Commissioner of Income-Tax, Bombay City-1

Vs

Godavari Sugar Mills Ltd.

Civil Appeal No. 28 of 1966

(J. C, Shah, V. Ramaswami-I, V. Bharagava JJ)

10.10.1966

JUDGMENT

RAMASWAMI, J.

This appeal is brought, by special leave, from the judgment of the High Court of Bombay dated September 27, 1962 in Income Tax Reference No. 39 of 1961. The respondent - Godavari Sugar Mills Ltd. - is a Public limited company. The assessment year in this case is 1949-50. The relevant accounting year ended on May 31, 1948. The Annual General Meeting of the respondent was held on December 30, 1948. At that meeting a sum of Rs. 3,68,433/- was declared as the dividend. Since the dividend fell short of the requisite percentage under s. 23A of the Income-tax Act (hereinafter called the 'Act') the Income-tax Officer passed an order, on March 11, 1955 under the provisions of s. 23A of the Act that the undistributed portion of the assessable income of the respondent of the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the General Meeting. Section 23A of the Act, as it stood at the material time, stated as follows :

> "23A. Power to assess individual members of certain companies. - (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as

dividends amongst the shareholders as at the date of the general meeting aforesaid; and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income."

The respondent raised an objection that it was not legally possible for it to declare a higher dividend than that declared in view of ss. 3 and 12 of the Public Companies (Limitation of Dividends) Ordinance No. XXIX of 1948 (hereinafter referred to as the 'Ordinance') which was promulgated on October 29, 1948. Section 3 of the Ordinance provided :

"No company shall, after the commencement of this Ordinance, distribute as dividend during any financial year, any sum which exceeds, or which when taken with any sum already distributed as dividend during the same year whether before or after the commencement of this Ordinance will exceed :

(a) six per cent of the paid up capital of the company as on the last date of the period in respect of which the dividend is distributed, after deducting from such capital all amounts attributable to the capitalisation on or after the first day of April 1946 of one or more of the following, namely, reserves, profits and appreciation of assets, or

(b) the average annual dividend of the company determined in the manner specified in sections 5 to 7,

whichever is higher."

Section 12 provided :

"Any Director, Managing Agent, Manager or other Officer or employee of a company who contravenes or attempts to contravene or abets the contravention of or attempt to contravene any of the provisions relating to the distribution of dividend or the issue of preference shares, contained in this Ordinance or in any rule, notification or order issued thereunder, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both."

Section 2(b) of the Ordinance defines a "Company" to mean "A public company as defined in clause (13-A) of section 2 of the Companies Act." It is not disputed by the parties that the respondent-company was a company within the meaning of the Ordinance and that the provisions of the Ordinance applied to it. It was also admitted that the dividend declared by the respondent complied with the requirements of the Ordinance. It was contended by the respondent that the Ordinance prohibited it from declaring any larger amount as dividend than that already declared by it. The contention was rejected by the Income Tax Officer. The order of the Income-tax Officer dated March 11, 1955 was confirmed by the Appellate Assistant Commissioner in appeal and, on further appeal, by the Tribunal. At the instance of the respondent the Tribunal referred the following question of law for the determination of the High Court :

"Whether on the facts of this case, an order under section 23A for the assessment year 1949-50 was validly made in the case of this company to which the provisions of the Public Companies (Limitation of Dividends) Ordinance, 1948, applied on the date of the Annual General Meeting but to which the Act replacing the Ordinance

ceased to apply within the period of 6 months referred to in Section 23A(1) ?"

By its judgment dated September 27, 1962, the High Court answered the question of law in favour of the respondent.

In support of this appeal Mr. S.T. Desai put forward the argument that s. 23A of the Act contemplated a declaration of dividend not only on the date of the Annual General Meeting but also at any further point of time within a period of 6 months from the date of the Annual General Meeting. It was pointed out that the Ordinance was repealed by the Public Companies (Limitation of Dividends) Act (Act No. 30 of 1949) (hereinafter referred to as the '1949 Act') which came into force on April 26, 1949. S. 2(3)(1) of the 1949 Act removed the restriction imposed by the Ordinance with regard to Public Companies to which the provisions of sub-s. (1) of s. 23A of the Act applied. It was submitted that it was possible for the respondent-company to declare further dividends within the said period of 6 months contemplated by s. 23A of the Act. The Annual General Meeting was held on December 30, 1948 and the six months' period from that date expired on June 30, 1949. The restrictions imposed by the Ordinance were lifted on April 26, 1949 and so during the period from April 26, 1949 to June 30, 1949 it was possible for the respondent-company to declare further dividends and to comply with the requirements of s. 23A of the Act. It was argued that as the respondent-company failed to do so the Income-tax Officer was legally justified in making the order under s. 23A. On behalf of the respondent Mr. Sen contended that s. 23A(1) of the Act did not contemplate declaration of further dividend after the holding of the Annual General Meeting and, in any event, the provisions of the Companies Act did not permit the declaration of any further dividend after the holding of the Annual General Meeting. Mr. Sen referred to the decision of the Calcutta High Court in Raghunandan Neotia v. Swadeshi Cloth Dealers (34 Com. Cas. 570.) Ltd. in support of this argument. It is not, in our opinion, necessary to express any concluded opinion on this aspect of the case, because we consider that, in any event, in view of the fact that the Ordinance was in force on the date of the holding of the Annual General Meeting of the respondent the Income tax Officer had no power to pass any order under s. 23A of the Act. The Ordinance was in force on December 30, 1948 on which date the Annual General Meeting of the respondent took place and a sum of Rs. 3,68,433/- was declared as dividend. Section 23A provides that on the fulfilment of certain conditions set out therein the Income-tax Officer shall make an order in writing that the undistributed portion of the assessable income of the respondent of the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax "shall be deed to have been distributed as dividend amongst the shareholders as at the date of the General Meeting aforesaid". It is clear therefore that the order which the Income-tax Officer is empowered to make under s. 23A of the Act is that the undistributed income shall be deemed to have been distributed amongst the shareholders "as at the date of the Annual General Meeting". Now, the question is whether it was legally permissible for the Income-tax Officer to make the order which he has made on March 11, 1955 in the present case. The legal fiction as enacted under s. 23A of the Act is that the undistributed portion of the assessable income is deemed to have been distributed as dividend amongst the shareholders as at the date of the Annual General Meeting. In other words, the notional distribution is not by the Income-tax Officer but is by the Company itself at its Annual General Meeting. Since the provisions of the Ordinance imposed the restriction on the declaration of dividend beyond a particular limit that restriction will equally be binding for the Income-tax Officer; and if the respondent is prevented for declaring a higher dividend than that declared on the date of the Annual General Meeting, the Income-tax Officer would be likewise prohibited by the Ordinance from passing an order that a higher dividend than that actually declared shall be deemed to have been declared at the date of the respondent's Annual General Meeting. To put it differently, if in actuality a higher dividend could not lawfully have been declared by the

respondent, the Income-tax Officer could not pass an order that such higher dividend should be deemed to have been declared, for the deemed declaration will suffer from the same legal restrictions which an actual declaration is subject to. In our opinion, the prohibition imposed by s. 3 of the Ordinance applies not only to the actual dividend declared but also to notional dividend deemed to have been declared under s. 23A of the Act. There is a manifest repugnancy between the provisions of the Ordinance and of s. 23A of the Act and it must be taken that there is an implied repeal of s. 23A of the Act to the extent of that repugnancy created by s. 3 of the Ordinance and so long as the Ordinance remains in force. In view of the provisions of ss. 3 and 12 of the Ordinance the fiction created by s. 23A cannot, therefore, be brought into existence and the Income-tax Officer cannot pass an order under the provisions of that section. As observed by Lord Asquith of Bishopstone in East End Dwellings Co. Ltd. v. Finsbury Borough Council ([1952] A.C. 109, 132.) :

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

It is, indeed, true that as a result of the order of the Income-tax Officer there is no factual distribution of dividend but it is only a fictional or notional distribution of dividend which was not, in fact, received by the shareholders. The section merely enacts that notional dividend is deemed to have been distributed as at the date of the Annual General Meeting, but even for bringing into existence that legal fiction there must be no statutory prohibition as the Ordinance in the present case.

We proceed to consider the next contention of the appellant that s. 13 of the 1949 Act repealed the Ordinance completely and the effect of this section was that the Ordinance was obliterated from the Statute Book as if it never existed and, therefore, there was no bar in the way of the Income-tax Officer to make the order on March 11, 1955. Section 13 of the 1949 Act provides as follows :

> "13(1). The Public Companies (Limitation of Dividends) Ordinance 1948 (XXIX of 1948) is hereby repealed.
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> (2) Notwithstanding such repeal, any rules made, action taken or thing done in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, taken or done in exercise of the powers conferred by or under this Act as if this Act had come into force on the 29th day of October 1948."

We are unable to accept this argument as correct. In the first place, the repeal of the Ordinance under s. 13 of the 1949 Act is immaterial, for, as we have already stated, s. 23A has created a fiction of distribution of the undistributed income as dividend and the section further states that it would be deemed as if it was distributed on the date of the Annual General Meeting. Since the notional distribution contemplated by s. 23A of the Act is as if the notional distribution took place at the date of the Annual General Meeting it is the law which prevailed as on the date of the Annual General Meeting which has to be taken into account in considering the issue as to the legal validity of the order made by the Income-tax Officer. In the second place, Mr. S.T. Desai is not right in his contention that the effect of s. 13 of the 1949 Act is to obliterate the Ordinance completely from the

Statute Book. Section 6 of the General Clauses Act (Act 10 of 1897) states as follows :

> "6. Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
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> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
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> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
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> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

The reason for enacting s. 6 of the General Clauses Act has been described by this Court in State of Punjab v. Mohar Singh ([1955] 1 S.C.R. 893, 897.) as follows :

> "Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law. A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right. To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Later on, to dispense with the necessity of having to insert a saving clause on each occasion, section 38(2) was inserted in the Interpretation Act of 1889, which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is will known, is on the same lines as section 38(2) of the Interpretation Act of England."
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> Section 13 of the 1949 Act is almost identical in language with s. 11 of Punjab Act XII of 1948 which was the subject-matter of consideration in State of Punjab v. Mohar Singh ([1955] 1 S.C.R. 893.) and for the reason given by this Court in that

case the provisions of s. 6(c), (d) and (e) of the General Clauses Act are applicable to this case since there is no contrary intention appearing in the repealing statute. Mr. S.T. Desai is, therefore, unable to make good his submission on this aspect of the case.

For these reasons we affirm the judgment of the Bombay High Court dated September 27, 1962 and dismiss this appeal with costs.

R.K.P.S.

Appeal dismissed.

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