MOHAMED NOORULLAH, REPRESENTING THE ESTATE OF LATE KHAN SAHIB MOHD. OOMER SAHIB

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS.

1961

January 18.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Assessment of an association of persons—Business carried on by Mohamedan—Continuance by heirs—Receivers appointed by consent of parties—Assessment on the receivers as income of an association of persons—Validity—Indian Income-tax Act, 1922 (11 of 1922), s. 3.

The business of manufacture and sale of a particular brand of beedies was carried on by O, a Mohamedan, who died in 1942 leaving a minor son, the appellant, by his pre-deceased wife, his widow L, and four children by her. Proceedings were taken first by the appellant and later on by L in connection with the partition of the properties left by O, including the business, and during the pendency of the proceedings the business was carried on by receivers who had been appointed by the court by consent of parties on May 17, 1943. The receivers continued the business till November 25, 1946, when during the course of the proceedings the business was put up for sale by auction between the co-heirs and was purchased by the appellant. For the years of assessment, 1944-45 to 1947-48, for which the accounting years were 1943 to 1946, the profits of the business were assessed to income-tax in the hands of the receivers as the income of an association of persons, and the claim of the appellant that the shares of the profits of each of the co-heirs should have been separately taxed was rejected by the income-tax authorities. The facts showed that the business was inherited by the heirs of O and was carried on without break during the accounting years first by L and another and then by the receivers, that the nature of the business was such that it could not be divided up and that all the parties desired that the business should be carried on as one whole with a unity of control.

Held, that on the finding that the business was carried on by the consent of all parties as one unit with unity of control, the co-heirs did form an association of persons within the meaning of s. 3 of the Indian Income-tax Act, 1922, and that the income of the business was assessable as the income of an association of persons ; and the mere fact that a suit was pending at the time for the administration of the estate of the deceased or for the separation of the shares of the co-heirs did not affect the incidence of taxation in the case.

Commissioner of Income-tax, Bombay v. *Indira Balkrishna*, [1960] 3 S.C.R. 513, followed.

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S. C. Mazumdar, Receiver, Trigunait Brothers' Estate v. *Commissioner of Income-tax*, [1947] 15 I.T.R. 484, disapproved in so far as it was contrary to the above decision of the Supreme Court.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 303 to 307 of 1960.

Appeals by special leave from the judgment and order dated May 14, 1957, of the Madras High Court, in Case Referred No. 111 of 1953.

R. Ganapathy Iyer and *G. Gopalakrishnan* for the appellant.

K. N. Rajagopal Sastri and *D. Gupta*, for the respondent.

1961. January 18. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.—These appeals are brought by special leave against the judgment and order of the High Court of Madras in an Income-tax reference under s. 66(1) of the Indian Income-tax Act, hereinafter termed the "Act". The question referred was :—

> "Whether the income-tax assessment of the business of 'Spade Clover Beedies' belonging to the estate of the deceased and carried on during the previous years 1943 to 1946 as an association of persons for the assessment years 1944-45 to 1947-48 is valid ?"

And this question was decided in the affirmative and therefore against the appellants.

The facts leading to the appeals are that one Khan Sahib Mohamed Oomer Sahib, who was carrying on the business of manufacture and sale of Spade Clover brand Beedies, died on December 17, 1942, leaving a minor son Mohamed Noorullah (the appellant) by his pre-deceased wife, a widow, Luthfunnissa Begum, and four children by her who were all minors at the date of the death of Oomer Sahib. Noorullah through his next friend applied to sue in *forma pauperis* and during the pendency of those proceedings two Advocates of the Madras High Court were appointed joint receivers of the properties of the deceased on March 17, 1943. This appointment was by consent of parties. On

May 10, 1943, the widow, Luthfunnissa, filed a suit for partition and also applied for the continuance of the joint receivers. Noorullah opposed this application but by an order dated May 25, 1943, the receivers were ordered to be continued and they carried on the business as before. In due course a preliminary decree for partition was passed. The High Court has observed that none of the parties wanted to break the continuity of the business after the death of the father. In the beginning Luthfunnissa and Dawood carried on the business and from the date of their appointment, i.e., May 17, 1943, the joint receivers continued the business till November 25, 1946, when during the course of the proceedings the business was put up for sale by auction between the co-heirs and was purchased by Noorullah.

The years of assessment are 1944-45 to 47-48, the relevant accounting years for which were the calendar years 1943 to 1946. The profits of the business were assessed to tax in the hands of the receivers as the income of an association of persons and the contention of the appellant that the share of the profits of each of the co-heirs should have been separately taxed, was rejected by the Income-tax authorities as well as by the Income-tax Appellate Tribunal. The only question which was raised both before the department as well as before the Tribunal was the assessment to tax of the income of the business. There was no dispute in regard to the income of the properties which was taxed under s. 9(3) of the Act.

The business was inherited by the heirs of Oomer Sahib and was carried on without break during the accounting years first by the widow and Dawood and then jointly by the receivers. The nature of the business was such that it could not be divided up and had to be carried on as one whole with a unity of control and all the parties desired to preserve and did preserve this unity. The opposition by the appellant to the application for receivership filed on behalf of Luthfunnissa, the widow, was only on the ground that the appellant wanted different persons to be appointed and not to the continuance of the business or to the unity

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of control. The Income-tax Appellate Tribunal in its order stated :—

"In fact, there was no change in the continuity of the business and from the date of death of Md. Oomer Sahib up to 24th March, 1943, the business was carried on by mutual agreement and consent by Luthfunnissa Begum acting on her own behalf and on behalf of her minor children and her minor step-son Md. Noorullah. There can, therefore, be no gainsaying the fact that immediately after the death of Md. Oomer his estate was inherited and run by combination of individuals who had pooled their resources for the common purpose of earning income."

And the High Court has observed :

"The opposition was apparently to the persons to be appointed receivers and not to the continuance of the business or to the unity of control that was necessary. Noorullah himself had realised that when he applied earlier for the appointment of receivers to conduct the business among other things. Despite Noorullah's opposition when Luthfunnissa asked for the continuance of receivers in her application No. 1162 of 1943, the existence of the desire of all the co-sharers including Noorullah for the continuance of the business with proper persons to take charge of the business under the orders of court was clear. That intention was material on which the departmental authorities and the Tribunal which agreed with them could find that the co-sharers did constitute an 'association of persons'."

From the finding of the Tribunal it is obvious that the business was such that it was not capable of division, it being the manufacture and sale of "Beedies" of a particular brand and the finding of the Tribunal was that the business was carried on with the consent of the parties. On this finding it has to be decided whether the business was the business of an "association of persons" and its profits are assessable as such ?

The contention of counsel for the appellant was (1) that on the death of Md. Oomer his estate including the business devolved upon his heirs in specific

shares; and (2) there was no consensus of opinion between the heirs which is shown by the fact that the appellant filed an application to sue in *forma pauperis* and before that application could be decided the widow sued for partition and even though receivers were appointed objection was taken by the appellant to the appointment of receivers. But these facts do not assist the case of the appellant. As has been said above, the business was in the first instance carried on by the widow and Dawood on behalf of the heirs of Oomer and subsequently when the suits were brought none of the parties wanted to break the unity of control of the business nor its continuity and it was of such a nature that it could not be carried on without such consensus and therefore the receivers carried on the business. On these findings the High Court has rightly come to the conclusion that the business was a business of an association of persons.

This Court in *Commissioner of Income-tax, Bombay* v. *Indira Balkrishna* (1) considered the question as to what an association of persons means. The test laid down in three cases: *In re B. N. Elias & Others* (2); *Commissioner of Income-tax* v. *Laxmidas Devidas and Another* (3) and *In re Dwarkanath Harischandra Pitale* (4) was accepted by this Court as correctly laying down the crucial test for determining what is an association of persons and that in each case the conclusion has to be drawn from the circumstances. In the first case the test was laid down as applying to combinations of individuals who were engaged together in some joint enterprise but not constituting a partnership. Such a combination of persons formed for the promotion of a joint enterprise banded together as if they were "co-adventurers" it was held would constitute an asssociation of individuals. In the second case, that is, *Commissioner of Income-tax* v. *Laxmidas Devidas and Another* (3) Beaumont, C. J., at p. 589 laid down the test as follows:—

"In my opinion, the only limit to be imposed on the words 'other association of individuals' is

(1) [1960] 3 S.C.R. 513.
(2) [1935] 3 I.T.R. 408,
(3) [1937] 5 I.T.R. 584.
(4) [1937] 5 I.T.R. 716.

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such as naturally follows from the fact that the words appear in an Act imposing a tax on income, profits and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words 'other association of individuals' in s. 3; and under s. 9 of the Act, the Association of individuals is the owner of the property and as such is assessable."

In that case it was also held that the fact that one of the assessees was a minor during the year of the assessment did not affect the question. In *In re Dwarkanath Harischandra Pitale* (1) the assessees were two brothers who became entitled to certain house properties as tenants in common and held and managed the properties as such and derived profit therefrom. It was held that though the assessees in the first instance did not constitute an association of individuals, they became so when they elected to retain the property and manage it as a joint venture producing income. The test there laid down was that as soon as there was election to retain the property and manage it as a joint venture the persons so electing became an association of individuals. The Rangoon High Court in *The Commissioner of Income-tax, Burma* v. *M. A. Baporia and Others* (2) also laid down the same interpretation of the words " association of individuals ". That was a case of Mohammedan co-heirs and it was held that 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, that is, an association of individuals. One of the co-heirs in that case was appointed an agent to realise the income from the properties left to the co-heirs by their father and mother under Mohammedan Law and that was held to be sufficient to constitute them an association of individuals.

(1) [1937] 5 I.T.R. 716. (2) [1939] 7 I.T.R. 225.

It is unnecessary to refer to other cases. Taking the test as laid down by this Court in *Indira Balkrishna's* case (1) it appears to us that the appellant and other co-heirs were rightly assessed as an association of persons. No doubt a suit for partition had been filed which was preceded by an application made by the appellant to sue in *forma pauperis*, but the suit in reality was for ensuring the proper conduct of the business and not its discontinuance. During the period that the suit was pending and even before that, i.e., after the death of the father the business was carried on by the consent of all parties as one unit as indeed it had to be, because it had to be carried on as one unit with unity of control and therefore the co-heirs did form an association of persons within the meaning of s. 3 of the Act.

Counsel for the appellant relied on *S. C. Mazumdar, Receiver, Trigunait Brothers' Estate* v. *Commissioner of Income-tax* (2). That was a case of persons who formed a joint family being governed by the Mitakshara School of Hindu Law. A suit for partition was filed and the court appointed a receiver and a preliminary decree was passed but the receiver was continued in regard to certain portion of the property and the income was assessed by the taxing authorities as the income of an association of persons. It was held that the income from property could not be taxed as such because the shares of the parties were definite and ascertainable. The amount paid by the lessees could not be taxed in a lump sum as being the profits of a business carried on by an association of persons and the assessment was, therefore, made in accordance with the provisions of s. 9(3). It was also held that the assessees were not carrying on a trade or business themselves and there was no association of persons as contemplated by the Act. But that case can be of no assistance in the decision of the matter now before us. The income to be assessed there was not income of any business carried on by or on behalf of the assessees and it was held that letting out property was not a trade or business. With regard to the income received by the receiver

(1) [1960] 3 S.C.R. 513. (2) [1947] 15 I.T.R. 484.

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who employed contractors to carry on the business of coal-cutting and raising it on the pit head, it was held that that was not the income of an association of persons on the ground (1) that the receiver was in possession and he employed contractors for coal-cutting and raising of coal; (2) that the assessees had no hand in the business which produced royalty and (3) that the assessees had disassociated themselves from each other because of this partition suit. In our opinion the case so far as it relates to the carrying on of the business and in so far as it is contrary to the opinion expressed by this Court in *Indira Balkrishna's* case (1), is not correctly decided. Another case relied upon by the counsel for the appellant was *Buldana District Main Cloth Importers' Group, Khamgaon* v. *Commissioner of Income-tax, Nagpur* (2). In that case a certain group of persons were directed to import cloth in the district and had to work a scheme for the distribution and sale of cloth which had been evolved by the District authorities. That was held not to be an association of persons. It appears that although they were appointed as a group of importers, all of them did not participate in that scheme during the entire period. There were changes in the personnel of the group from time to time and there was no compulsion to work the scheme. On these facts it was held that the group did not agree to carry on the business or share the profits. That case must be taken to have been decided on its own facts and does not in any way affect the meaning of the phrase "association of persons." Counsel also relied on *Khan Bahadur M. Habibur Rahman* v. *Commissioner of Income-tax, Bihar & Orissa* (3) in which a waqf deed was executed by which the assessee dedicated the income with ultimate benefit to the poor and constituted himself the sole mutwali of the trust. The deed provided that the beneficiaries should be benefited concurrently and in the same proportion. It was held that s. 41(1) was inapplicable and the assessee should, therefore, be taxed on the basis of profits falling to the share of

(1) [1960] 3 S.C.R. 513. (2) [1956] 30 I.T.R. 61.
(3) [1945] 13 I.T.R. 189.

each beneficiary and not on the footing that all the beneficiaries constituted an association of persons. Fazl Ali C. J. (as he then was) there observed at p. 194:—

> "It seems to me therefore that the finding of the Tribunal that there were only 24 persons who were entitled to share the profits in the accounting year and that they were entitled to equal shares therein must be accepted. As it does not seem to have been contended that the assessee had any other relations than those enumerated by the Tribunal who would be entitled to share the profits, it is academic to discuss whether the various categories of persons referred to by the Appellate Assistant Commissioner of Income-tax were included in the term 'family' or not."

On this ground the income was not assessed as the income of an association of persons and that case was also decided on its own facts.

The question in the present case is as to what income was to be taxed. The income was the income of a business which was carried on as a single business by the consent of all the parties. The mere fact that a suit was pending at the time for the administration of the estate of the deceased or for the separation of the shares of the co-heirs does not affect the incidence of taxation in this case, because the business was carried on, as said above, as one business with unitary control and by the consent of the parties. The High Court was right in holding that the income was assessable as an income of an association of persons.

The appeals must, therefore, be dismissed with costs. One hearing fee.

Appeals dismissed.