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Oct. 20.

KSHETRA MOHAN-SANNYASI. CHARAN SADHUKHAN
v.
COMMISSIONER OF EXCESS PROFITS TAX, WEST BENGAL.

[PATANJALI SASTRI C.J., S.R. DAS, VIVIAN BOSE, GHULAM HASAN and BHAGWATI JJ.]

Excess Profits Tax Act (XV of 1940), s. 8(1)—Partnership between kartas of two Hindu undivided families—Death of kartas—Partnership continued by sons—Nature of such partnership—Separation of members of each branch—Whether effects change in constitution of firm—Carry forward of deficiencies.

Though a partnership entered into by the kartas of two Hindu undivided families is popularly described as one between two Hindu undivided families, in the eye of the law it is a partnership between the two kartas, and the other members of the family do not *ipso facto* become partners. It is open to the individual members of a Hindu undivided family to enter into a partnership with the individual members of another Hindu undivided family but in such a case it cannot be called a partnership between two Hindu undivided families.

(1) [1937] 5 I.T.R. 202.
(2) [1939] 7 I.T.R. 195.
(3) [1952] 22 I.T.R. 108.

Two separated brothers governed by the Dayabhaga school of Hindu law, as kartas of their respective families, started a business in partnership and carried it on for some years. In 1932 one of them died and his four sons who were undivided amongst themselves were admitted to the partnership. The other brother also died in 1934 leaving four sons, and the sons of the two brothers thereafter continued the partnership, the members of each branch constituting a separate joint family as amongst themselves. On the 13th April, 1943, there was a severance of both the families *inter se*, and the business was carried on by the eight sons who constituted themselves into a partnership with effect from the 14th April. The Appellate Tribunal found that prior to the 14th April, 1943, the partnership was one between two Hindu undivided families and from that date the partnership was one between eight individual members of two disrupted families:

Held, (i) that, as the finding of the Appellate Tribunal was one of fact it was not open to the assessees to contend that the partnership before the 14th April, 1943, was also a partnership of eight individuals; (ii) that on the facts as found by the Appellate Tribunal there was on the 14th April, 1943, a change in the persons carrying on the business within the meaning of section 8 of the Excess Profits Tax Act, and the deficiencies which occurred before 14th April cannot be deducted from the excess profits of the succeeding chargeable accounting periods.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 173 of 1952.

Appeal from Judgment and Order dated the 20th day of June, 1951, of the High Court of Judicature at Calcutta (Chakravartti and S. R. Das Gupta JJ.) in Income-tax Reference No. 64 of 1950, arising out of the Common Order dated the 25th day of July, 1949, of the Court of Income-tax Appellate Tribunal in E. P. T. A. Nos. 550, 551 and 552 of 1948-49.

N. C. Chatterjee (*A. K. Dutt*, with him) for the appellant.

C. K. Daphtary, Solicitor-General for India (*G. N. Joshi*, with him) for the respondent.

1953. October 20. The Judgment of the Court was delivered by

DAS J.—This is an appeal from the judgment and order pronounced on the 20th June, 1951, by a Bench of the Calcutta High Court on a reference made by the Income-tax Appellate Tribunal under section 66(1) of

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the Income-tax Act read with section 21 of the Excess Profits Tax Act whereby the High Court answered in the affirmative the following question:—

"Whether on the facts and circumstances of this case there is a change in the persons carrying on the business within the meaning of section 8(1) of the Excess Profits Tax Act, 1940, with effect from 14th April, 1943, when the business, which had previously been carried on in partnership between two Dayabhaga Hindu undivided families, was carried on by a partnership between the separated male members of the two families?"

The controversy arose at the time of the assessment of the appellant firm to excess profits tax for three chargeable accounting periods, namely, 14th April, 1943, to 13th April, 1944, 14th April, 1944, to 13th April, 1945, and 14th April, 1945, to 31st March, 1946. During the aforesaid chargeable accounting periods the status of the assessee was that of a firm registered under section 26-A of the Indian Income-tax Act. In the chargeable accounting period ending 13th April, 1944, there was no profit in excess of the standard profit but there was a deficiency of Rs. 12,804. The assessee claimed that the total deficiencies amounting to over Rs. 84,000 carried forward from previous years up to the chargeable accounting period ending 13th April, 1943, should be added to the sum of Rs. 12,804 and the aggregate amount should be carried forward under section 7 of the Excess Profits Tax Act. The Excess Profits Tax Officer rejected this contention on the ground that there had been a change in the persons carrying on the business and the old business should be deemed to have been discontinued and a new business to have commenced within the meaning of section 8 of the Excess Profits Tax Act and carried over only Rs. 12,804. In the chargeable accounting period ending 13th April, 1945, there was a profit of Rs. 88,652 over the standard profit and the Excess Profits Tax Officer allowed only Rs. 12,804 as the deficiency brought forward and assessed the firm for the nett excess of Rs. 75,848. He rejected the contention of the assessee that the deficiency which accrued before

14th March, 1943, should also be deducted from the excess profits of this chargeable accounting period. In the chargeable accounting period ending 31st March, 1946, no deduction whatever was allowed on account of the deficiency that was said to have accrued up to the chargeable accounting period ending 13th April, 1943.

There were three separate appeals by the assessee to the Appellate Assistant Commissioner against the three orders of the Excess Profits Tax Officer. The Appellate Assistant Commissioner confirmed the assessments and dismissed the appeals. Further appeals were taken to the Income-tax Appellate Tribunal. By an order made on the 25th July, 1949, the Appellate Tribunal dismissed all the three appeals. Thereupon three applications were made before the Appellate Tribunal under section 66(1) of the Indian Income-tax Act read with section 21 of the Excess Profits Tax Act. The Appellate Tribunal thereupon drew up a statement of case and submitted for the opinion of the High Court the question referred to above. The High Court, in agreement with the Appellate Tribunal, answered the question in the affirmative. Hence the present appeal under a certificate granted by the High Court under section 66-A(2) of the Indian Income-tax Act.

According to learned counsel who appears in support of this appeal Kshetra Mohan Sadhukhan and Sannyasi Charan Sadhukhan who were two brothers governed by the Dayabhaga School of Hindu law separated from each other many years ago. The two separated brothers, as kartas of their respective families, started a business in partnership under the name and style of Kshetra Mohan Sadhukhan and Sannyasi Charan Sadhukhan, each having an eight-annas share in the profit and loss thereof. Sannyasi Charan Sadhukhan died in 1932 and his sons were admitted into the partnership and the business was continued by Kshetra Mohan Sadhukhan and the sons of Sannyasi Charan Sadhukhan. Kshetra Mohan Sadhukhan died in 1934 and on and from 17th June, 1934, the sons of Kshetra Mohan Sadhukhan and the sons of Sannyasi Charan Sadhukhan continued the business in partnership.

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Although this business was carried on in partnership, the members of each branch as between themselves constituted a separate Hindu undivided family right up to the 13th April, 1943, when there was a severance of both the families *inter se*. The business, however, carried on by the members of the two branches in partnership continued. A deed of partnership is said to have been executed between the eight partners on the 19th September, 1943, and eventually another deed of partnership was executed on the 28th December, 1944. Learned counsel's contention is that the firm was originally a partnership of two Hindu undivided families represented by their respective kartas Kshetra Mohan Sadhukhan and Sannyasi Charan Sadhukhan and that on and from the 17th June, 1934, the sons of Kshetra Mohan Sadhukhan and the sons of Sannyasi Charan Sadhukhan individually became partners in the firm and the firm has remained so constituted at all material times and that there has been no change in the persons carrying on the business within the meaning of section 8 of the Excess Profits Tax Act. It appears to us that this is an entirely new case which is not now open to the assessee to put forward.

In the course of the assessment the Excess Profits Tax Officer found that previous to 14th April, 1943, the business was carried on by two Hindu undivided families, that on 13th April, 1943, both the families were disrupted and since then the individual members of the two families began carrying on the business after forming a partnership concern and accordingly these new partners were not the same persons as the persons who carried on the business up to 13th April, 1943. The case made by the assessee before the Appellate Assistant Commissioner was that the business was carried on by the two Hindu undivided families right up to 13th April, 1943, when there was a disruption of both the families *inter se* and that after that day the eight individual members formed themselves into a partnership and carried on the business. Before the Appellate Tribunal also the same case was made, namely, that up to 13th April, 1943, the business was a partnership concern of two Dayabhaga Hindu

undivided families, namely, the family of Kshetra Mohan Sadhaukhan consisting of four adult male members and the family of Sannyasi Charan Sadhukhan also consisting of four adult male members and that from 14th April, 1943, the eight members of the two families constituted themselves into a partnership and carried on the business as such, although the contention of the assessee at one stage was that though the original partnership was entered into by the two kartas of the two families, *in effect* the partnership was between the adult members of the two families even at the inception. However, in its application under section 66(1) an attempt was made for the first time to suggest yet another case, namely that prior to 13th April, 1943, the business was carried on in partnership by two associations of persons and not by two Hindu undivided families, implying that before that date the business was carried on by the eight individual members of the two families. It was not suggested at any time before that at first there was a partnership of two kartas and then a partnership of the eight sons of the two kartas on and from the 17th June, 1934, and that such partnership of eight continued ever since then.

Learned counsel for the assessee maintains that there has not been any variance in the case made by his client inasmuch as the partnership which, according to him, was being carried on by and between the individual members of one Hindu undivided family, namely, the four sons of Kshetra Mohan Sadhukhan and the individual members of another Hindu undivided family, namely, the four sons of Sannyasi Charan Sadhukhan may well have been described as a partnership between two Hindu undivided families. A Hindu undivided family is no doubt included in the expression "person" as defined in the Indian Income-tax Act as well as in the Excess Profits Tax Act but it is not a juristic person for all purposes. The affairs of the Hindu undivided family are looked after and managed by its karta. When two kartas of two Hindu undivided families enter into a partnership agreement the partnership is popularly described as one between the two Hindu

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undivided families but in the eye of the law it is a partnership between the two kartas and the other members of the families do not *ipso facto* become partners. There is, however, nothing to prevent the individual members of one Hindu undivided family from entering into a partnership with the individual members of another Hindu undivided family and in such a case it is a partnership between the individual members and it is wholly inappropriate to describe such a partnership as one between two Hindu undivided families. We need not pursue this matter further, for in the case now before us there is no evidence whatever to prove that all the members of the two families had individually become partners in the business at any time before the 14th April, 1943. The documents to which reference will presently be made do not support the case now sought to be made by learned counsel for the assessee.

Section 26-A permits an application to be made to the Income-tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners for registration for the purposes of the Indian Income-tax Act. Sub-section (2) of that section provides that the application shall be made by such person or persons and shall be in such form and be verified in such manner as may be prescribed. Rule 2 of the Indian Income-tax Rules requires that such application shall be signed by all the partners personally. Rule 3 enjoins that the application shall be made in the form annexed to that rule. It appears that on the 19th October, 1943, an application was made on behalf of Kshetra Mohan Sadhukhan and sons and Bijan Kumar Sadhukhan and brothers for the renewal of the registration of the firm under section 26-A of the Indian Income-tax Act for the assessment for the Income-tax year 1942-43. It was alleged in that application that the constitution of the firm and the individual shares of the partners as specified in the instrument of partnership remained unaltered. In the schedule to the application were set out the required particulars. The last column showed that in the balance of profits or loss the share of Kshetra Mohan Sadhukhan and sons was Rs. 4,370 and that of

Bijan Kumar Sadhukhan and brothers was also Rs. 4,370. The instrument of partnership dated the 19th September, 1943, referred to in the application appears to be one made between Gosta Behari Sadhukhan and Bros. called the first party and Bijan Kumar Sadhukhan and Bros. called the second party. Clause 6 of that deed provided that the profits of the partnership should belong to "the partners equally, *i.e.*, eight-annas share each". Clause 7 of the deed referred to "either partner" and clause 8 to "either of the partners". These expressions clearly indicate that the partners were two only, and an equal share of eight annas also indicates the same. It further appears that on the 28th December, 1944, another deed of partnership was drawn up. In this deed there are eight parties. Learned counsel for the appellant relies on the first four recitals as clearly indicating that even before the 13th April, 1943, the eight individual members of the two families carried on business in partnership. This construction of those clauses is clearly inconsistent with the fifth recital which says that on and from the 1st Baisak, 1350 B. S. *i.e.* 14th April, 1943, the said firm was reconstituted as constituted of eight partners. If the firm was before 1st Baisak, 1350 B. S., constituted of eight partners then there could be no occasion for reciting that "the firm was reconstituted as constituted of eight partners". Further, the statement of case drawn up by the Appellate Tribunal, which is binding on the assessee, clearly indicates that up to 13th April, 1943, the business was a partnership concern carried on by two Dayabhaga Hindu undivided families and that it was after that date that the eight members of the two families constituted themselves into a partnership. The returns in the firm's files up to 1943-44 also show only two partners—Kshetra Mohan Sadhukhan and sons and Sannyasi Charan Sadhukhan and sons—each having an eight annas share. It is from 1944-45 that eight partners are being shown. As already stated, the application dated the 19th October, 1943, also indicates that the parties themselves considered that the business was carried on by two partners. Further,

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the very question referred by the Appellate Tribunal implies, as pointed out by the High Court, that a business was carried on by a partnership composed of two partners each of which was a Hindu undivided family, that there was a disruption of both the families and that on and after such disruption the business was carried on by a partnership entered into by and between the separated male members of the two families. We also agree with the High Court that if the case of the assessee was that even before 14th April, 1943, there was a partnership of eight persons and if that case was accepted by the Appellate Tribunal then no question of law could have arisen on those facts. It is only because the fact found was that prior to 13th April, 1943, the business was carried on by a partnership of two Hindu undivided families which *prima facie* means a partnership between two Kartas representing two Hindu undivided families and that from 14th April, 1943, it became a business of eight individual members of two disrupted families that the question of law could arise. If, as we hold, the assessee is not entitled to go behind the facts so found by the Appellate Tribunal in the statement of the case and as is implicit in the question itself, then there can be no doubt that there had been a change in the persons carrying on the business within the meaning of section 8 of the Excess Profits Tax Act and it has not been argued otherwise. In our opinion, therefore, the answer given by the High Court to the referred question was correct.

In this view of the matter it is not necessary to consider whether the fact of Nandodulal, the youngest son of Sannyasi Charan, being a minor before 13th April, 1943, and of his attaining majority on 18th July, 1943, as stated by the learned counsel for the assessee will bring the case within the meaning of section 8 of the Excess Profits Tax Act.

For the reasons stated above this appeal is dismissed with costs.

Appeal dismissed.

Agent for the appellant : *H. N. Sen.*

Agent for the respondent : *G. H. Rajadhyaksha.*