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JODHA MAL KUTHIALA

v.

COMMISSIONER OF INCOME TAX, PUNJAB, JAMMU & KASHMIR, HIMACHAL PRADESH AND PATIALA

September 9, 1971

B

[K. S. HEGDE AND A. N. GROVER, JJ.]

Income-tax Act, s. 9(1)—Property left by evacuee in Pakistan—Administered by Custodian under provisions of Pakistan (Administration of Evacuee Property) Ordinance 15 of 1949—Evacuee whether continues 'owner' of property for purpose of s. 9 of the Income-tax Act, 1922.

C

The assessee was a registered firm deriving income from securities, property, business and other sources. In 1946 it purchased a hotel in Lahore for a sum of Rs. 46 lacs. For that purpose it raised a loan of Rs. 30 lacs from a bank and a loan of Rs. 18 lacs from one R. The loan taken from the bank was largely repaid but with R the assessee came to an agreement whereby R accepted a half share in the said property in lieu of the loan advanced and also 1/3rd of the outstanding liability of the bank. This arrangement came into effect on November 1, 1951.

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After the creation of Pakistan, Lahore became a part of Pakistan and the hotel in question was declared evacuee property. As such it came to vest in the Custodian in Pakistan. In its returns for the assessment years 1952-53, 1955-56 and 1956-57 the assessee claimed certain amounts as losses on account of interest payable to the bank but showed the gross annual letting value from the said property at Nil. The Income-tax Officer held that since the property had vested in the Custodian no income or loss from that property could be considered in the assessee's case. The

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Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. The Appellate Tribunal however came to the conclusion that the assessee still continued to be the owner of the property for the purpose of the computation of loss, and the interest paid was a deductible allowance under s. 9(1)(iv) of the Income-tax Act, 1922. In reference the High Court on an analysis of the various provisions of the Pakistan (Administration of Evacuee Property) Ordinance 15 of 1949 came to the

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conclusion that for the purpose of s. 9 of the Act the assessee could not be considered as the owner of that property. In the assessee's appeal to this Court it was contended that the property vested in the Custodian only for the purpose of administration and the assessee still continued to be its owner.

HELD : Under the Pakistan (Administration of Evacuee Property) Ordinance 1949 the evacuee could not take possession of his property. He could not lease that property. He could not sell the property without

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the consent of the custodian. He could not mortgage that property. He could not realise the income of the property. All the rights that the evacuee had in the property were exercisable by the Custodian excepting that he could not appropriate the proceeds to his own use. The evacuee had only a beneficial interest in the property. In the eye of the law the Custodian who had all the powers of the owner was the owner of the property. His position was no less than that a Trustee. [643 F-644 A]

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Section 9 of the Income-tax Act, 1922, brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence for the purpose of s. 9 the owner must be

that person who can exercise the rights of the owner, not on behalf of the owner but in his own right. Accordingly the assessee was not the owner of the property in question during the relevant assessment years for the purpose of s. 9 of the Act. [644 D]

It is true that equitable considerations are irrelevant in interpreting tax laws. But those laws like all other laws have to be interpreted reasonably and in consonance with justice. If the thousands of evacuee who left practically all their properties as well as businesses in Pakistan had been considered as the owners of those properties and businesses as long as the 'ordinance' was in force then those unfortunate persons would have had to pay income-tax on the basis of the annual letting value of their properties and on the income, gains and properties of the business left by them in Pakistan though they did not get a paisa out of those properties and business. Fortunately no one in the past interpreted the law in the manner suggested by the assessee. [644 E-G]

Official Assignee for Bengal (Estate of Jnanendra Nath Pramanik), 5 I.T.R. 233, *Commissioner of Inland Revenue* v. *Fleming*, 14 T.C. 78 and *Sir Currimbhoy Ibrahim Baronetcy Trust* v. *C.I.T., Bombay*, 2 I.T.R. 148, applied.

Amar Singh v. *Custodian, Evacuee Property, Punjab*, [1957] S.C.R. 801, distinguished.

P. C. Lal Choudhary v. *C.I.T.*, 16 I.T.R. 123 and *Nawab Bahadur of Murshidabad* v. *C.I.T., West Bengal*, 28 I.T.R. 510, considered.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1970 to 1973 of 1968.

Appeals from the judgment and order dated September 20, 1967 of the Delhi High Court in Income-tax Reference Nos. 2 and 3 of 1967.

V. C. Mahajan and *H. K. Puri*, for the appellant (in all the appeals).

V. S. Desai, *R. N. Sachthey* and *B. D. Sharma*, for the respondent (in all the appeals).

The Judgment of the Court was delivered by

Hegde, J. In these appeals by certificate, the only question arising for decision is : "whether on the facts and in the circumstances of the case, the assessee continued to be the owner of the property for the purposes of computation of income under s. 9 of the Income-tax Act, 1922" (to be hereinafter referred to as the Act). A Full Bench of the Delhi High Court speaking through S. K. Kapur, J. answered that question in the negative. Being dissatisfied with that decision the assessee has brought these appeals.

Now turning to the facts of the case, the concerned assessment years are 1952-53, 1955-56 and 1956-57, the relevant accounting periods being financial years ending March 31, 1952, March 31, 1955 and March 31, 1956. The assessee is a registered

A firm deriving income from interest on securties, property, business and other sources. Sometime in the year 1946 it purchased the Nedous Hotel in Lahore for a sum of Rs. 46 lakhs. For that purpose it raised a loan of Rs. 30 lakhs from M/s. Bharat Bank Ltd., Lahore and a loan of Rs. 18 lakhs from the Raja of Jubbal. The loan taken from the bank was partly repaid but as regards B the loan taken from the Raja, the assessee came to an agreement with the Raja under which the Raja accepted a half share in the said property in lieu of the loan advanced and also 1/3rd of the outstanding liability of the bank. This arrangement came into effect on November 1, 1951. After the creation of Pakistan, declared an evacuee property and consequently vested in the C Custodian in the Pakistan.

In its return for the relevant assessment years, the assessee claimed losses of Rs. 1,00,723/- Rs. 1,16,599/- and Rs. 1,16,599/- respectively but showed the gross annual letting value from the said property at Nil. The loss claimed was stated D to be on account of interest payable to the bank. Since the property in question has vested in the Custodian of Evacuee Property, in Pakistan, the Income-tax Officer held that no income or loss from that property can be considered in the assessee's case. He accordingly disallowed the assessee's claim in respect of the interest paid to the bank. The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. In second appeal E the Tribunal came to the conclusion that the assessee still continued to be the owner of the property for the purpose of computation of loss. The Tribunal held that the interest paid is a deductable allowance under s. 9(1)(iv) of the Act. In arriving at that conclusion, the Tribunal relied on its earlier decision in the case of the assessee in respect of the assessment year 1951-52. F Thereafter at the instance of the assessee, the Tribunal submitted the question set out earlier. The High Court on an analysis of the various provisions of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 (XV of 1949) (to be hereinafter referred to as the 'Ordinance') came to the conclusion that for the purpose of s. 9 of the Act, the assessee cannot be considered as G the owner of that property.

It was urged by Mr. V. C. Mahajan, learned Counsel for the assessee that the High Court erred in opining that the assessee was not the owner of the property, for the purpose of s. 9 of the Act. According to him the property vested in the Custodian only H for the purpose of administration and the assessee still continued to be its owner. He contended that the expression "owner" means the person having the ultimate right to the property. He further contended that the so long as the assessee had a right to that

property in whatever manner that right might have been hedged in or restricted, he still continued to be the owner. On the other hand, it was contended on behalf of the Revenue that the Income-tax is concerned with income, gains and profits. Therefore for the purpose of that Act, the owner is that person who is entitled to the income. According to the Revenue the word "owner" in s. 9 refers to the legal ownership and not to any beneficial interest in the property.

For deciding the question whether the assessee was the owner of the property for the purpose of s. 9 of the Act during the relevant accounting years, we have to look to the provisions of the Ordinance. Let us first take a survey of the relevant provisions of the Ordinance and thereafter analyse the effect of those provisions.

The long title of the Ordinance says that it is an Ordinance to provide for the administration of the evacuee property in Pakistan and for certain matters incidental thereto. The preamble says that "whereas an emergency has arisen which renders it necessary to provide for the administration of evacuee property in Pakistan and for certain matters incidental thereto". Section 6(1) provides that all evacuee property shall vest and shall be deemed always to have vested in the Custodian with effect from the 1st day of March 1947. Section 9 gives power to the Custodian to take possession of the evacuee property. Section 11 provides that any amount due to an evacuee or payable in respect of any evacuee property, shall be paid to the Custodian by the person liable to pay the same and the payment to the Custodian discharges the debtor's liability to the extent of the payment made. Section 12 prescribes that the property which has vested in or of which possession has been taken by the Custodian shall be exempt from all legal process, including seizure, distress, ejectment or sale by any officer of a Court or any other authority and no injunction or other order of whatever kind in respect of such property shall be granted or made by any Court or any other authority. Section 14(1) permits the Rehabilitation Authority to allot evacuee property to the refugees. Section 16(1) says that no creation or transfer of any right or interest in or encumbrance upon any property made in any manner whatsoever on or after the first day of March, 1947 by or on behalf of an evacuee or by or on behalf of a person who has or may become an evacuee after the date of such creation or transfer, shall be effective so as to confer any right or remedy on any party thereto or on any person claiming under any such party, unless it is confirmed by the Custodian. Section 19 empowers the Custodian to restore the evacuee property to the lawful owner subject to such conditions as he may be pleased to impose. Section 20(1) stipulates that the Custodian may take such measures as he considers

A necessary or expedient for the purpose of administering, preserving and managing any evacuee property which has vested in him and may for any such purpose as aforesaid, do all acts and incur all expenses necessary or incidental thereto. Sub-s. (2) of that section provides that "without prejudice to the generality of the provisions contained in sub-s. (1), the Custodian may,

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> (m) sell any evacuee property, notwithstanding anything contained in any law or agreement to the contrary relating thereto,
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> Provided that the Custodian shall not under this
C Clause or the next succeeding clause sell any immovable evacuee property or any business or undertaking which is evacuee property, except with the previous approval of the Central Government."

Clause (i) of that sub-section empowers the Custodian to
D demolish or dismantle any evacuee property which in his opinion cannot be repaired, or sell the site of such property and the materials thereof. The Custodian can recoup all the expenses incurred by him in the administration of the evacuee property from out of the receipts in his hand in respect of that property, Section 22(1) requires the Custodian to maintain separate account
E of the property of each evacuee of which he has taken possession and shall cause to be made therein entries of all receipts and expenditure in respect therof.

The Ordinance starts by saying that it is an Ordinance to provide for the administration of evacuee property and not management of evacuee property. The expression "administra-
F tion" in relation to an estate, in law means management and settling of that estate. It is a power to deal with the estate. The evacuee could not take possession of his property. He could not lease that property. He could not sell that property without the consent of the Custodian. He could not mortgage that property. He could not realise the income of the property. On the
G other hand, the Custodian could take possession of that property. He could realise its income. He could alienate the property and he could under certain circumstances demolish the property. All the rights that the evacuee had in the property he left in Pakistan were exercisable by the Custodian excepting that he could not appropriate the proceeds for his own use. The evacuee could
H not exercise any rights in that property except with the consent of the Custodian. He merely had some beneficial interest in that property. No doubt that residual interest in a sense is ownership. The property having vested in the Custodian, who had

all the powers of the owner, he was the legal owner of the property. In the eye of the law, the Custodian was the owner of that property. The position of the Custodian was no less than that of a Trustee. Section 9(1) says :

> "The tax shall be payable by an assessee under the head "Income from Property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax subject to the following allowances namely :—

The question is who is the "owner" referred to in this section ? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property It must be remembered that s. 9 brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence for the purpose of s. 9, the owner must be that person who can exercise the rights of the owner, not on behalf of the owner but in his own right.

For a minute, let us look at things from the practical point of view. If the thousands of evacuees who left practically all their properties as well as business in Pakistan had been considered as the owners of those properties and business as long as the 'Ordinance' was in force then those unfortunate persons would have had to pay income-tax on the basis of the annual letting value of their properties and on the income, gains and profits of the businesses left by them in Pakistan though they did not get a paisa out of those properties and businesses. Fortunately no one in the past interpreted the law in the manner Mr. Mahajan wants us to interpret. It is true that equitable considerations are irrelevant in interpreting tax laws. But these laws, like all other laws have to be interpreted reasonably and in consonance with justice.

The question as to who is the owner of a house property under s. 9 of the Act in circumstances similar to those before us came up for consideration before the Calcutta High Court in the matter of *The Official Assignee for Bengal (Estate of Jnanendra Nath Pramanik)* (1). In that case on the adjudication of a person as insolvent under the Presidency Towns Insolvency Act, 1909, certain house property of the insolvent vested in the Official Assignee. The question arose whether the Official Assignee

(1) 5, I.T.R. 233.

A could be taxed in respect of the income of the property under s. 9. The High Court held that the property did not by reason of the adjudication of the debtor cease to be a subject fit for taxation and in view of the provisions of s. 17 of the Presidency Towns Insolvency Act, the Official Assignee was the "owner" of the property and he could rightly be assessed in respect of the income B from that property under s. 9. Section 17 of the Presidency Towns Insolvency Act, reads:

> "On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this C Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose: D
>
> Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner, as he would have been entitled to realise or deal with it if this section had not been passed."

E We may note that the powers of the Custodian are no less than that of the Official Assignee under the Presidency Towns Insolvency Act, 1909. Delivering the judgment of the Court in the *Official Assignee's case*(1), Costello, J. observed:

> "With regard to the first point, Mr. Page argued that although by section 17 of the Presidency Towns F Insolvency Act these properties vested in the Official Assignee he did not thereby or thereupon become the owner of those properties within the meaning properly ascribable to that word for the purposes of the applicability of Section 9. What Mr. Page really invited us to do was to restrict the meaning of the word by putting G before it the qualifying adjective "beneficial". What was argued by Mr. Page was that the Official Assignee had no legal interest in the properties themselves, they were merely vested in him for the purposes of the administration of them in the interest of the creditors of the insolvent. I am unable to accept Mr. Page's contention. In this country there is no difference H between "legal estate" and "equitable estate". In this connection the case of *Sir Currimbhoy Ebrahim Baro-*

(1) 5 I.T.R. 233.

netcy Trust v. *Commissioner of Income-tax, Bombay* 61, I.A. 209) is of assistance. At page 217 Sir Sydney Rowlatt when giving the judgment of the Privy Council made this observation: "In their Lordships" opinion the effect of the Act creating these trusts is not to give the baronet for the time being any right to any part of the interest or property specifically or any right which, even granting that the legal title is not the only thing that can ever be looked at, would make it true to say that any proportion of the interest is not 'receivable' or any proportion of the property is not 'owned' by the incorporated trustees."

The learned judges of the Calcutta High Court in reaching that conclusion relied on the decision in *The Commissioner of Inland Revenue* v. *Fleming*(1). That appeal related to a claim for repayment of income-tax to which the respondent claimed to be entitled in respect of "personal allowance" introduced into the Income-tax system by s. 18 of the Finance Act, 1920. The claim arose in the following circumstances:

The respondent was declared insolvent in 1921. He was then the owner of heritable properties. His insolvency lasted till May 10, 1926. When he received his discharge on payment of composition and was reinvested in his estate. At that time his estate consisted of (1) Two of the original heritable properties which had not been realised by the trustee in the insolvency and (2) a balance in cash of £ 53 odd. During the insolvency, the trustee paid income-tax on the full annual value of the two properties in question. The contention of the respondent was that the radical right to these properties was in him all that time; and that; in paying the tax, the trustee was really paying it on his behalf—that is, on his income—and that consequently there arose in each of the years in which the payment was made a right to deduct his "personal allowance" from the annual value of the properties. The right to this abatement is said to have passed to the Respondent himself in virtue of the reinvestment in his estate which occurred upon his discharge on composition. Rejecting this contention Lord President observed:

> "It is obvious that, unless during the years in question the annual value of the properties was income of the Respondent, he cannot have any claim to abatement of it for income-tax purposes; and accordingly everything depends upon the soundness of the proposition that the income consisting in the annual value of

(1) 14, Tax Cases 78.

A these properties was truly income of the Respondent. I do not see how it can possibly be so described. It was part of the income arising from the sequestrated estates vested in the trustee for the Respondent's creditors. Any income that did arise from those estates was income of the trustee as such, and he (and he alone) B had the right to put it into his pocket as income. It was not income that went or could go into the pocket of the Respondent as income in any of the years in question. How then can it be said to have reached his pocket as income on his subsequent reinvestiture."

C For determining the person liable to pay tax, the test laid down by the court was to find out the person entitled to that income. An attempt was made by Mr. Mahajan to distinguish this case on the ground that under the corresponding English statute the liability to tax in respect of income from property is not laid on the owner of the property. It is true that s. 82 of the English Income-tax Act, 1952 is worded differently. But the D principles underlying the two statutes are identical. This is clear from the various provisions in that Act.

The conclusion reached by Costello, J. in *Official Assignee's* case(1) receives support from the decision of the Privy Council in Trustees of *Sir Currimbhoy Ibrahim Baronetcy Trust* v. *Commissioner of Income-tax, Bombay*(2). The Counsel for the appellant E was unable to point out to us any decision which has taken a view contrary to that taken in *Official Assignee's* case(1).

The learned judges of the High Court in reaching their conclusion that the assessee was not the owner of the property in the relevant assessment years, took assistance from the decisions of English courts dealing with the question of levy of income-tax F on the income from enemy properties taken possession of by the Custodian during war. In those cases the English judges have enunciated the theory of suspended ownership. We do not think that we need call assistance from those decisions.

Mr. Mahajan contended that despite the fact that evacuee G property was taken over by the Custodian and that he had been conferred with large powers to deal with it, an evacuee from Pakistan who owned that property before he migrated to India still continued to be the owner of the property. For this contention of his he placed reliance on some of the observations of this Court in *Amar Singh* v. *Custodian, Evacuee Property, Punjab*(3) Therein delivering judgment of the Court Jagannadhadas, J H observed (at p. 815 of the report) :

(1) 5 I.T.R. 233.
(2) 2, I.T.R. 148.
(3) [1957] S.C.R. 801

"Stopping here it will be seen that the position, in its general aspect, is that all evacuee property is vested in the Custodian. But the evacuee has not lost his ownership in it. The law recognised his ultimate ownership subject to certain limitations. The evacuee may come back and obtain return of his property, as also an account of the management thereof by the Custodian."

Those observations have to be understood in the context in which they were made. Therein, their Lordships were considering whether the right of an evacuee in respect of the property left by him in the country from which he migrated was property right for the purpose of Art. 19(1)(I)(f) of the Constitution. No one denies that an evacuee from Pakistan has a residual right in the property that he left in Pakistan. But the real question is, can that right be considered as ownership within the meaning of s. 9 of the Act. As mentioned earlier that section seeks to bring to tax income of the property in the hands of the owner. Hence the focus of that section is on the receipt of the income. The word "owner" has different meanings in different contexts. Under certain circumstances a lessee may be considered as the owner of the property leased to him. In Stroud's Judicial Dictionary (3rd Edn.), various meanings of the word "owner" are given. It is not necessary for our present purpose to examine what the word "owner" means in different contexts. The meaning that we give to the word "owner" in s. 9 must not be such as to make that provision capable of being made an instrument of oppression. It must be in consonance with the principles underlying the Act.

Mr. Mahajan next invited our attention to the observations in Pollock on Jurisprudence (6th Edn. 1929) 178-80 : "Ownership may be described as the entirety of the powers of use and disposal allowed by law... The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere".

It is not necessary to consider whether those observations hold good even now because of the various legislative measures enacted during the last about forty years after those observations were made. Suffice it to say that those observations are inapplicable to the case of the "owner" under s. 9 of the Act.

A Mr. Mahajan in support of his contention next placed reliance on the decision of the Patna High Court in *Raja P. C. Lal Choudhary* v. *Commissioner of Income-tax*(1). Therein the question was whether the receiver of a property appointed by court was the owner of the property for the purpose of s. 9 of the Act. The court came to the conclusion that he was not the owner as B the property did not vest in him. In fact in the course of the judgment, the court made a distinction between a receiver and a trustee and an official assignee. In our opinion this decision instead of supporting the case of the appellant may lend some support to the contention of the Revenue.

C Reliance was next placed on the decision of the Calcutta High Court in *Nawab Bahadur of Murshidabad* v. *Commissioner of Income-tax, West Bengal*(2). The facts of that case were :

Properties which belonged to the ancestors of the Nawab of Murshidabad as Rulers, were, some time after the territories had been conquered by the British, settled by the Secretary of State D for India in the year 1891 on the then Nawab of Murshidabad under a deed of settlement which provided that such properties "shall henceforth and for ever be held and enjoyed by the said Nawab Bahadur and such one among his lineal male heirs as may be successively entitled to hold the said title in perpetuity, with and subject to the incidents, power, limitations and conditions as to the inalienability and otherwise hereinafter contained". E One of the conditions was that he was not entitled to sell or alienate the properties except with the approval of the Governor of Bengal. The Settlement deed was confirmed by Act XV of 1891. The question arose whether Nawab of Murshidabad was liable to pay tax in respect of the income of those properties under s. 9 of the Act. The Court held that whatever might have F been the original nature of the "State properties", after the deed of settlement and the Act of 1891, as the dual status of the Nawab as the holder of the State and as an individual ceased, it could not be said that the Nawab for the time being was not the "owner" of such properties for the purposes of s. 9 of the Act and the Nawab was therefore liable to be assessed to income-tax on the G income of such properties. The Court further held that the word "owner" in s. 9 of the Act applies to owners of the whole income, even though they are under certain restrictions with regard to the alienation of the properties. We are unable to see how this decision gives any support to the contentions advanced on behalf of the assessee.

H After giving our careful consideration to the question of law under consideration, we have come to the conclusion that the

(1) 16, I.T.R. 123. (2) 28, I.T.R. 510.

assessee was not the owner of Neadous Hotel during the relevant assessment years for the purpose of s. 9 of the Act. Hence these appeals fail and they are dismissed. In the circumstances of the case we make no order as to costs in these appeals.

G.C.

Appeals dismissed.