

Shree Changdeo Sugar Mills, Ltd.

Vs

The Commissioner of Income-Tax, Bombay

Civil Appeal No. 380 of 1957

(J.L. Kapur, M. Hidayatullah, J.C. Shah JJ)

07.12.1960

JUDGMENT

HIDAYATULLAH, J. -

This appeal, on a certificate by the High Court, has been filed by Shree Changdeo Sugar Mills, Ltd., to which section 23A of the Income-tax Act (prior to its amendment by the Finance Act, 1955) was applied in respect of the assessment year, 1948-49. The question which was referred to the High Court was whether at the relevant time the assessee Company could be deemed to be a Company. in which the public were substantially interested. This question was answered in the negative by the High Court.

During the assessment year, the Company had not distributed dividends to the extent of 60 per cent. of its profits, and an order under section 23A(1) of the Indian Income-tax Act was passed by the Income-tax Officer. The Company appealed to the Appellate Assistant Commissioner, who dismissed the appeal. It next appealed to the Tribunal, but was unsuccessful. The Tribunal, however, referred the above question which, as already stated, was answered in the negative by the High Court.

The issued, subscribed and paid-up capital of the assessee Company consisted of 60,000 shares, which were distributed as follows :

#(1) 11 Directors of the Company ... 41,500 shares. (2) The Managing Agency Firm ... 2,300 shares. (3) Mysore Merchants Ltd. ... 11,880 shares. (4) Others ... 4,320 shares. ----- 60,000 shares. -----##

The question arose in determining whether the public were substantially interested in the Company, that is to say, held 25 per cent. of the voting power. The Bombay High Court in determining this point followed its decision in Raghuvanshi Mills Ltd. v. Commissioner of Income-tax ([1953] 24 I.T.R. 338.) and held that no holding by the Directors of a company could be regarded as one in which the public were substantially interested. We have heard Civil Appeal No. 30 of 1957 from the decision of the Bombay High Court in the Raghuvanshi Mills' case ([1953] 24 I.T.R. 338.) in which judgment has been pronounced today, and have held that that is not the correct test to apply. We have remanded the said appeal, after setting out the correct test to apply. What we have said there applies equally here.

There is yet another question, which arose in this appeal but not in the appeal of the Raghuvanshi Mills. As we have already stated, Mysore Merchants Ltd., held 11,880 shares of the assessee

Company. If these shares could be said to be held by the public along with 4,320 shares, the public would be holding 25 per cent. of the voting power, whether or not the Directors of the Company held the rest of the shares. It was, therefore, necessary for the High Court to consider whether the shares held by Mysore Merchants Ltd., could be said to be held by the public. The High Court held against the assessee Company that they could not be counted as part of the holding by the public and, in our judgment, the High Court has reached the correct conclusion.

The matter has to be judged under the third proviso to section 23A(1), which read as follows :

"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.

Explanation. - For the purpose of this sub-section, a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public."

In applying the proviso and the Explanation, we have to give effect to the words "not including a company to which the provisions of this sub-section apply", and have to determine whether Mysore Merchants Ltd., is a Company, to which the provisions of section 23A can be said to be applicable. Learned counsel for the assessee Company contends that in deciding this, we have to be satisfied on three points, which he summarises as follows :

- (a) The public should not be substantially interested in that Company;
- (b) It must have assessable profits for the relevant assessment year; and
- (c) It must not have distributed 60 per cent. of its net assessable profits.

He contends that unless these three conditions are fulfilled, section 23A will not apply to Mysore Merchants Ltd., and that the shares held by it will be deemed to be held by the public. He points out that Mysore Merchants Ltd., had no assessable income in the corresponding assessment year and had suffered a loss, that conditions (b) and (c) did not, therefore, apply and that section 23A is not applicable to that Company. In our opinion, the paramount condition is that even in that Company the public should be beneficially interested in 25 per cent. of the voting power, and it was admitted before us that it was not a public Company at all but a private Company, and that, therefore, the public were not interested in that Company. The shares held by Mysore Merchants Ltd., cannot at all be counted as a holding in which the public are beneficially interested, in view of the exclusion contained in the Explanation. This point will not, therefore, be open for the determination of the High Court, when the question is reconsidered by the High Court in the light of our observations in *Raghuvanshi Mills Ltd. v. Commissioner of Income-tax, Bombay* ([1961] 2 S.C.R.

978.) decided today.

Learned counsel for the assessee Company also contended that in view of clause 14 of the Part B States (Taxation Concession) Order, 1950, the provisions of section 23A could not be applied to Mysore Merchants Ltd. That clause reads as follows :

"14. Requiring distribution of dividends by private companies.

The provisions of section 23A of the Act shall not be applied in respect of the profits and gains of any previous year ending before the appointed day unless the State law contained a provisions corresponding thereto."

This Concession would be open to Mysore Merchants Ltd. if it satisfied the terms of Clause 14. That, however, cannot detract from the application of section 23A to determine whether the shares held by it can be described as those in which the public are beneficially interested in another company. The Explanation requires that the shares held by a company should be considered as held by the public, only if section 23A does not apply to it. The Concessions Order does not seek to negative this test; it only confers a benefit on a company, to which clause 14 applies. Mysore Merchants Ltd., may be able to avail of that concession, and still fall within section 23A for other purposes. This contention has no force.

The appeal is allowed, and the case is remitted to the High Court for deciding the question in the light of the observations in our decision in the Raghuvanshi Mills' case ([1961] 2 S.C.R. 978.). As the case is remanded, the costs of the appeal shall be paid by the respondent, but the costs in the High Court will abide the result.

Appeal allowed.

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