M. A. Jabbar vs Commissioner Of Income-Tax, Andhra ... on 23 November, 1967

Equivalent citations: 1968 AIR 745, 1968 SCR (2) 413, 1968 2 SCJ 133, AIR 1968 SUPREME COURT 745, 1968 2 ITJ 5, 1968 2 SCR 413, 11968 1 SCWR 618, 68 ITR 493

Author: Vishishtha Bhargava

Bench: Vishishtha Bhargava, J.C. Shah, V. Ramaswami

PETITIONER:
M. A. JABBAR

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX, ANDHRA PRADESH,HYDERABAD

DATE OF JUDGMENT:
23/11/1967

BENCH:
BHARGAVA, VISHISHTHA
BENCH:
BHARGAVA, VISHISHTHA
SHAH, J.C.
RAMASWAMI, V.

CITATION:
1968 AIR 745 1968 SCR (2) 413
CITATOR INFO :
F 1973 SC 15 (5)
D 1987 SC 564 (4)
RF 1991 SC 227 (11)

ACT:
Income-tax-Lease of land for removing sand-Provision for payment of lease money-Tests for determining whether capital or revenue expenditure.

HEADNOTE:
The assessee was carrying on the business of supplying lime and sand, and for the purpose of procuring sand, obtained a lease of a river bed from the State Government, for a. period of 11 months. The lease deed provided, (a) for the

payment of a large amount of lease money, (b) that the lessee (assessee) was to have an exclusive right to enter upon and occupy the land and to carry away sand within or under or upon the land, and (c) that if any mineral was discovered and the assessee -intimated his intention not to work or failed to give any intimation to work it, would be open to the Government to sublet the working of such newly discovered mineral.

The assessee paid the lease money and in proceedings for assessment of income tax claimed it as a deduction on the basis that it was a revenue expenditure. The Income-tax Officer disallowed the claim holding that it was capital expenditure. On appeal, the Appellate Assistant Commissioner, after a personal investigation, found that the contract was for removal 1 of sand lying on the surface of the land and that no excavation or skillful extraction was involved in the process, and held, that no interest in the land was conveyed to, the lessee and that therefore the amount was deductible as revenue expenditure. The Appellate Tribunal confirmed the order observing that the finding of fact given by the Appellate Assistant Commissioner was not challenged before the Tribunal. On reference, the High Court, relying on the terms of the lease, reversed the finding of fact that the contract was for removal of sand lying on the surface of the land- and that no excavation or skillful extraction was involved, and held that,the assessee bad acquired a right in the land and that the amount was not deductible.

In appeal to this Court,

HELD. :(I) The clauses in the lease deed, giving an exclusive right to the assessee to enter upon and occupy the land, and referring to the right of the Government to sublet the working of any newly discovered mineral, indicate that the assessee was the lessee and that an interest in land was conveyed to him by the lease. But that is.not decisive of the question whether the money paid under the lease was a capital or a revenue expenditure. That question has to be decided on the facts of each case and the decisive factors are the object with which the lease was take and the nature of the payment which was made when obtaining the leas-.-. [416 C-E; 418 A]

(2) In spite of the right given to the assessee to dig and excavate, the Appellate Assistant Commissioner found as a fact that the sand was lying loose on the surface and that the contract was only for removal of Sup.Cf/68 -1 2

414

that sand. The finding was affirmed by the Appellate Tribunal and is no question was referred to the High Court that it was a finding based on no evidence, the High Court was in error in not accepting it. Therefore, (a) as the lease was for a short period, and consequently, the expenditure incurred by the assessee was not related to the acquisition of an asset or of a right of an enduring nature

or permanent character but merely to obtain his stock-in-trade in the form of sand; and (b) as the expenditure was incurred not for the reservation of a source which had to be excavated or skillfully worked but for the specific object of enabling the assessee to remove sand lying loose on the surface of the land, the expenditure was deductible as revenue expenditure. [417 D-E, G-H, 419 A-B]

Gotan Lime Syndicate v. Commissioner of Income-tax, Rajasthan and Delhi, 59 I.T.R. 718 and Bombay Steam Navigation Co. (1953) (P.) Ltd. v. Commissioner of Income-tax, 56 I.T.R. 52, 59 followed.

K.T.M.T.M. Abul Kayoom & Anr. v. Commissioner of Income-tax, 44 I.T.R. 689, distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2514 and 2515 of 1966.

Appeals from the judgment and order dated March 4, 1965 of the Andhra Pradesh High Court in R. C. No. 15 of 1963. Y. V. Anjanevulu and Anwaru llah Pasha, J. B. Dadachanii and O. C. Mathur, for the appellant (in both the appeals).

S. T. Desai, R. N. Sachthey and S. P. Nayar, for the respondent (in both the appeals).

The Judgment of the Court was delivered by Bhargava, J. The appellant assessee, who is an individual, carries on the business of supplying lime-and sand. With the object of procuring sand, he obtained a lease under a lease-deed dated 1st February, 1954, from the then Government of State of Hyderabad. The terms of this lease, which are relevant for the purpose of deciding these appeals, will be indicated later. At this stage, it may be mentioned that, under this lease, the assessce was required to pay a sum of Rs. 82,500/- as lease money to the Government. The period of lease was from 1st February, 1954 to 31st December, 1954. The assessee's account year ends with the last day of September each year. The assessee paid a sum of Rs. 56,1001- in respect of the account year ended 30th September, 1954 for the assessment year 1955-56, and another sum of Rs. 26,400/- for the account year ended 30th September, 1955 relevant to the assessment year 1956-57. Both these payments were claimed by the assessee, in the proceedings for assessment to income-tax, as revenue expenditure. The Income-tax Officer held that, under the lease-deed, the assessee had secured a right to quarry sand from the river-bed, which was a right in the nature of a capital asset, so that these payments made to secure the right were capital expenditure, and disallowed their deduction as reve-

nue expenditure. The assessee appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, in addition to the material provided by the terms of the lease-deed and other material before him, made a personal investigation also. Thereafter, in his appellate order, he recorded findings that the lease was a short-term contract for one year, that the contract was for

removal of sand lying on the surface of the river-beds. within a specified period, and no excavation or skillful extraction was involved in the process, and that no interest in the land was conveyed to the lessee, and if the lessee discovered any minerals not specified in the deed, he was required to report that fact to the Director of Mines and obtain a prospecting licence separately. On these facts, he held that what the assessee had secured under the lease-deed was only stock-in-trade of his business and not a capital asset, so that his claim that the payments made by him Linder the lease-deed to the Government were deductible as revenue expenditure was allowed. Thereupon an appeal was brought before the Income-tax Appellate Tribunal by the Department. 'Re Tribunal upheld the order of the Appellate Assistant Commissioner. At the instance of the Department, the Tribunal then referred the following question for opinion to the High Court "Whether, on the facts and in the circumstances of the case, the payments of Rs. 56,100 for the assessment year 1955-56 and Rs. 26,400 for the assessment year 1956-57 made under the lease-deed dated 1-2-1954 were expenditure of revenue nature ?"

The High Court answered the question in the negative, accepting the case of the Department, and thus upsetting the decision given by the Appellate Assistant Commissioner and the Tribunal. The assessee has now come up to this Court in appeal by certificate granted by the High Court. Learned counsel appearing for the assessee first contended before us that an examination of the terms of the lease-deed would show that no right at all in land was acquired by the assessee Linder the lease and that the only right which had been acquired was the right to remove sand lying on-the land constituting the beds of the river and the nallahs specified in the deed and the ancillary right to enter the land for that purpose. It appears to, us that, on the language of the lease-deed, this submission cannot be accepted. The lease specifically mentions in para. 3 that, under it, the Government do hereby demise and grant unto the Lessee exclusive lease and liberty to enter, occupy, and use for quarrying purpose and to raise, render marketable, carry away, sell and dispose of sand within or under or upon the lands specified in this lease and for the period named therein. Thus, there was a specific provision that the lessee was to have an exclusive right to enter and occupy the land. Further, there was a provision that, in. case any mineral not specified in the lease was discovered in this land, the lessee was to report such discovery to the Director of Mines and Geology and could obtain either a prospecting licence or a mining lease in respect of it, but, if he intimated his intention of not working the newly discovered mineral, or failed to give any intimation to work it within the period of three months, it would be open to the Government to sublet the working of such newly discovered mineral. This use of the word "sublet" in the deed indicates that, though the Government reserved to it the right to allow some other person to work the newly discovered mineral, that person could only be admitted as a sub-lessee and, obviously, he would be the sub-lessee under -the assessee. These terms do indicate that an interest it). land ,was also conveyed by the lease; but that is, in our opinion, not decisive of the question whether the money payable under the lease was a capital expenditure or a revenue expenditure. As -an example, if a shop is taken on rent by a person to run his business and he pays monthly or annual rent, he certainly acquires an interest in the building and the land on which it stands as a

lessee, but no one will contend that the payment of rent would be an expenditure of a capital nature and not revenue expenditure. The decisive. factor is. the object with which the lease is taken and the nature of the payment which is being made when obtaining the lease.

In the present case, there are, a number of factors which lead to the conclusion that the expenditure incurred by the asscssee in obtaining the lease *as revenue expenditure for the purpose of obtaining stock-in-trade and not capital expenditure. The first point is that the lease was for a very short period of 11 months only. Consequently, it is clear that the assessee did not obtain any capital asset of an enduring nature by obtaining this lease. Then the second circumstance is that the sole right which was acquired by him under the lease-deed was to take away the sand lying on the leased land. No doubt, the document mentioned that he was entitled to raise, render marketable, carry away, sell and dispose of the sand within or under or upon the land specified in this lease; but there was a clear finding of fact recorded by the Appellate Assistant Commissioner and affirmed by the Tribunal that all the sand that could be removed was lying on the surface and there was, no question of raising, digging or excavating for the sand before obtaining it. No operations were, therefore, to be performed on the land itself. It appears that the High ,Court, in giving its decision against the assessee, fell into an error in not accepting the finding of fact that the sand was lying` loose on -the surface and the contract was only for removal Of that sand and, instead, recording for itself a different -finding. In its appellate order, the Tribunal mentioned the findings of fact recorded by the Appellate Assistant Commissioner and added : "It is to be noted that the findings of fact given by the Appellate Assistant Commissioner as quoted from this order above have not at all been challenged before us in these appeals." The findings of fact. to which this sentence referred, included the finding recorded.by the Appellate Assistant Commissioner that it was a contract for removal of sand lying on the surface of the river-beds within a specified period and no excavation or skillful extraction was involved. No doubt, this finding of fact was partially based on the personal investigation made by the Appellate Assistant Commissioner and this investigation was made, as held by the High Court, about six years after the lease contract had been entered into. The High Court was of the view that it was difficult to see how, after a lapse of six years, the terms of the lease deed could be varied, altered or clarified so as to confer any benefit on the lessee, and that the lease-deed contained absolutely no references to the accumulation of sand as the result of floods. its lying loose on the surface and the lessee being allowed to remove the sand merely from the surface without digging underneath. In examining this question of fact, it is clear that the High Court exceeded its jurisdiction. The finding of fact recorded by the Appellate Assistant Commissioner had been affirmed by the Tribunal and no question was referred to the High Court that it was a finding which was based on no evidence. Whether the evidence on which the finding was accepted by the Tribunal was good or bad did, not fall for consideration by the -High Court.- The finding being binding on the High Court, that Court should have proceeded on the basis that these facts did

exist and should have examined the legal position on that premise. This circumstance that the sand was lying loose and merely required removal without any excavation or digging makes it clear that what the assessee was taking under the lease for the purpose of his business was the right to remove that sand and that,he was not acquiring the land or any other rights in the land for any other purpose. Then, there is the additional fact that the lease was for a very short period of 11 months. On these facts, the conclusion was irresistible that, in agreeing to pay this large sum of Rs. 82,500/the assessee was bargaining for the right to remove the sand lying loose on the land within that short period of II months to the extent to which he could do so. He did not acquire any fixed or capital asset of an enduring nature by obtaining this lease and all he had in view was to have the right to obtain his stock-in- trade in the form of sand.

During the course of arguments before us, a number of cases were brought to our notice which related to quarrying leases of various types in India and in England. We do not consider it necessary to refer to those cases, because the question whether a particular expenditure, is of a capital nature or is a revenue expenditure has always to be decided on the special facts of each case. We may, however, make a reference to the decision of this Court in Gotan Lime Syndicate v. Commissioner of Income-tax, Rajasthan and Delhi(1). In that case also, Rule 13 of the Rajasthan Minor Mineral Concession Rules, 1955, which was applicable, provided that the lease shall be in respect of plots comprising of 5 square miles each. The lessee was even entitled to transfer his lease or any right, title or interest therein to a person holding a certificate of approval on payment of a fee, subject to the previous sanction of the Director of Mines and Geology. and subject to some other conditions. Rule 18 prescribed a period of 5 years for a lease and the lease was renewable at the ,option of the assessee for a further period of five years. Even ,on these facts, this Court held that the lessee in that case, in obtaining- the lease and paying lease money, had not incurred an expenditure of a capital nature, and was entitled to claim that the lease money paid by him was a revenue expenditure. In that case also, thus, the lease was in respect of plots, so that interest in land was conveyed, but the Court, on considering the object of the lease and the manner in which the rights under it were to be exercised, came to the finding that no capital expenditure was involved and that the only right acquired was the right to obtain raw material from the leased land. The payment was not for securing an enduring advantage. In the case before us, the facts are much stronger in favour of the assessee. The period of lease is shorter and the only object of the lease is to remove sand lying loose on the surface, without exercising any other right on the land included in the lease.

In Bombav Steam Navigation Co. (1953) Private Ltd. v. Commissioner of Income-tax, Bombay(1), this Court explained the principle of determining the nature of an expenditure. The -Court held :-

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of ail facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the

(1) 59 I.T.R. 718.

(2) 56 I.T.R. 52, 59.

carrying on of the business, the expenditure may be regarded as revenue expenditure,". Clearly, in the present case, the expenditure incurred by the assessee was not related to the acquisition of an asset or a right of a permanent character. It was for the specific object of enable the assessee to remove sand lying loose on the surface which was the stock-in-trade of the business of the assessee, so that the expenditure has to be regarded as revenue expenditure.

Counsel appearing for the Department relied on a decision of this Court in K. T. M. T. M. Abdul Kayoom and Another v. Commissioner of Income-tax(1). The majority judgment in that case shows that the assessee, which was carrying on business in ,,conch" shells locally known as "chanks", took on lease the exclusive right, liberty and authority to take and carry away all chanks found in the sea for a period of three years ending on June 30, 1947, along a specified portion of the coast. The consideration of Rs. 6,111 per year was payable in advance. It was held on the facts of that case that "this expenditure wag of the nature of capital expenditure and not revenue expenditure." On the face of it, the distinguishing feature was that, in that case, the lessee had to obtain fish from the sea and, consequently, had to operate in the waters of the sea itself, and that was the main reason why the Court held against the assessee. This difference is clearly brought out in the judgment of the majority where it was held "This is not a case of so much clay or so much saltpeter or a dump of tailings or leaves on the trees in a forest. The two modes in which the respondent did the business furnish adequate distinguishing characteristics. Here 'is an agreement to reserve a source, where the respondent hoped to find shells which, when found, became its stock-in-trade but which, in situ, were no more the firm's than a shell in the deepest part of the ocean beyond the reach of its divers and nets. The expenses of fishing shells were its current expenses as also the expenses 'incurred over the purchase of shells from the divers. But to say that the payment of lease money for reserving an exclusive right to fish for chanks was on a par with payments of the other character is to err."

It is clear that, in the present case, there is no such reservation of an exclusive right in respect of any land. In fact, the first sentence in the quotation above is clearly applicable to the present case if, for 'the word clay", the word "sand" is substituted.

(1) 44 I.T.R. 689, 707.

The present is a case where sand lying loose on the surface of the land is to be removed and the whole object of the lease was to obtain the right to the sand which was to be the stock-in-trade of the

assessee. The appeals are, consequently, allowed with costs, the order of the High court is set aside and the question referred is answered in the affirmative.

V.P.S. Appeals allowed.