L. Hirday Narain

Vs

Income-Tax Officer, A Ward, Bareilly

Civil Appeal Nos. 193 and 448 of 1970

(J. C. Shah, K. S. Hegde JJ)

21.07.1970

JUDGMENT

SHAH J. -

These appeals arise out of orders passed in petitions praying for a writ of mandamus to rectify orders of assessment relating to income assessed to tax for the years 1951-52 and 1952-53. The corresponding previous years for the assessment years were October 1, 1949, to September 30, 1950, and October 1, 1950, to September 30, 1951.

Hirday Narain and his five sons were members of a Hindu undivided family. Till the assessment year 1950-51, the income received by Hirday Narain was assessed to tax as the income of a Hindu undivided family. On November 19, 1949, the property of the joint family was partitioned between Hirday Narain and his sons. In assessing the income for the assessment year 1951-52, the Income-tax Officer recorded an order that the property was partitioned, but he still assessed the income received by Hirday Narain as income of a Hindu undivided family. In appeal the Appellate Assistant Commissioner treated Rs. 18,250 earned between October 1, 1949, and November 18, 1949, as income of the former Hindu undivided family and directed that it be "excluded from the assessment".

Pursuant to that order, the Income-tax Officer made two order of assessment - (1) assessing Rs. 18,520 as income of the Hindu undivided family or Hirday Narain and his five sons; and (2) assessing Rs. 1,06,156 also as income of a Hindu undivided family and liable to tax in the hands of Hirday Narain by the application of section 16(3) (a) (ii) of the Indian Income-tax Act, 1922.

Hirday Narain then applied for rectification of a mistake in the order of assessment which he claimed was apparent from the record. He submitted that :

> "the assessment of..... Hirday Narain has been made in the status of Hindu undivided family comprising of himself and his minor son, Satendra Prakash. Section 16(3) (a) (ii) does not apply to cases of 'Hindu undivided family', but only to those of 'individuals'. It is, therefore, requested that such of the income as has by mistake been included in the assessment of the Hindu undivided family for the said year under section 16(3) (a) (ii) may kindly be excluded under section 35 as the mistake is apparent from the record".

The Income-tax Officer accepted the plea that to income assessed to tax in the hands of Hirday Narain in the status of a Hindu undivided family section 16(3) (a) (ii) of the Indian Income-tax Act,

1922, did not apply, but he declined to give relief holding that for the period November 19, 1949, to September 30, 1950, Hirday Narain should have been assessed as an individual.

Hirday Narain then moved a petition before the High Court of Allahabad under article 226 of the Constitution challenging the order of the Income-tax Officer. A single judge of the High Court rejected the petition holding that at the stage of the original assessment the question that the income was not liable to be assessed under section 16(3) (a) (ii) of the Income-tax Act was not raised and that the assessee had not applied in revision to the Commissioner under section 33A of the Act. A Division Bench of the High Court confirmed that order in appeal, observing that the rectification under section 35 of the Act was "discretionary", and if the Income-tax Officer thought that proceedings were "substantially fair" he was "not bound to rectify the assessment on technical grounds".

The High Court also observed that "it was not clear that after November 19, 1949, there was a Hindu undivided family which Hirday Narain represented and therefore it was possible to say with certainty that the Income-tax Officer was wrong in proceedings on the footing that the assessment could be supported as assessment of an individual."

With special leave Hirday Narain has appealed to this court.

In respect of the period November 19, 1949, to September 30, 1950, the income was assessed in the hands of Hirday Narain in the status of a Hindu undivided family. Section 16 of the Indian Income-tax Act, 1922, by sub-section (3) (a) (ii) provides :

> "In computing the total income of any individual for the purpose of assessment, there shall be included -
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> (a) so much of the income of the wife of minor child of such individual as arises directly or indirectly - .....
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> (ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner".

Income for the period November 19, 1949, to September 30, 1950, being assessed to tax as the income of a Hindu undivided family and not of an individual, section 16(3) (a) (ii) plainly did not apply and the income of the minor children of Hirday Narain could not be included in the income of Hirday Narain assessed as a Hindu undivided family.

Under the Income-tax Act, it is not predicated of a Hindu undivided family as a taxable entity that it must consist of two or more made members : Gowli Buddanna v. Commissioner of Income-tax; see also N. V. Narendra Nath v. Commissioner of Wealth-tax, (a case under the Wealth- tax Act). Hirday Narain received a share in the properties of the Hindu undivided family of which he and his wife were members. It may again be noticed that before the previous year expired, Hirday Narain's wife gave birth to a son on April 6, 1950. We are, therefore, unable to agree that the income accruing between November 19, 1949, and September 30, 1950, could be assessed in the hands of Hirday Narain as an individual.

But the Solicitor-General submitted that Hirday Narain had filed his return in the status of an individual, and since the Appellate Assistant Commissioner had also, passed an order when he directed separate assessment of the total receipts during the year October 1, 1949, to September 30,

1950, as the income of two distinct assessable entities, the Income-tax Officer was bound to assess the income for the period November 19, 1949, to September 30, 1950, as the income of the Hirday Narain as an individual, and to that income, the income of his minor children arising out of the partnership to which they were admitted was liable to be added under section 16(3) (a) (ii) of the Income-tax Act, and the tax officer was entitled and indeed bound to rectify the assessment when his attention was invited to the error.

There is no clear evidence on the record about the status in which Hirday Narain submitted the return the income. If the order of assessment made by the Income-tax Officer furnishes any indication, the return was probably filed in the status of a Hindu undivided family. By the order dated December 16, 1953, the total income of the relevant year was ordered to be assessed in the hands of Hirday Narain in the status of a Hindu undivided family. It is true that in the appeal before the Appellate Assistant Commissioner it was contended by Hirday Narain that the Income-tax Officer "had erred in including a sum of Rs. 18,520 to the income of the appellant (Hirday Narain) as an 'individual' and in not assessing it separately as the income of the 'Hindu undivided family'." The Appellate Assistant Commissioner observed that the income of Rs. 18,520 related to the period when the family of the appellant was undivided, but by an order under section 25A the Income-tax Officer had held that the appellant and his sons had partitioned the property of the family. He, therefore, directed that the amount of Rs. 18,520 which belonged to the erstwhile Hindu undivided family be excluded from the assessment which accordingly stood reduced from Rs. 1,24,676 to Rs. 1,06,156. The Appellate Assistant Commissioner did not direct that the status in which the income was sought to be assessed for the period November 19, 1949, to September 30, 1950, be altered. Pursuant to the order of the Appellate Assistant Commissioner the Income-tax Officer assessed the income for the period as income of a Hindu undivided family represented by Hirday Narain. There was in fact an existing Hindu undivided family of which, for a part of period, Hirday Narain and his wife were members, and for the rest, besides the two, their infant son was a member.

The order of the Income-tax Officer is subject to a procedural infirmity as well. In rejecting the application under section 35 the Income-tax Officer apparently assumed that in an application made by an assessee he could exercise his power suo motu and modify the status of the assessee even without giving an opportunity to the assessee to establish that the order assessing him in the status of Hindu undivided family was in law correct. Hirday Narain had claimed that the income of his minor children was not liable to be included in his assessment in the status of a Hindu undivided family. There was no defence to the claim for rectification on the merits of that application. Right to obtain the benefit of rectification could not be refused by changing the status on the basis of which the original assessment was made without investigating, after due notice, whether in assessing the income for the period November 19, 1949, to September 30, 1949, a mistake in fact was committed.

An order under section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by section 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

The High Court observed that under section 35 of the Indian Income-tax Act, 1922, the jurisdiction

of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that view is in our judgment erroneous. Section 35 enacts that the Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a status invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right - public or private - of a citizen.

In Julius v. Bishop of Oxford it was observed by Cairns L. C. that "the words 'it shall be lawful'" conferred a faculty of power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exorcised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise the power when called upon to do so." Lord Blackburn observed in the same case at pages 244- 245 that the enabling words give a power which prima facie might be exercised or not, but if the object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Lord Penzance and Lord Selborne made similar observations at pages 229 and 235.

Exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding.

The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.

For the assessment year 1952-53 the assessee is also entitled to the relief claimed by him.

The appeals must therefore be allowed and the order passed by the High Court set aside. Writs will issue directing that the assessment of Hirday Narain for the years 1951-52 and 1952-53 be rectified by deleting the income of his minor sons included under section 16(3) (a) (ii) of the Indian Income-tax Act, 1922, from assessment. The appellant will be entitled to his costs in this court and in the High Court. One hearing fee.

Appeals allowed.

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