 from the total income on account of maintenance allowances paid under a decree of a High Court to certain female members of the Hindu family to which he belongs."

The learned Commissioner answered the first question in the affirmative, and the second in the negative.

So far as the first question is concerned, the facts are that the assessee was assessed for the year 1936–37 on July 1, 1936, the assessment being based on the income of the preceding year, which expired on March 31, 1936. Then, in February 1937, there was a supplementary assessment, because it was found that the income of a house had been omitted from the original assessment and the final

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assessment was at a sum of Rs. 1,67,260, which was duly paid. That assessment was based on the view that the assessee was the last surviving co-parcener of a Hindu joint family, which still existed, and was assessable as such. On September 27, 1937, the assessee was served with a notice under s. 34, alleging that he had been assessed at too low a rate for the purposes of super-tax, because in assessing the super-tax the assessee had been allowed a deduction of Rs. 75,000 as a member of a Hindu joint family, whereas as an individual he would only have been allowed a deduction of Rs. 30,000. The object, therefore, of the notice under s. 34 was to assess to super-tax the sum of Rs. 45,000. Section 34 provides, so far as material, that if for any reason income, profits or gains chargeable to income-tax has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve a notice and proceed to correct the mistake. Super-tax is chargeable under s. 55, and, by virtue of the provisions of s. 58, s. 34 is applicable to assessments to super-tax. The reason why the assessee was assessed as a member of a Hindu joint family, although he was the sole surviving co-parcener, was because this Court had held that in such a case he was entitled to be so assessed, but subsequently, the Privy Council took a different view. So that the mistake, which resulted in the original assessment, was a mistake of law, for which the learned Commissioner of Income-tax had some justification. The words of s. 34 are very wide and say that "if for any reason the assessment is too low". I think those words are wide enough to cover such a mistake as existed in the present case, and I see no reason, therefore, why a fresh assessment should not be made under s. 34.

It is suggested by Sir Jamshedji Kanga for the assessee that the assessment to income-tax had become final and conclusive for the purposes of income-tax by payment of

the tax and, therefore, under s. 56 it was also final and conclusive for the purposes of super-tax. But the fallacy of that argument is in saying that the assessment had become final and conclusive for the purposes of income tax, because the assessment might have been corrected under s. 34 in a proper case for the purposes of income-tax, and until the time limited for altering the assessment under s. 34 or s. 35 has expired, I think it cannot be said that the assessment has become final and conclusive.

It is also suggested that this is really a mistake, which ought to have been remedied under s. 35, but even if that be so, the fact, that a mistake might be remedied under s. 35, is no reason why the assessment should not be altered under s. 34, if the case falls within that section. I see no reason for supposing that ss. 34 and 35 are mutually exclusive.

In my judgment, therefore, the learned Commissioner was right in answering the first question in the affirmative.

With regard to the second question, the whole of the income of the assessee is derived from immoveable property. But under a decree of this Court made on December 22, 1914, the income is subject to certain maintenance allowances in favour of widows, who are members of a joint family, and, in my opinion, those maintenance allowances are a charge on the property, because the decree of the Court declares that the immoveable property belongs to the residuary legatee subject to the abovementioned payments, that is payments for maintenance. The learned Commissioner took the view that as the income is derived from immoveable property, the only deductions which can be

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allowed are those specified in s. 9, and he is of opinion,—rightly, I think,—that charges of this sort do not fall within the language of s. 9. But, in my opinion, the answer to the learned Commissioner's view is to be found in the decision of the Privy Council in *Bejoy Singh Dudhuria* v. *Commissioner of Income-tax, Calcutta*.[1] Their Lordships there were dealing with a very similar case, in which the assessee's income, derivable in part from immoveable property, was subject to charges in favour of a widow, and their Lordships held that although those charges could not be deducted under s. 9, the question really was whether the income of the assessee was the whole income of the immoveable property, or the income of the immoveable property less the deduction, and they held that the real income, which was liable to tax, was the income subject to the deductions in respect of the charges. I think that that reasoning applies in this case and that the assessee ought to have been assessed not to the full amount of the income derivable from the immoveable property, but to that income less the Rs. 7,200 payable for maintenance allowances.

In my judgment the second question also should be answered in the affirmative.

Both questions will be answered in the affirmative. No order as to costs on either side.

B. J. WADIA J. I agree.

Attorney for assessee : Mr. *S. R. Mirajkar*.

Attorney for Commissioner : Mr. *H. F. Mulla*, Solicitor to Central Government at Bombay.

Answers accordingly.

N. K. A.

[1] (1933) 35 Bom. L. R. 811.