COMMISSIONER OF INCOME-TAX, BOMBAY CITY II

v.

SHAKUNTALA AND TWO OTHERS ETC.

1961

July, 18.

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-Tax—Shares registered in names of members of Hindu undivided family—Undistributed income deemed to be distributed dividend—Whether assessable in hands of family—Indian Income-tax Act, 1922 (11 of 1922), s. 23A.

A Hindu undivided family was the beneficiary of 1842 shares in a company; but the shares were held in the names of different members of the family. For the assessment year 1949-50 the Income-tax Officer applied the provisions of s. 23A of the Income-tax Act, 1922 (as it stood at that time) and ordered that the undistributed portion of the assessable income of the company in the previous year shall be deemed to have been distributed as dividend among the shareholders. The proportionate amount of dividend in respect of the 1842 shares after being grossed up was added to the income of the joint family. The assessee-family contended that the dividend deemed to have been distributed under s.23A should be assessed in the hands of the shareholders and not in the hands of the family.

Held, that the dividend deemed to have been distributed under s. 23A of the Act could not be assessed in the hands of the Hindu undivided family but could be assessed only in the hands of the members of the family who were registered shareholders of the company. Under the express words of the section the artificial or notional income had to be included in the total income of the shareholder. The expression "shareholder" in s.23A meant the person who was shown as a shareholder in the register of the company. The section did not talk of the beneficial owner of the share. The Hindu undivided family was not a shareholder of the Company. The fiction enacted by the legislature must be restricted to the plain terms of the statute.

S. C. Cambatta v. *Commissioner of Income-tax, Bombay*, (1946) 14 I. T. R. 748 and *Shree Shakti Mills Ltd.*, v. *Commissioner of Income-tax, Bombay*, (1948) 16 I. T. R. 187, approved.

Howrah Trading Co. Ltd., v. *Commissioner of Income-tax, Central Calcutta*, (1959) 36 I.T.R. 215 and *Charandas Haridas* v. *Commissioner of Income-tax, Bombay*, (1960) 39 I. T. R. 202, applied.

1961

The Commissioner of Income-tax, Bombay City II
v.
Shakuntala and two others etc.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 125, 231 and 447 of 1960.

Appeals from the judgment and order dated September 25, 1957, of the Bombay High Court of Income-tax References Nos. 30, 29 & 37/57, respectively.

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

A. V. Viswanatha Sastri and *J. B. Dadachanji*, for the respondents.

1961. July, 18. The Judgment of the Court was delivered by

S.K. Das J.

S. K. DAS, J. These three appeals, with special leave of this Court, have been heard together. They arise out of three Income-tax References made to the High Court of Bombay, namely, Income-tax Reference No. 29 of 1957, Income-tax Reference No. 30 of 1957 and Income-tax Reference No. 37 of 1957. The facts are similar in the three cases and the question of law which the High Court had to answer was the same in each of the cases. The High Court gave its answer in its leading judgment in Income-tax Reference No. 29 of 1957, and the other two References were disposed of in accordance with that answer. For the purposes of these appeals, it would be enough if we state the facts of Reference No. 29 and then indicate the question which arose for decision and the answer which the High Court gave to it.

One Nanalal Haridas was the *karta* of a Hindu undivided family which admittedly was the beneficiary of 1842 shares in a company called the Cotton Export and Import Limited (hereinafter referred to as the Company). The shares were held in the names of different members of the family as given below.

No. of shares	*Name or names in which they stand*
877	Tribhuvandas Haridas
815	Nanalal Haridas
150	Nanalal Haridas and Tribhuvandas Haridas

The Company was one in which the public were not substantially interested. For the assessment year 1949-50 the Income-tax Officer concerned applied the provisions of s. 23A of the Indian Income-tax Act, 1922 (as it stood previous to the amendment of 1955) and ordered that the undistributed portion of the assessable income of the Company of the relevant previous year, as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by it in respect thereof, shall be deemed to have been distributed as dividend among the shareholders as at the date of the relevant General Meeting of the Company. The proportionate amount of dividend of the 1842 shares, after being grossed up, came to Rs. 54,307/-. This amount the Income-tax Officer added to the income of the joint family. The assessee-family claimed that the dividend deemed to have been distributed under s. 23A should be assessed in the hands of the shareholders, that is, the persons in whose names the shares stood registered in the books of the Company, and not in the hands of the Hindu undivided family though admittedly it was the beneficiary of the shares. The Income-tax Officer and the Appellate Assistant Commissioner rejected this contention. The matter then went in appeal to the Income-tax Appellate Tribunal. The Department contended before the Tribunal that having regard to the scheme of s.23 A and the ordinary dictionary meaning of the word "shareholder," there was no reason why the joint family should not be held to be the shareholder within the meaning of s 23 A. The Tribunal by its order dated February 15, 1957, expressed the view that

1961

The Commissioner of Income-tax, Bombay City II v. Shakuntala and two others etc.

S.K. Das J.

the interpretation of s. 23A for which the assessee contended would defeat the very purpose of that section, but held that it was bound by the decision of the Bombay High Court in *S. C. Cambatta* v. *Commissioner of Income-tax, Bombay* (1). Accordingly, the Tribunal allowed the appeal and directed the Income-tax Officer concerned to delete the deemed dividend income from the income of the Hindu undivided family. The Commissioner of Income-tax, Bombay, then moved the Tribunal to refer the following question of law to the High Court of Bombay:

> "Whether the dividend income of Rs. 54,307/- is to be assessed in the hands of the assessee, the Hindu undivided family ? "

The Tribunal was of the view that the question did arise out of its order and made a reference to the High Court accordingly.

The High Court by its order dated September 25, 1957, answered the question in favour of the assessee. It held that in respect of an income which was deemed to be distributed under the provisions of s. 23A, the section in terms provided that the proportionate share of the shareholders in such distribution should be included in *their* income ; and as the Hindu undivided family was not and could not be a registered shareholder of the Company, the amount in question could not be treated as the income of the Hindu undivided family under the provisions of that section. The High Court re-affirmed the view it had expressed in its earlier decision in *S. C. Cambatta* v. *Commissioner of Income-tax, Bombay* (1).

The High Court having refused leave to appeal to this Court from its decision in question, the Commissioner of Income-tax, Bombay, applied to this Court for special leave and having obtained

(1) (1946) 14 I.T.R. 748.

such leave has brought these appeals to this Court.

It is necessary now to read the relevant portion of s. 23A as it stood prior to its amendment by the Finance Act, 1955.

"23A: *Power to assess individual members of certain companies.*

(1) where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax porposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income :

x x x x

1961

The Commissioner of Income-tax, Bombay City II v. Shakuntala and two others, etc.

S.K. Das J.

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof."

The section in effect creates a fictional or notional dividend-income which is not in fact received by the shareholder. The notional dividend is deemed to have been distributed as on the date on which the accounts of the previous year were laid before the company in a general meeting. It is clear from the section that an order made under it is not in itself an order of assessment; it has to be followed by an assessment on the shareholder either under s. 23 or under s.34. Under the express terms of the section, the artificial or notional income has to be included in the total income of the shareholder for the purpose of assessing his total income. The High Court has referred to its earlier decision in *S.C. Cambatta* v. *The Commissioner of Income-tax, Bombay*(1). That decision laid down that where a share stood registered in two or more names, the registered holders treated as an association of persons must be regarded as the 'shareholder' under s.23A and they must be assessed accordingly. It further laid down that s. 23A did not say anything about equities or beneficial ownership; it was a procedural section and not a charging section. It created a notional income which was wholly artificial and did not in fact exist in the pocket of any shareholder. In a later decision in *Shree Shakti Mills Ltd.* v. *Commissioner of Income-tax, Bombay City*(2) the same High Court held that the expression 'shareholder' mentioned in s. 18 (5) of the Act meant the person who was shown as a shareholder in the register of the company and it was only the shareholder of a company who was entitled to the procedure

(1) (1946) 14 I.T.R 748. (2) (1948) 16 I.T.R. 187.

of processing permissible under ss. 16 (2) and 18(5) of the Act. This view was accepted by this Court in *Howrah Trading Co., Ltd.* v. *Commissioner of Income-tax, Central Calcutta* (1) where it said that no valid reason existed as to why the expression 'shareholder' as used in s. 18(5) should mean a person other than the one denoted by the same expression in the Indian Companies Act, 1913. A reference was made to the decision of the Bombay High Court in *Shree Shakti Mills Ltd.* v. *Commissioner of Income-tax, Bombay City*(2) and other decisions bearing on the subject. Similarly, we see no reason why the expression 'shareholder' in s. 23A should not have the same meaning, namely, a shareholder registered in the books of the company. It would be anomalous if the expression 'shareholder' has one meaning in s. 18(5) and a different meaning in s. 23A of the Act ; for that would mean that a Hindu undivided family treated as a shareholder for the purpose of s. 23A would not be entitled to the benefit of s. 18(5) of the Act.

The learned counsel for the appellant has urged two points in support of his contention that the expression 'shareholder' in s. 23A means the person who owns the share, irrespective of the circumstance whether that person is registered in the books of the company as a shareholder or not. His first point is that the very object of the section is to prevent avoidance of super-tax by the shareholders of a company, and if the beneficial owner of the shares is a Hindu undivided family, that family will not come within the purview of s. 23A, because a Hindu undivided family as such cannot be a shareholder in a company. The argument is that the narrow interpretation put on s.23 A will defeat the very purpose of the section. The second point urged is that the principle that a

(1) (1959) 36 I.T.R. 215. (2) (1948) 16 I.T.R. 187.

1961

The Commissioner of Income-tax, Bombay City II v. Shakuntala and two others, etc.

S. K. Das J.

legal fiction must be carried to its logical conclusion cannot be overlooked in construing s. 23A. The legal fiction enjoined by the section is that the profits must be "deemed to have been distributed as dividend amongst the shareholders as at the date of the general meeting". This legal fiction must be carried to its logical conclusion by holding that the dividend had been actually distributed and received by the Hindu undivided family. It is pointed out that if the same dividend were actually distributed by the company, it would certainly be income in the hands of the Hindu undivided family which would be liable to pay all taxes on its income, whether actual or artificial.

We do not think that either of the two points urged by the appellant is really decisive of the question. The question is really one of interpretation of s. 23A, and we must interpret s. 23A with reference to its own terms. The section in express terms says that "the proportionate share of each shareholder shall be included in the total income of the shareholder for the purpose of assessing his total income". The section does not talk of the beneficial owner of the share. It talks of the shareholder only. Section 18(5) of the Act deals with grossing up of dividend and two expressions occur therein : "owner of the security" and the "shareholder". So far as the expression "owner of the security" is concerned it may perhaps include a beneficial owner ; but it has been decided by this Court that the expression "shareholder" in s.18 (5) means the shareholder registered in the books of the company. As we have earlier said, no good reason exists as to why the expression "shareholder" in s. 23A shall not have the same meaning. Sub-sections (3) and (4) of s. 23A also make the position clear : they talk of members of the company and a Hindu undivided family as such is not a member of the company.

The position of a Hindu undivided family *vis-a-vis* a partnership was considered by this Court in *Charandas Haridas* v. *Commissioner of Income-tax Bombay* (1) *and Commissioner of Income-tax, Bombay* v. *Nandlal Gandalal* (2). It is not disputed that the Hindu undivided family as such was not a shareholder of the company in the present case. Therefore, so far as the notional income is concerned, we must go by the terms of s.23A and if there is any lacuna in the wording of the section, we cannot cure it in the guise of interpretation. The question here is not one of deciding the matter from the point of view of partnership law or Hindu law, as was the question in *Commissioner of Income-tax, Bombay* v. *Nandlal Gandalal* (2) which led to a difference of opinion. The question here is one of interpretation only and that interpretation must be based on the terms of the section. The fiction enacted by the Legislature must be restricted by the plain terms of the statute. Nor do we see how it can be said that the interpretation put on s.23A that it is confined to a shareholder registered in the books of the company defeats the very purpose of the section. The section will still apply to shareholders of the company and to their income will be added the notional income determined under s. 23A. We are unable to accept the argument that the principle that a legal fiction must be carried to its logical conclusion requires us to travel beyond the terms of the section or give the expression "shareholder" a meaning which it does not obviously bear.

For these reasons we are of the view that the High Court correctly answered the question which was referred to it. In view of that answer the High Court rightly held that the second question referred to it did not fall for

(1) (1960) 39 I. T. R. 202. (2) (1960) 40 I. T. R. 1.

1961

The Commissioner of Income-tax, Bombay City II v. Shakuntala and two others, etc.

consideration. The result, therefore, is that all these three appeals fail and must be dismissed with costs; one hearing fee.

Appeals dismissed.

S. K. Das J.

1961

July, 24.

SETH BIKHRAJ JAIPURIA

v.

UNION OF INDIA

(J. L. KAPUR, K. SUBBA RAO, M. HIDAYATULLAH, J. C. SHAH and RAGHUBAR DAYAL, JJ.)

Contract—Divisional Superintendent of Railway placing orders—Contract not expressed to be in name of Governor-General and not executed on behalf of Governor-General—Whether binding on Government—Government of India Act, 1935 (26 Geo. 6 Ch. 2) s. 175 (3).

In the year 1913 the Divisional Superintendent, East Indian Railway placed certain purchase orders with the appellant for the supply of foodgrains for the employees of the East Indian Railway. The orders were not expressed to be made in the name of the Governor-General and were not executed on behalf of the Governor-General as required by s. 175 (3) of the Government of India Act, 1935. They were signed by the Divisional Superintendent either in his own hand or in the hand of his Personal Assistant. Some deliveries of foodgrains were made under these orders and were accepted and paid for by the Railway Administration. But the Railway Administration declined to accept further deliveries of foodgrains. The appellant sold the balance of foodgrains under the purchase orders and filed a suit to recover the difference between the price realised by sale and the contract price. The respondent resisted the suit *inter alia* on the ground that the contracts were not binding on it.

Held, that the contracts were not binding on the respondent and it was not liable for damages for breach of the contracts. Under s.175(3) of the Government of India Act, 1935, as it stood at the relevant time, the contracts had: (a) to be expressed to be made by the Governor-General, (b) to be executed on behalf of the Governor-General and (c) to be executed by officers duly appointed in that behalf and in such manner as the Governor-General directed or authorised. The