

Bhaichand Amoluk & Co. vs Commissioner Of Income-Tax, Bombay ... on 7 November, 1960

Equivalent citations: [1962]44ITR511(SC)

Bench: J.C. Shah, M. Hidayatullah

JUDGMENT

Hidayatullah, J.

1. This appeal with special leave has been filed by Messrs. Bhaichand Amolukh & Co. (referred to in this judgment as the firm) against the judgment and order of the High Court of Bombay, by which the High Court asked for a reference on question of law but declined to include therein a question or questions which, the firm contended, also arose out of the Tribunal's order.

2. The facts leading up to the appeal may be stated shortly. One Bhaichand Amolukh Vora, father of Chhotalal Bhaichand, started a firm in 1910, to work as principal agents for a number of insurance companies. In that firm, in addition to Bhaichand Vora and Chhotalal Bhaichand, one Nathubhai Patel was also a partner. Bhaichand Vora died in 1948, and the two surviving partners continued as the firm. Nathubhai Patel died in 1949, and it is stated that the firm thereafter consisted of Chhotalal Bhaichand and his wife, Bai Lalitaben. In the years that followed, the business of the firm was treated as the sole business of Chhotalal Bhaichand to which no objection was taken, because, as is now explained, the income of the wife would, in any event, have been included in the income of Chhotalal Bhaichand under section 16 (3) of the Income-tax Act. In June 1950, the Insurance (Amendment) Act, 1950 (No. 67 of 1950), came into force, which amended the Insurance Act 1938 (No. 4 of 1938), by adding a new section (42B) by which the insurers were prohibited after the expiration of seven years from the commencement of Act No. 67 of 1950, from appointing, or transacting any insurance business in India through a principal agent. Contracts between an insurer and a principal agent were also required to be in writing, and the model terms contained in Part I of the Sixth Schedule to the Act were to be deemed to be incorporated in and form part of every such contract.

3. The case of the firm is that Chhotalal Bhaichand, realising that the business of principal agents was to come to an end after the expiry of seven years, looked for other sources of employment and accepted a job as assistant manager of the New India Assurance company. He withdrew from the firm, and the old firm was reconstituted from January 1, 1953, though the deed of partnership was executed on April 22, 1953. By this deed, the partnership consisted of three persons with shares as follows :

(1) Bai Manibai (mother of Chhotalal Bhaichand) - 5 annas in the rupee.

(2) Mr. Khambatta - 3 annas in the rupee.

(3) Mr. Premchand D. Parikh - 3 annas in the rupee.

(4) Two minor sons of Chhotalal Bhaichand, Jayant and Harshad, were also admitted to the benefits of the partnership to the extent of 1 1/2 annas in the rupee, each.

4. The balance of 2 annas in the rupee was earmarked to build up a reserve fund of Rs. 10,000.

5. For the assessment year 1954-55, corresponding to the year of account, calendar year 1953, an application for the registration of this new firm was made under section 26A of the Income-tax Act. The Income-tax Officer by his order dated September 30, 1954, declined registration, holding that the firm belonged solely to Chhotalal Bhaichand had not made by formal transfer of the business to the new partners, that the deed stated that neither Khambatta nor Premchand claimed any interest in the goodwill of the business, that there was no consideration for which Bai Manibai, the mother of Chhotalal Bhaichand (the assessee), and his two minor sons became entitled to the income from the business, and that the reason that the goodwill was reserved for her because the business had been started by her late husband was "fallacious". A fifth reason was given that a cheque for Rs. 6,400 being Manibai's share of profits was drawn by the firm "to self", and in later years the amount was traced to the account of Commissioner. The explanation of Manibai that she received Rs. 5,000 out of that amount and spent it on charities was not accepted.

6. On appeal to the Appellate Assistant Commissioner, registration of the firm was ordered. On further appeal to the Tribunal, the order of the Appellate Assistant Commissioner was, in its turn, set aside, and the Tribunal reached the conclusion that Manibai and the two minor sons were not the real partners of the new firm, but that the partnership consisted of Chhotalal Bhaichand and two others. The Tribunal, in spite of this finding, restored the order of the Income-tax Officer. The firm then applied for a reference of the questions arising from the Tribunal's order, and suggested as many as 18 questions. The Tribunal declined the reference by an order, which set out the grounds on which its decision in the appeal proceeded, adding reasons which had not been given before. To those reasons we shall refer later.

7. The firm then applied to the High Court under section 66 (2), and set out the 18 questions which it alternatively summarised into two, as follows :

"1. Whether the finding of the Tribunal that the partnership is not genuine but is in reality a partnership between Chhotalal, Premchand and Khambatta is supported by any material on record and or/is based wholly or partly on conjectures, suspicions, surmises, incorrect assumptions or irrelevant materials, and/or amounts to an error or misdirection in law ?

2. If the above question is answered against the applicant, then, in view of the Tribunal's finding that there was a partnership between Chhotalal, Premchand and Khambatta, whether the Tribunal ought to have directed an assessment to be made on that firm as an unregistered firm and whether the action of the Tribunal is setting aside the order of the Appellate Assistant Commissioner and restoring that of the Income- tax Officer is valid ?"

8. The High Court declined to raise the first question, and asked for a reference only on the second question, which it recast as follows :

"In view of the Tribunal's finding that there was a partnership between Chhotalal, Premchand and Khambatta, whether the Tribunal ought to have directed an assessment to be made on that firm as an unregistered firm and whether the action of the Tribunal in setting aside the order of the Appellate Assistant Commissioner and restoring that of the Income- tax Officer is valid ?"

9. We are not concerned in this appeal with the question on which the High Court has called for a reference. That is a matter which, we presume, will be decided hereafter. We are concerned only with the refusal to raise and call for a reference on the first question, which we have set out above.

10. In dealing with the matter, the Income-tax Officer had taken statements from Chhotalal Bhaichand, Manibai, Premchand and Khambatta. The Tribunal in its order stated that the alleged partnership with Manibai and admitting Jayant and Harshad to the profits of the partnership was "nothing short of a farce." In its reasons, the Tribunal referred to various matters. It observed that with the exit of Chhotalal, no adjustment entries were made in the books of the business, which was carried on as before by the partnership, that an employee and an agent of the firm were taken as partners but had no right to the goodwill of the business, which was stated in the deed to belong solely to the assessee's old mother, that the monthly drawings of Premchand and Khambatta were limited to Rs. 300 which was almost equal to their remuneration or commission in the past, that the old business had three bank accounts which continued as before, one of them being operated by Chhotalal himself and the other two, by the new partners under a power-of-attorney which was not withdrawn, that no new letter of appointment was issued by the three insurance companies for whom the old firm was acting as principal agents, and that no written communication was given to them. In disposing of the matter, the Tribunal stated that Chhotalal probably wished to retain the business which had been build up by the family, and devised a scheme to transfer the business to a sham partnership consisting of his mother, an employee and an agent of the firm, with the benefits of the partnership to his two minor sons, that the New Indian Assurance Company lent its support to a practice by which insurance business was being done, in addition to being an employee of the company, that Manibai, mother of Chhotalal, was not capable of taking any part in the business and had signed documents as desired by Chhotalal, and that the assessee perhaps attended to the business personally outside office hours. The Tribunal also stated that there was no reason why the goodwill of the firm was assigned to Manibai, whose only qualification was that she was Chhotalals mother. When the Tribunal rejected the application for a reference, it again adverted to some of these reasons, adding that Manibai was examined, hinting thereby that her statement was not

satisfactory. When the High Court called for a reference, it presumably considered the finding of the Tribunal, which was recorded in the following words :

"In order to get over the legal difficulty, the assessee converted the old business into a partnership concern by taking the two employees as working partners. These employees were given only three annas share which perhaps at the material times the approximate remuneration earned by them in preceding year. It is in reality a partnership between the assessee, Premchand and Khambatta. Manibai and the two minor sons are bogus parties...."

11. The High Court, therefore, raised the question whether the order of the Income-tax Officer could be restored in toto in view of this finding, because the Income-tax Officer had taken the whole of the income of the firm into Chhotalal's individual assessment.

12. In this appeal, it is contended that the High Court was in error in not calling for a reference, because (a) there were no materials on which the finding that the firm seeking registration was a pretense, could be rested, and (b) in any event, the Tribunal having acted on suspicions, conjecture and surmises, its decision is erroneous, in view of the decisions of this court reported in Dhirajlal Girdharilal v. Commissioner of Income-tax, Omar Salay Mohamed Sait v. Commissioner of Income-tax, and Lalchand Bhagat Ambica Ram v. Commissioner of Income-tax. Reference was also made to Umacharan Shaw & Bros. v. Commissioner of Income-tax. The respondent relied upon a recent pronouncement of this court in Homi Jehangir Gheesta v. Commissioner of Income-tax.

13. Regarding the first ground, it is quite obvious that there was material on which the finding could be based. If Chhotalal withdrew from the business, his wife, Lalitabai, would be left as the sole proprietor. No mention of her interest what ever was made in the subsequent deed, and she seems to have disappeared completely. On the termination of the old firm and the setting up of the new firm, one would expect some adjustment entries in the books of account, and there were singularly lacking. One would also expect a communication by the new agents to the various insurance companies in writing about the change of principal agents and an appointment letter in the name of the new firm by them. The bank accounts would have been transferred to the new partnership firm, and the power-of-attorney in favour of Premchand and Khambatta would have been cancelled and the new firm would have been authorised to deal with the accounts. Without any such action, the decision of the Tribunal, that the firm which asked for registration was not a real firm, cannot be said to be founded on no material.

14. In so far as the addition of certain other reasons, which are characterised as surmises, conjectures and suspicious, is concerned, this court has observed in Gheeta's case as follows :

"We must read the order of the Tribunal as a whole to determine whether every material fact, for and against the assessee, has been considered fairly and with due care; whether the evidence pro and con has been considered in reaching the final conclusion; and whether the conclusion reached by the Tribunal has been coloured by irrelevant consideration or matters of prejudice. Learned counsel for the appellant

has taken us through the entire order of the Tribunal as also the relevant materials on which it is based. Having examined the order of the Tribunal and those materials, we are unable to agree with learned counsel for the appellant that the order of the Tribunal is vitiated by any of the defects adverted to in *Dhirajlal Girdharilal v. Commissioner of Income-tax*, or *Omar Salay Mohamed Sait v. Commissioner of Income-tax*. We must make it clear that we do not think that those decisions required that the order of the Tribunal must be examined sentence by sentence, through a microscope as it were, so as to discover a minor lapse here or an incautious opinion there to be used as a peg on which to hang an issue of law. In view of the arguments advanced before us it is perhaps necessary to add that in considering probabilities properly arising from the facts alleged or proved, the Tribunal does not indulge in conjectures, surmises or suspicions.

15. "The Tribunal was trying to motive for the formation of the new firm with an old lady and two minor sons in place of Chhotalal, and what was observed by the Tribunal was in connection with the motive which suggested itself to unravel the motive for the formation of the new firm with an old lady and two minor one in place of Chhotalal, and what was observed by the Tribunal was in connection with the motive which suggested itself to it, and was not based on any material. Even if the Tribunal mentioned those suspects, we do not think that they entered into the solution of the problem before it. Suspicious and surmises are best avoided; but in the present case, the order of the Tribunal proceeded on such solid facts that the speculation about the motive of Chhotalal did not make any material difference to the finding reached, though we cannot held saying that the Tribunal would have been well-advised to leave speculation out altogether. We are of opinion that this case falls within the ruling in *Gheeta's* case.

16. In the result, the appeal fails, and will be dismissed with costs.

17. Appeal dismissed.