Commissioner of Income-Tax (Central), New Delhi

Vs

S. Zoraster & Co.

Civil Appeals Nos. 2012 and 2013 of 1968

(C.A. Vaidialingam, P. Jagmohan Reddy JJ)

24.09.1971

JUDGMENT

VAIDIALINGAM J. -

1. These two appeals, on certificate; by the commissioner of income tax (Central), New Delhi, are directed against the common judgment and order dated February 21, 1967, in income tax reference No. 7 of 1961. The reference related to the assessment years 1942-43 and 1943-44. The question of law, referred for the opinion of the High Court under section 66(1) of the Indian Income Tax Act, 1922 (hereafter to be referred to as "the act"), was as follows :

> "Whether, on the fats and circumstances of the case, the profits and gains in respect of the sales to the government of India, were received by the assessee in the taxable territories ?"

The High Court answered the said question in favour of the assessee as follows :

> "On the facts and circumstances of the case, the profits and gains in respect of the sales, made to the Government of India, must be deemed to have have been received by the assessee outside the taxable territories."

When Mr. R. H. Dhebar, learned counsel for the revenue, opened the appeals, a preliminary objection was raised by Mr. N. D. Karkhanis, learned counsel or the assessee respondent that the certificates granted by the High court are not proper and as such the appeals ar not maintainable. The nature of the preliminary objection will be referred to by us in due course. As we are accepting the preliminary objection, we will only refer to the facts in so far as they are relevant for holding that the certificates granted are not proper and as such the appeals are not maintainable.

The assessee-respondent is a firm consisting of the partners, namely, Sohanmal, Meehtabchand and Allahdin. Sohanmal and Mehtabchand are also the two coparcener of a Hindu undivided family. The said family had got its own business firm known also by the name of the assessee, M/s S. Zoraster and Company. The assesses-firm, as well as the joint family firm, were both situated in Jaipur, which was outside the taxable territories at the relevant period. The assessee had business dealings with the government of India. In respect of the goods supplied by the said firm, the Government of India paid the price by cheques. The cheques in question were received by the assessee at Jaipur. However, the said cheques were drawn on the reserve bank of India at Bombay. The assessee, through the agency of the family firm, set those cheques to Bombay for collection and released the amount due undue the cheques at Bombay. The question arose whether the amounts represented by

the cheques, which were cashed at Bombay, were taxable in the hands of the assessee undue the Act. The Income-tax Officer; the Appellate Assistant Commissioner, as well as the Appellate Tribunal held that, as the amounts had been realised in Bombay, which is a taxable territory, the amounts covered by the cheques were liable to tax under the Act.

On an application made by the assessee, the Appellate Tribunal made a reference on December 10, 1952, to the High Court of jurisdiction for the state of Punjab at Simla. The question of law, that was referred to the High Court was one, which we have set to in the earlier part of the judgment. The reference was numbered as Civil Reference Case No. 3 of 1953 in the Punjab High Court. As in the opinion of the High Court, the appellate Tribunal had not given a finding as to whether the CHEQUES in question were sent to the assessee by post and whether the assessee had given any direction in that regard to the government of India, by its order dated March 24, 1955, a supplementary statement was called for. The assessee challenged this order of the High Court calling for a supplementary statement in an appeal before this court. By its order dated August 17, 1960, this court dismissed the said appeal. The decision of this court is reported in Zoraster & Co. v. Commissioner of Income-tad. After the decision of this court, the Appellate Tribunal, on March 18, 1961, submitted to the High Court as supplementary statement. The case was renumbered in the High Court as Income-tax Reference No. 7 of 1961. At this stage it may be mentioned that in the supplementary statement, the Appellate Tribunal had recorded a finding that there is no material on record to show as to how the cheques in question were sent i.e. whether by post or by hand. The appellate tribunal further found that the assessee had given a direction to pay by cheques and that apart from this there was no other material on record to show any direction given by the assess regarding the mode of despatch of cheques.

The High Court, in its order under attack, noted the findings recorded by the tribunal namely that the cheques were received by the assessee at Jaipur, but collected at Bombay, and that it is not established how the cheques were sent to the assessee by the government of India. The revenue contended before the High Court that the amounts covered by the cheques in question must be considered to have been received by the assessee in the taxable territory, either at Bombay, on the basis that the amounts covered by the cheques were released at that place, or at Delhi, on the ground that the cheques must be considered to have been received by the assessee at that place where the cheques were posted, as the post office is to be considered the agent of the assessee. The high court first considered the question as to what is the effect of payments made by the government to the assessee by means of cheques. After a reference to certain decisions of this court, the High Court held that the mere fact that the cheques were realised at Bombay is of no consequence. In the particular circumstances of the case, the High Court is of the view that as the cheques were received by the assessee at Jaipur, it must held that the amounts covered by the cheques were received by the assessee at that place, which was outside the taxable territory.

In dealing with the contention the revenue that the cheques must be considered to have been received by the assess at Delhi, where they wee posted, the High Court again, after a refrain to the relevant decisions of this court, adverted to the binding recorded by the appellate Tribunal that there is no evidence to show that the cheques were sent by post. In fact, it is pertinent to note how the High Court actually dealt with the question. It observed as follows :

> "If there was a finding by the tribunal that the Government of India was invariably sending the cheques, referred to earlier, from Delhi to Jaipur through post and that the assessee was receiving those cheques without demur, then we would have found no difficulty in upholding the contention of Shri Kapur that the cheques in question

were sent to the assessee through post with its implied consent and, that being so, the post office should be considered as the agent of the assessee. But, as mentioned earlier, in the instant case, there is no evidence to show that those cheques were sent by post. Hence, the question of the assessee's consent implied otherwise, does not arise for consideration."

Later on, the High Court has also observed that the start fact is that there is no finding by the appellate tribunal that the government of India sent the cheques by post and that the revenue has failed to place any material to prove that the cheques in question were being sent by the government through post. On the basis of the above binding, the High Court answered the question, referred to it, in favour of the assessee.

The revenue filed two applications, Supreme Court applications Nos. 95 and 96 of 1967, before the High Court for great of certificates declaring the cases to be a fit one for appeal to this court. Supreme Court Application No. 96 of 1967 related to the assessment year 1942- 43 and No. 96 of 1967 related to the assessment year 1943-44. In the grounds of appeal, in particular, it was stated that the high court has not properly interpreted the decisions of this court and that the High Court further erred in holding that there was no proof as to how the cheques were received by the assessee in Jaipur. Another ground was taken that the evidence on record establishes that the cheques were issued and sent to the assessee at his request by post.

The learned judges who dealt with the applications for grant of certificates were different from those who dealt with the main reference. By order dated july 13, 1968, the High Court granted the certificates that the cases are it for appeal to the court. Before the learned judges, the revenue contended that the assessee must be considered to have received the amounts covered by the cheques in the taxable territories on two alternative grounds : (1) that the payments by cheques made by the government of India from Delhi to the assessee at Jaipur were not made at Jaipur where the cheques were received by the assessee but at Bombay where the cheques were cashed, or (2) the cheques were posted by the government of India at Delhi to the address of the assessee at Jaipur and as the post office acted as an agent of the assessee in receiving CHEQUES the payment was made at Delhi and not at Jaipur.

Regarding the first ground the learned judges held "that it has been convincingly negatived by the learned judges, who dealt with the reference on the authority of the decisions of this court." There is a reference to the decisions of this court as well as the finding recorded by the High Court when answering the reference. The learned judges finally held that the revenue is not entitled to a certificate on the basis of ground No. 1 in the following words :

In the view of the supreme court decisions fully covering this point, no substantial question of law further remains to be considered regarding this aspect of the case."

Regarding the second ground, that the cheques were posted by the government at Delhi and that the post office acted as an agent of the assessee and therefore the amount covered by the CHEQUES must be considered to have been received by the assessee at Delhi, which is a taxable territory, the learned judges are of the view that the said contention cannot be rejected on the plea that no substantial question of law arises for consideration by this court. In considering this aspect, the learned judges observe that it is common knowledge that cheques are invariably sent by post and the Government of India, which has to make payments by cheques to numerous persons situated all over India, cannot be expected to send messengers carrying cheques to the various places. There is a

reference to certain English decisions, from which the learned judges inferred that a common usage can be inferred the cheques are always send by post and never through personal messengers in countries where postal communication is universal. The learned judges further observe that the only reasonable and proper way of dealing with the situation when payments have to be made by cheques by the government is to assume that the latter would send the cheques by post. The High Court is of the view that certain decisions of this court support the case of the revenue that parties intended the cheques issued by the government of India at Delhi should be send to Jaipur by post. The learned judges then refereed what in their opinion is a misunderstanding by the High Court of the decisions of this court when answering the reference and characterised the said misunderstanding as unfortunate. The learned judges then referred to illustration (d) to section 50 of the Indian Contract Act and expressed the view the posting of the cheques in Delhi by the government amounts to payments of money to the assessee in Delhi and that is the position regarding the present assessee. Ultimately, the learned judges held that the question of law which really arises in the present case is whether a presumption could be drawn under the circumstances of the are that the cheques were sent by the government to the assessee by post or whether the fact of sending the cheques by post must be positively proved by the revenue. After referring to section 114 of the Indian Evidence Act and in particular to illustration (f) thereof, the learned judges observed the in the case on hand the cheques should have been sent by the government from Delhi to the assessee either by post or by the messenger and that as it is not the case of either party that the CHEQUES were sent by the messenger, the only conclusion to be drawn is that the cheques must have been sent by post. Any other conclusion, according to the learned judges, apart from being improbable will also be absurd and, therefore, the only alternative on which one can proceed is that the cheques must have been sent by post. There is a discussion how the risk can be avoid by the cheques being drawn in a particular manner when they are sent by post. According to the learned judges, the most natural finding should be that the cheques were sent from Delhi to Jaipur by post. Actually, what according to the learned judges, is the substantial question of law, on the basis of ground No. 2 and in respect of which the certificates have been issued may be reproduced in their own words :

> ".....whether the common course of usage can be lead to the presumption that not only the parties intended that the cheques should be sent by post but that the cheques were actually sent by post. This question has not been considered by this court and does not appear to have been considered in any other reported judicial decision. The question has not been considered by this court and does not appear to have been considered any other reported judicial decision. The question whether the profits in a case were received in the taxable territories or not is not likely to arise in further cases in views of the fact that the distinction between taxable and non taxable territories does not now obtain. But, the general question whether a presumption under section 114, illustration (f) of the Evidence Act, should be raised by the court in circumstances such as those that are present in this case, is of great importance. It is likely to arise in many future cases not restricted to income-tax. Not only is there no specific decision of the supreme court on this question, but even a High Court decision covering this point has not been brought to out notice. We, therefore, certify that these two cases are fit for appeal to the Supreme Court."

The preliminary conjunction of Mr. Karkhanis to the maintainability of the appeals on the ground that the certificates granted by the high court are not proper is as follows : The learned judges have declined to grant certificates on the ground that no substantial question of law remains to be considered regarding the first content that was urge by the revenue, namely, that the assessee when he cashed the cheques uses at Bombay must be considered to have received the amounts in the

taxable territory. But so far is the second contention raised by the revenue was concerned which related to the posting of the cheques by the government of India, at Delhi, the High Court in coming to the conclusion that there is a substantial question of law has grossly erred in ignoring the specific findings recorded by the appellate tribunal the revenue placed no evidence before it to show that the cheques were posted at Delhi, which finding has been accepted by the High Court when answering the reference. In view of this finding of fact, according to the learned counsel, there is no question of any presumption arising under section 114, illustration (f), of the Evidence Act, coming into play. The counsel further urged that the learned judges have granted a certificate on a matter which did not arise for consideration and which was not in dispute before the High Court when it answered the reference and which point had not even been raised in the applications for grant of certificate. When there was a categorical finding that the government placed no evidence regarding the posting of cheques at Delhi, the reasoning of the learned judges when dealing with the applications for grant of certificates that the cheques must have been posted at Delhi, is opposed to evidence. Further, it was a conclusion which cannot be reached at the stage of granting a certificate, being quite contrary to that reached by the High Court when dealing with the reference. In short, according to the learned counsel, the certificates have been granted on a point which does not arise for consideration in the appeals.

Mr. Dhebar, learned counsel for the revenue, contended that the high court has considered all aspects when granting the certificates and that there is no infirmity attached to the orders granting certificates that the cases are fit for appeal to this court. According to the counsel, this was for a fit case where the presumption arising under section 114 of the Evidence Act should have been applied by the High Court when dealing with the reference. Mr. Dhebar finally contended that as the certificates have been issued properly, the appeals are maintainable. The counsel further urged that as reasons had to be given in the order granting certificate of fitness, it is inevitable that there should be some discussion about the nature of the questions that arose for decision before the bench which answered the reference.

While we agree with Mr. Dhebar that reasons for granting the certificates must be given by the learned judges in the order, those reasons, however, in our opinion, must be confined to the material on record, which must have been before the court which dealt with an appeal or reference and in respect of which decision the aggrieved partly desires to come in appeal to this court on certificate on the ground that a substantial question of law arises for consideration.

We are not inclined to accept the contention of Mr. Dhebar that the high court has properly exercised its jurisdiction in certifying that the two cases are fit for appeal to this court. We must frankly admit that when we want through the order of the High Court granting the certificates we felt that the learned judges were either sitting in appeal over the judgment of the Division Bench, which answered the reference or were themselves dealing with the reference under section 66(1) of the Act, in the first instance. Unless the learned judges were exercising one or the other of the above jurisdiction, the criticism about the approach made by the division bench when answering the reference could not be justified. It is clear that when dealing with an application for grant of certificate of fitness, the court was exercising no such jurisdiction. It must be emphasised that in the circumstances like this, the jurisdiction of the court, at the stage of dealing with applications for grant of certificate is limited only to considering whether any substantial question of law arises having due regard to the material on record and the discussion on facts and law contained in the judgment of the High Court which dealt with the appeal or reference or any other proceeding, as the case may be.

Regarding the question that the assessee may be considered to have received the payments at Bombay, the learned judges have quite rightly declined to grant a certificate on the ground that the point is covered by the decisions of this court and that no substantial question of law arises.

As we have already pointed out, the certificate has been granted by the learned judges on the basis that the general question whether a presumption under section 114, illustration (f), is of the Evidence Act, can be raised is of great importance and that it is likely to arise in many future cases not restricted to income tax. It should be remembered that this court should not be invited to decide any question of law much less the substantial question of law purely in the abstract. Such question of law must reasonably arise on the basis of the material on records. Further, the substantial question of law, in order to be certified as fit to be decided by this court must arise on the facts of a particular case. With great respect to the learned judges who dealt with the applications for grant of certificate, we are constrained to remark that they have ignored the finding of fact recorded by the appellate tribunal in its supplementary statement dated March 18, 1961, that the revenue has placed no materials to prove that the cheques were posted at Delhi. It should be remembered that when the reference was made in the first instance, the Punjab High Court felt that the appellate tribunal had not given any finding as to whether the cheques in question were sent to the assessee by post and whether the assessee had given any direction in that regard to the government of India. In view of the absence of such a binding, the High Court by its order dated March 24, 1955, called or a supplementary statement from the Appellate Tribunal under section 66(4) of the Act. This order was challenged before this court by the assessee successfully. The purpose of seeking a supplementary statement was to focus the attention of the appellate tribunal to aspect, namely, the position of cheques claimed to have been done at Delhi by the government of India. That the revenue miserably failed to establish the fact of posting of cheques at Delhi, is clear from the finding recorded by the Appellate Tribunal in its supplementary statement which finding has been accepted by the High Court in its judgment dated on February 21, 1967, when answering the reference. The High Court has also recorded a finding that the revenue has failed to place any material before the appellate tribunal to prove that the cheques in question were being sent by the government of India through post. Unfortunately all these aspects have been missed by the learned judges when dealing with the applications filed by the revenue for the grant of certificates.

On the above findings recorded by the appellate tribunal and confirmed by the High Court, no question of applying any presumption under section 114 of the Evidence Act arises for consideration. The learned judges, dealing with the applications for grant of certificates, had no jurisdiction to go behind the finding recorded in the original judgment disposing of the reference. In out opinion, the entire discussion on this aspect of posting of the cheques at Delhi by the learned judges is beside the point, as that the question no longer was available to the revenue, in view of the finding recorded against it, to which we have made a reference earlier.

When once the question of a presumption under section 114, illustration (f), of the Evidence Act, does not fall to be considered in these proceedings, in view of the specific finding recorded by the appellate tribunal against the revenue, and accepted by the High Court, in our opinion, the High Court was not justified in certifying, on this ground, that the cases are fit for appeal to this court.

As the issue of certificates by the High Court is not proper, the only course open to us is to cancel the certificates and set aside the order of the High Court granting them. The result is that the above appeals have become unsustainable, as they have been brought to this court on the basis of certificates, which, as held by us, have not been properly granted.

The appeals, accordingly, are held to be not maintainable and are dismissed with costs. There will, however, be only one hearing fee.

Appeals dismissed.

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