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COMMISSIONER OF INCOME-TAX, MADRAS

v.

K. H. CHAMBERS, MADRAS

November 9, 1964

B [K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.]

The Income-tax Act, (XI of 1922), *s.* 25(4)—*Succession—What is—Finding regarding succession—High Court—Jurisdiction to review.*

Succession contemplated by s. 25(4) of the Indian Income-tax Act, (XI of 1922) involves change of ownership, that is, the transferor goes out and the transferee comes in. It connotes that the whole business is transferred. It also implies that substantially the identity and the continuity C of the business are preserved. If there is a transfer of a business, any arrangement between the transferor and the transferee in respect of some of the assets and liabilities, not with a view to enable the transferor to run a part of the business transferred but to enable the transferee to run the business unhampered by any load of debts, or, for any other appropriate collateral purpose, cannot detract from the totality of succession. [49 F-H]

D *Reynolds, Sons & Co. Ltd.* v. *Ogston H. M. Inspector of Taxes,* (1929) 15 T.C. 501, *Commissioner of Income-tax, Burma v. N. N. Firm,* (1934) 2 I.T.R. 85, *Commissioner of Income-tax, Burma* v. *A.L.V.R.P. Firm,* (1940) 8 I.T.R. 531, *Jittanram Nirmalram* v. *Commissioner of Income-tax, Bihar & Orissa,* (1953) 23 I.T.R. 288, *Malayalam Plantations, Ltd.* v. *Clark (H.M. Inspector of Taxes)* (1935) 19 T.C. 314, referred to.

The tests crystallised by decisions have given a legal content to the E expression "succession" in s. 25(4) of the Act and whether facts proved satisfy those tests would be a mixed question of law and fact. The High Court would therefore have jurisdiction under s. 66(1) of the Act, to ascertain the correctness of a finding given by the Tribunal on the question of succession. [52 D]

Meenakshi Mills, Madurai v. *The Commissioner of Income-tax, Madras,* [1956] S.C.R. 691, referred to.

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1106 of 1963.

Appeal by special leave from the judgment, dated December 21, 1960 of the Madras High Court in Case Referred No. 136 of 1956.

G *N. D. Kharkhanis* and *R. N. Sachthey,* for the appellant.

R. Ganapathy Iyer, for the respondent.

The Judgment of the Court was delivered by

Subba Rao, J. This appeal by special leave raises the question of the applicability of s. 25(4) of the Indian Income-tax Act, H hereinafter called the Act, to the assessment in question.

One G. A. Chambers was carrying on two businesses, one in the name and style of "Chambers & Co." and the other in the

name and style of "Chrome Leather Company". The first business was concerned with export of hides, skins and mica, insurance and shipping brokerage. The said Chambers & Co. was an assessee under the Indian Income-tax Act, 1918. As the business was in a bad way, in or about 1931 G. A. Chambers handed over the management of the said business to his son, K. H. Chambers. The change of management did not bring about any favourable turn in the affairs of the business. The appellant's case is that towards the end of 1932 G. A. Chambers transferred the business to his son, K. H. Chambers, and that after the said transfer, K. H. Chambers carried on the business in his own name till January 1, 1948, when the business was taken over by a limited company. For the assessment year 1948-49 K. H. Chambers claimed relief under s. 25(4) of the Act on the ground that the business had been assessed under the old Act of 1918 when it was carried on by his father, G. A. Chambers, and that the said Chambers transferred the business to him towards the end of 1932. The Income-tax Officer, by his order, dated March 18, 1949, held that K. H. Chambers did not take over the business of his father carried on in the name of "Chambers & Co." "as a whole running concern" and, therefore, the assessee was not entitled to relief under s. 25(4) of the Act. On appeal, the Appellate Assistant Commissioner agreed with the Income-tax Officer and held that the business carried on by K.H. Chambers was not the same business which was originally assessed under the old Act of 1918 in the hands of his father. On a further appeal, the Income-tax Appellate Tribunal came to the same conclusion and found that the identity of the business carried on by the father was lost in the hands of the son, as the entire business was not transferred to him. Ultimately the Tribunal referred the following question to the High Court of Madras for its opinion under s. 66(1) of the Act :

> "Whether on the facts and in the circumstances of the case the Tribunal was right in law in refusing relief under Section 25(4) of the Indian Income-tax Act to the assessee."

The High Court answered the aforesaid question in the negative in favour of the assessee; it held that the son succeeded to the business of his father after November 1932 and, thereore, there was succession within the meaning of s. 25(4) of the Act. Hence the appeal.

Mr. Karkhanis, learned counsel for the Revenue, raised before us two contentions, namely, (i) the question referred by the Tribunal to the High Court was only a pure question of fact and,

A therefore, the High Court has no jurisdiction to give its opinion thereon; and (ii) where the transferor retains the goodwill and most of the assets and the transferee carries on the same business with a part of the assets of the principal business, it cannot be said that there is succession to the whole of the business within the meaning of s. 25(4) of the Act.

B We shall take the second question first. G. A. Chambers, the father, was carrying on two independent businesses, one in the export of hides, skins and mica, in insurance and shipping brokerage under the name and style of "Chambers & Co." and the other under the name and style of "Chrome Leather Company". In C 1932, G. A. Chambers handed over the sole management of the former business to his son, K. H. Chambers. The son was managing the business, but not with any success. In July 1932, the son was going to foreign countries, presumably in connection with his business. On July 7, 1932, before the son left India, G. A. Chambers wrote a letter to him informing him that by the D end of August 1932 the sum of Rs. 40,000 invested by him in the business would run out, and that unless Rs. 60,000 was invested by him (the father), which he could not afford to risk, the business could not be conducted. He, therefore, suggested to his son that the Chambers & Co. could be wound up and that if he chose he could have the goodwill of the said Company so that he might E obtain some advantage from the goodwill and connections of Chambers & Co., either by interesting financially one or other of the firm's connections or by offering to work on a commission basis. On July 8, 1932, the son replied to the father to the effect that he would prefer to start right afresh in his own name or in the name of Chambers & Co.; he also suggested that he could get a F place for less rent and use a smaller staff; and requested his father to allow him to use the existing private codes. On December 5, 1932, G.A. Chambers asked his auditors, M/s. Fraser & Ross, to close the accounts of Chambers & Co. and send the balance-sheet, venture and profit and loss accounts for 8 months ending November 30, 1932, together with the schedule of accounts taken over by K. H. G Chambers showing the amount due to him from K. H. Chambers. In that letter G. A. Chambers informed the auditors that from December 1, 1932, K. H. Chambers would be running the export business separately in his own name; that he had asked Chambers & Co. "to close their accounts upto the end of November and transfer all such accounts to Messrs. Chambers and Company H relating to G. A. Chambers to us so that we may run Messrs. Chambers and Company's account at Chromepet." This letter was signed by G. A. Chamebrs on behalf of the Chrome Leather

Company. This letter shows that from December 1, 1932, K. H. Chambers would run the export business and that the accounts of G. A. Chambers in the Chambers & Co. would be transferred to the accounts of Chrome Leather Co. From that date the export business which K. H. Chambers was running earlier as manager would be continued by him in his own name; that is, instead of as manager, as its own proprietor. Pursuant to the instructions given by G. A. Chambers, M/s. Fraser & Ross, the auditors, prepared a balance-sheet of the Chambers & Co. and also the individual accounts of G. A. Chambers and K. H. Chambers. The balance-sheet shows that G. A. Chambers was given assets valued at Rs. 5,67,485-10-2 and liabilities valued at Rs. 5,95,433-12-3; K. H. Chambers was given assets valued at Rs. 55,214-2-3 and liabilities valued at Rs. 27,266-0-2. The liabilities given to K. H. Chambers includes the amount representing the difference between the value of the assets and liabilities given to G. A. Chambers. Broadly stated, the father had taken over the liabilities of the Company and assets, including buildings and machinery sufficient to discharge the liabilities, while the son was given the stock in trade and a small amount of debts. After this allotment, it is conceded that K. H. Chambers continued to operate the same lines of business as was carried on by Chambers & Co. taking over all the constituents of that business, using the same premises, the same telephone number, Post Box No., private codes and trade marks and the important sections of the staff that belonged to Chamber & Co. On May 23, 1933. G. A. Chambers wrote to the Liverpool and London and Globe Insurance Company, Calcutta, wherein he stated :

> "We confirm our conversation with your representative that inasmuch as we have transferred all our export business to Mr. K. H. Chambers, who is now running the business in his own name and at his own risk and responsibility, we shall be pleased if you will transfer the agency of your firm to him."

It is also conceded by the Department that G. A. Chambers utilized his good offices in getting the Liverpool and London and Globe Insurance Company to transfer the agency of that company to Chambers & Co. run by K. H. Chambers. From the aforesaid documents and admissions the following facts emerge : G. A. Chambers was conducting two businesses, one under the name and style of Chambers & Co. and the other under the name and style of Chrome Leather Company. The Chambers & Co. was doing export business. Some months prior to July 7, 1932, K. H.

A Chambers invested a sum of Rs. 40,000 in the business conducted by Chambers & Co. and was actually managing the same. The business was running at a loss and the father was not anxious to continue the business and, therefore, he made some alternative suggestions to his son. But the son was anxious to continue the business independently. The changeover was effected after the B accounts were audited and the balance-sheet was prepared by the Company's auditors; and the father took over the old liabilities and assets sufficient to discharge them and the business was handed over to the son. Thereafter, the son was carrying on the business of Chambers & Co. in his own name, in the same premises, taking over all the constituents of Chambers & Co., using C the same codes and trade marks and the important members of the staff of the Company. It is true that the name of Chambers & Co. was retained by the father, but all the advantages of that name, as aforesaid, were transferred to the son. It is also true that some substantial assets of Chambers & Co. were not transferred to the son, but they were retained by the father only for discharging the D debts in order to help the son to carry on the transferred business without being burdened with heavy debts. The taking over of the assets and liabilities by the father was not for the purpose of continuing to do a business of his own in the same lines, but to facilitate the carrying on of the transferred business by the son effectively and profitably. On these facts, can it be held that there was no succession to the business within the meaning of s. 25(4) of the Act? Though there is no clear and exhaustive definition of the expression "succession", decided cases and text-books throw some light on the subject. In *Simon's Income Tax*, Vol. 2, 2nd Edn., it is stated at pp. 137-138 :

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> "In particular, argument from decided cases has resulted in the acquisition by the word "succession" of a somewhat artificial meaning.....
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> 'In order to constitute a succession there must be, G broadly speaking, a taking over of the whole of the business concerned; ..... But if a business is taken over as a whole, the fact that minor assets of the business are omitted from the transfer will not prevent there being a succession. The fact that the purchaser already has a similar business is not a material H fact in establishing succession. The purchase of a business with a view to closing it down would not appear to constitute succession.

> Other questions which have been used as tests are : (1) whether a similar trade has been carried on after the transfer; (2) whether goodwill or other intangible assets are included in the transfer; (3) whether staff is taken over; (4) the treatment on transfer of the stock and debts of the transferor; (5) whether there was an interval in the carrying on of the trade as a result of the transfer'." (*Briton Ferry Steel Co., Ltd.* v. *Barry*, [1940] 1 K. B. 463, 476).

In *Reynolds, Sons & Co., Ltd.* v. *Ogston* (*H. M. Inspector of Taxes*)(1), Lord Hanworth, M. R., accepted the following tests laid down by Rowlatt, J., to ascertain whether there was a succession, namely :

> "You want to measure the income of the successor by the past history of the business, it is therefore essential that there should be a very close identity between the business of the former proprietorship and the business in the present proprietorship."

The Rangoon High Court in *Commissioner of Income-tax, Burma* v. *N. N. Firm*(2) had to consider the meaning of the word "succeeded" in s. 26(2) of the Income-tax Act. Page, C.J., giving the opinion of the Court, observed :

> "In order that a person should be held to have "succeeded" another person in carrying on a business, profession or vocation, it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole."

The Rangoon High Court again in *The Commissioner of Income-tax, Burma* v. *A. L. V. R. P. Firm*(3) reiterated the same principle. What is the meaning of the expression "whole business" has been the subject of other decisions. A Division Bench of the Patna High Court in *Jittanram Nirmalram* v. *Commissioner of Income-tax, Bihar & Orissa*,(4) after considering the relevant decisions, both English and Indian, said that it was sufficient if there was substantial identity or similarity in the nature and extent of the activities carried on between the two firms *i.e.*, the transferor and the transferee firms. The Court observed therein :

> "For the application of Section 26(2) or Section 25(4) it is not essential in every case that the successor

(1) (1929) 15 T.C. 501, 527.
(2) (1934) 2 I.T.R. 85, 87, 88.
(3) (1940) 8 I.T.R. 531.
(4) (1953) 23 I.T.R. 288, 296.

A firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers as belonging to the predecessor firm nor does it mean that the successor firm should have taken over all the different businesses which the predecessor firm had B carried on."

In *Malayalam Plantations, Ltd.* v. *Clark (H. M. Inspector of Taxes)* (1) the appellant-company therein, by an agreement dated March 28, 1928, acquired from another company, as from April 1, 1928, a rubber estate in India together with plantations, C nurseries, factories, plant etc., and the benefit of contracts and engagements whether with coolies or others, but did not take over any book debts or the vendor's selling organisation. It was contended that there had been no succession to a trade. In rejecting that contention, Finlay, J., observed :

D "The substance of what was done, I think, clearly was this. The thing was taken over as a going concern, taken over with the things growing on it, and with the coolies employed to work the estate. I am not going into it any further because it is essentially a question of fact, but I cannot avoid the view that there was material E upon which the Commissioners might arrive at the conclusion that there was a succession."

This is an authority for the position that if a business was taken over as a going concern the mere fact that some assets, which were not required by the successor for carrying on of the business, were not transferred to him would not make it anytheless a F succession in law. It is not necessary to multiply decisions. Succession involves change of ownership; that is, the transferor goes out and the transferee comes in; it connotes that the whole business is transferred; it also implies that substantially the identity and the continuity of the business are preserved. If there is a transfer of a business, any arrangement between the transferor G and the transferee in respect of some of the assets and liabilities not with a view to enable the transferor to run a part of the business transferred but to enable the transferee to run the business unhampered by the load of debts or for any other appropriate collateral purpose cannot detract from the totality of succession.

H In the present case, the export business of the father was carried on by the son. The whole of the business was transferred,

(1) (1935) 19 T.C. 314, 323.

the identity was preserved and the same business was continued. The father reserved for himself some assets for the purpose of discharging the debts. He did so not for the purpose of running the same business by himself but only to help the son to carry on the same business more effectively. If so, it follows that on the facts found or admitted there is a clear case of succession in the present case.

Learned counsel for the Revenue argued that whether there was succession or not was a pure question of fact and the High Court had no jurisdiction to question the correctness of the finding given by the Tribunal to the effect that there was no succession to the business.

This Court in *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax, Madras*(1) laid down the following propositions which are relevant to the question now raised before us :

(a) Where an ultimate finding on an issue is an inference to be drawn from the facts found, on the application of any principle of law, there is a mixed question of law and fact, and the inference from the facts found is, in such a case, a question of law and is open to review by the Court.

(b) Where the final determination of the issue does not involve an application of any principle of law, an inference from the facts is a pure inference of fact although it is drawn from other basic facts.

(c) The proposition that an inference from proved facts is one of law is therefore correct in its application to mixed questions of law and fact, but not to pure questions of fact.

In the case of pure questions of fact, the inference from proved facts being itself a question of fact can be attacked as being erroneous in law only if there is no evidence to support it or if it is perverse."

This distinction between a question of law and a question of fact was also brought out by some of the English decisions cited at the Bar. In *Bell (Surveyor of Taxes)* v. *The National Provincial Bank of England, Ltd.*(2) the Master of the Rolls observed :

"The finding of the Commissioners upon that part of the case is this : 'The Commissioners were of opinion

(1) [1956] S.C.R. 691.

(2) (1903) 5 T.C. 1, 10, 12.

A that there was no succession within the meaning of the said 4th Rule.' That is, as my brother Mathew has pointed out, not a finding in fact that there was no succession, but that the particular kind of succession which took place in this case was not a succession within the meaning of the 4th Rule. That is not a finding of
B fact, but a finding of law and construction based upon the fact that one existing Bank did acquire and take over, not for the purpose of extinction, but for the purpose of development, the existing business of another Bank existing in another place."

C So too, Mathew, L.J., stated :

> "'No succession' say the Commissioners within the meaning of the said 4th Rule. That is the proposition of law we have to decide as distinguished from fact, and we are entitled to differ from that view."

D In *Wilson and Barlow* v. *Chibbett* (*H. M. Inspector of Taxes*) (1) Rowlatt, J., observed :

> "The question was whether here there was a succession, which is a primary question of fact upon which, of course, it is possible the Commissioners might take
E a wrong view of the law and apply false law."

The learned Judge concluded thus :

> "All I can say is that I do not see my way to say that I can discern any sort of error in law here in the way in which the Commissioners have dealt with the
F case....."

These observations imply that if correct tests are not applied in coming to a conclusion whether there is succession or not in a particular case, it can be re-opened by the High Court. In *Malayalam Plantations, Ltd.* v. *Clark* (*H. M. Inspector of*
G *taxes*) (2), Finlay, J., after considering at some length the facts placed before him, refused to go further into the matter because the finding of succession was essentially a question of fact. But the facts in that case disclosed that the correct tests were applied and, therefore, no illegality was committed by the Commissioners.

The said decisions did not lay down that in every case the
H finding of succession is one of fact. Indeed, the first two decisions

(1) (1929) 14 T.C. 407, 412, 413.
(2) (1935) 19 T.C. 314, 323.

clearly maintained that a finding on a question whether a succession is one within the meaning of a particular provision or whether it is vitiated by any error of law is not final. The English view is also in accord with that expressed by this Court. A

The question, therefore, is whether a finding that a person succeeded another in his business within the meaning of s. 25(4) of the Act is a finding of fact. The expression "succession", as stated by Simon in his book on Income-tax, has acquired a somewhat artificial meaning. The cases we have considered *supra* and similar others have laid down some tests, though not exhaustive, to ascertain whether there is succession in a given case or not. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another. Unless the facts found by the Tribunal satisfy the said tests, the finding cannot be conclusive. The tests crystallized by decisions have given a legal content to the expression "succession" within the meaning of s. 25(4) of the Act and whether facts proved satisfy those tests is a mixed question of law and fact. If so, it follows that a question of law arose out of the Tribunal's order and the High Court has jurisdiction to ascertain the correctness of the finding given by the Tribunal on the question of succession. B C D

In the result, the appeal fails and is dismissed with costs. E

Appeal dismissed.