Raja Ram Kumar Bhargava (Dead) By Lrs

Vs

Union of India

Civil Appeal No. 4034 of 1975

(S. Natarajan, M. N. Vankatachaliah JJ)

11.12.1987

JUDGMENT

VENKATACHALIAH, J. –

1. This appeal, by special leave, by the legal representatives of Raja Ram Kumar Bhargava, the unsuccessful plaintiff, is directed against the judgment and decree, dated February 14, 1980 of the High Court of Delhi in First Appeal (O.S.) No. 17 of 1972 on its file, affirming the judgment and decree of dismissal dated, July 28, 1972 in Suit No. 372 of 1969 entered by the learned Single Judge of the High Court.

2. Plaintiff sued for recovery of interest on certain refunds of income tax and excess profits tax claimed to be statutorily due and payable to him under Section 66(7) of the Income Tax Act, 1922 (hereinafter referred to as the '1922 Act') on the refunds of the taxes. The suit claim comprised of a sum of Rs. 1,17,358.87 sought by way of interest on the refund of income tax; and Rs. 12,282.11 claimed as representing interest on the refund of excess profit tax. The assessments were made under the Income Tax Act (1922 Act) and the Excess Profits Act, 1940 respectively.

3. The necessary and material facts may briefly be stated : Raja Ram Kumar Bhargava was assessed in the capacity of Kartha of a Hindu Undivided Family for income and excess profits taxes for the assessment year 1947-48. It would appear, pursuant to the order of assessment dated, September 23, 1951 made by the Income Tax Officer, as modified by the appellate orders dated May 15, 1952 and March 27, 1957 of the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal, respectively, a sum of Rs. 2,57,383.87 was recovered from him on March 27, 1957 under threat of coercive process. It was plaintiff-assessee's case that he met this obligation by raising funds from the Central Bank of India Ltd. on the mortgage of his properties incurring heavy liability towards interest on the mortgage loans.

4. However, the quantum of both the taxes came to be substantially reduced pursuant to the consequential orders, dated September 16, 1969 made under Section 66(5) of the 1922 Act and under Section 66(5) read with Section 21 of Excess Profits Tax Act, 1940 respectively giving effect to the orders of the High Court in certain references under Section 66(1) of the Act. A sum of Rs. 2,01,146.62 and a sum of Rs. 19,126.16 became refundable by way of income tax and excess profits tax, respectively, on such recomputation of the income. The said sum of Rs. 2,01,146.62 was refunded on December 17, 1966; and the sum of Rs. 19,126.16 towards excess profits tax refunded on December 9, 1967. The question that yet remained was whether plaintiff-assessee was entitled to the payment of interest on the said refunds under Section 66(7) of the 1922 Act.

5. In the meanwhile, on April 1, 1962, the Income Tax Act (1961 Act) had come into force. Section 297(1) of the '1961 Act' repealed the '1922 Act'. Under the 1922 Act and the Excess Profits Tax Act, 1940, appellant was entitled to claim interest on the refund of taxes under circumstances contemplated by Section 66(7) of the '1922 Act'. But Section 297(2)(i) provided that :

> (i) where, in respect of any assessment completed before the commencement of this Act, a refund falls due after such commencement or default is made after such commencement in the payment of any sum due under such completed assessment, the provisions of this Act relating to interest payable by the Central Government on refunds and interest payable by the assessee for default shall apply;

6. Accordingly, the claim of the plaintiff-assessee for payment of interests on the refunds came to be considered by the authorities under the provisions of 1961 Act and no claim for interest was held to survive.

7. Plaintiff-assessee thereafter, instituted the present suit against the Union of India for recovery of the interest under Section 66(7) of the 1922 Act alleging that the assessment in the present case must be held to have been "completed" before the commencement of the 1961 Act - according to the assessee the assessment was completed the moment the Income Tax Officer made the order dated March 28, 1951 - and that, therefore, the claim for interest squarely fell within Section 66(7) of the 1922 Act read with, and saved by, Section 297(2)(a) of the 1961 Act.

8. The defendant resisted the suit contending first, that the suit was not maintainable : secondly, that it was statute-barred and that, thirdly, at all events, the view taken by the authorities that the matter was governed by the Section 297(2)(i) of the 1961 Act was correct.

9. The High Court framed the necessary and relevant issues stemming from the pleadings. Having regard to the questions agitated in this appeal, the following two issues - issues 4 and 6 - require to be noticed :

> (4) Whether this Court has jurisdiction to try this suit ?
>
> (6) Whether the claim of the plaintiffs in the suit is governed by the provisions of Income Tax Act, 1922 ?

10. The learned Single Judge of the High Court who tried the suit recorded findings against plaintiff-assessee on issue 4 and in his favour on issue 6. On issue 6 the learned Judge held :

> In my judgment, the present case is governed by the provisions of the old Act ...
>
> ... In the present case, the reference was pending when the present act came into force. The rights of the parties will, therefore, be governed by the provisions of the old Act and it cannot be said that the assessment had been completed. As observed by the Supreme Court in Kalawati Devi Harlalka v. CIT (66 ITR 680 : AIR 1968 SC 162), the word "assessment" can bear a very comprehensive meaning; it can comprehend the whole procedure for ascertaining and imposing liability upon the tax-payer ...
>
> ... On a reading of the provisions of Section 297 with the Removal of Difficulties Order, it seems to me that the intention of the legislature was that in a case of

> assessment such as the present one the provisions of the old Act should apply ...
>
> ... I, therefore, hold that the claim of the plaintiffs is governed by the provisions of the Income Tax Act, 1922. ...

11. On issue 4, however learned Judge held :

> ... The remedy of a civil suit, it seems to me, is misconceived, for the civil court has no jurisdiction to substitute its discretion to grant interest in place of the discretion vested in the Commissioner. Section 66(7) of the Act provides that the amount overpaid shall be refunded to the assessee "with such interest as the Commissioner may allow". Now, rate of interest may be anything between one per cent and six per cent. In view of this statutory provision, the discretion is vested in the public functionary created by the statute and the civil court in this suit has no power to override him, and grant interest ....

12. Accordingly, the suit came to be dismissed. In the appeal before the Division Bench of the High Court, the finding of the learned single Judge on issue 6 was reversed. It was held that the provisions of the 1922 Act did not govern the claim. As this appellate finding was sufficient to support and sustain the decree of dismissal, the appellate Bench did not record any finding of its own on issue 4. The legal representatives of the deceased-plaintiff have come up with this appeal.

13. Shri Nariman, learned senior counsel, appearing in support of the appeal, urged that the correct view which should commend itself for acceptance is that for purposes of Section 297(2)(i) the assessment must be held to be "completed" not when the ITO made the initial order of assessment, but only when the assessment assumes finality in appeal. Implicit in the idea of a completed assessment, says learned counsel, is the element of its finality and the requirements and concomitants of the idea of a "completed assessment" would, accordingly be satisfied only when all proceedings including those in appeal come to an end and the assessment thus assumes finality under the Act. Shri Nariman relied upon some authorities including the one in CIT v. Khemchand Ramdas (6 ITR 414 (PC)) to explain what the concept of a completed assessment or a final assessment connotes in law. Learned counsel referred to the scheme of the 1961 Act in this behalf and to the provisions of the Removal of Difficulties Order, 1962 to suggest that the expression "assessment completed before the commencement of this Act" in Section 297(2)(i) should not be so construed as to render the provisions in the 1922 Act relating to the payment of interest on refunds nugatory and deprive an assessee of a right vesting in him under the '1922 Act'. Learned counsel urged that if the expression "assessment completed" in Section 297(2)(i) is construed in a manner so as to advance justice, then, it should not be limited to cases where only the original assessment by ITO had come to be made. A proper construction would require that a case of the present kind was kept outside the mischief of Section 297(2)(i) and brought within the benignity of Section 297(2)(a) - a construction which would promote and preserve the vested rights under Section 66(7) of the '1922 Act'. It was urged that no provision under the 1961 Act envisaged payment of interest in a case of the present kind and any construction which brings the case under Section 297(2)(i) and not Section 297(2)(a) would not promote justice. Shri Nariman in fairness brought to our notice the pronouncement of this Court in O. RM. M. SP. SV. P. Panchanatham Chettiar v. CIT (99 ITR 519 : (1975) 4 SCC 834 : 1975 SCC (Tax) 480 : AIR 1976 SC 909) but he urged, however, that we should prefer a broader view of the matter consistent with justice and fairness.

14. Shri Manchanda, learned senior counsel for the respondent, maintained that the point raised in

the appeal is no longer res integra, having been the subject of an earlier, definitive pronouncement of this Court on the very question and that, therefore, the contention urged for the appellant is untenable. We think Shri Manchanda is right in this submission.

15. In Panchanatham Chettiar case (99 ITR 519 : (1975) 4 SCC 834 : 1975 SCC (Tax) 480 : AIR 1976 SC 909), a similar question having arisen, this Court held that an assessment would be a 'completed assessment' within Section 297(2)(i) if the ITO had passed the order of assessment prior to the coming into force of the 1961 Act. In view of this pronouncement, it is not possible to accept the contention that the matter fell within Section 297(2)(a) and not Section 297(2)(i) of the 1961 Act. It is not disputed that, in the present case, if the matter fell under Section 297(2)(i) the claim for interest on the refund of income tax becomes wholly insupportable. The view taken by the Division Bench of the High Court on the point must, therefore, be held to be correct and does not call for interference in appeal.

16. Accordingly, the first part of the claim insofar as it pertains to Rs. 1,17,358.87 must be held to have been rightly rejected by the High Court.

17. But the claim of Rs. 12,282.11 said to represent interest on the refund of excess profits tax does not admit of such an easy exit. Shri Nariman urged that this claim rested on an altogether different and surer legal footing. Learned counsel said that Section 21 of the Excess Profits Tax Act, 1940 incorporated and assimilated into itself as a part of its own legislative scheme, inter alia. Section 66 of the 1922 Act and the provisions so built into Section 21 by the legislative expedient of incorporation - and not merely of reference - continue to be operative notwithstanding the repeal of the 1922 Act and that, therefore the claim for interest based on Section 21 of the Excess Profits Tax Act, 1940 pre-eminently survives. Learned counsel submitted that the claim for interest has been negatived by the High Court without examining the scheme of Excess Profits Tax Act, 1940 and merely as a corollary of the untenability of the claim of interest on the refund of the income tax.

18. The distinctive nature of this part of the suit claim pertaining to the interest on excess profit tax has not been specifically dealt with by the High Court. Section 66(7) of the 1922 Act which, by virtue of Section 21 of the Excess Profits Tax Act, 1940, is attracted to cases of refunds of excess profit taxes stipulates that notwithstanding that a reference has been made to the High Court, tax shall be payable in accordance with the assessment made in the case provided that if the amount of assessment is reduced as a result of such reference, the amount overpaid shall be refunded "with such interest as the Commissioner may allow". Several High Courts have taken the view that the provision mandates the grant of interest, the discretion of the Commissioner being in the area of the rate of such interest (see Liquidators of Pursa Ltd. v. CIT (32 ITR 603 (Pat)); Khushalchand Daga v. N. M. Joshi (130 ITR 180 (BOM))).

19. But then, even if the right to claim interest on the refunds of excess profits tax could be said to have been preserved, the question yet remains whether a suit for its recovery is at all maintainable. The question turns on the scope of the exclusionary clause in the statute. The effect of clauses excluding the civil court's jurisdiction are considered in several pronouncements of the Judicial Committee and of this Court (see Secretary of State v. Mask & Co. (AIR 1940 PC 105); K. S. Venkataraman & Co. v. State of Madras ((1966) 2 SCR 229 : AIR 1966 SC 1089); Dhulabhai v. State of Madhya Pradesh ((1968) 3 SCR 662 : AIR 1969 SC 78); Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke (AIR 1975 SC 2238 : (1976) 1 SCC 496 : 1976 SCC (L & S) 70)). Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement

of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then even in the absence of an exclusionary provision the civil court's jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the civil court's jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai case ((1968) 3 SCR 662 : AIR 1969 SC 78).

20. It was suggested for the revenue that a civil suit is clearly barred and that the remedy of an assessee who has been denied interest by the Commissioner under Section 66(7) of the 1922 Act would be a recourse to proceedings under Article 226 of the Constitution, where if the assessee succeeds the remedy is limited to the issue of a direction to the repository of the statutory power to consider and dispose of the matter afresh in accordance with law and that, even then, the court, could not itself, grant the relief in terms of its own quantification of the interest. These contentions, of course, are eminently arguable. The Division Bench of the High Court did not keep the qualitative distinction between the two refunds distinguished; but treated the second claim stemming from the excess profit taxes not with reference to the particularities characterising it but purely on its assumed similarity with that of the first.

21. This is an old litigation which has vexed the parties for over two decades. It appears to us somewhat unjust to expose the parties to a fresh round of litigation. Even if the contention of the respondent as to the non-maintainability of a civil suit is upheld, appellants could yet have recourse to proceedings under Article 226 if they can satisfy the High Court as to the delay in approaching it and seek an appropriate mandamus to the Commissioner who would then have to reconsider the claim for interest under this head. Interest claimed is at 6 per cent per annum. In the particular and special circumstances of this case, we thought - and put it to the learned counsel - whether the interests of justice would not be served by granting relief in these proceedings itself without going into the technicalities of procedure and without a pronouncement on the question of the maintainability of the suit. Learned counsel, in all fairness, left the matter to the court. We think that with a view to doing full and complete justice between the parties, a sum of Rs. 12,282.11 representing interest on the refund of the excess profits taxes should be ordered to be paid to the appellants. This direction we give without pronouncing on issue 4.

22. In the result, while the judgment and decree under appeal, insofar as they pertain to the dismissal of the suit concerning the claim of Rs. 1,17,358.87 is left undisturbed, this appeal is, however, allowed in part to the extent it pertains to the claim of Rs. 12,282.11 claimed by way of interest on the refund of excess profits tax; and in reversal of that part of the judgment and decree of the High Court pertaining to this claim of Rs. 12,282.11, the suit is decreed directing the respondent-defendant to pay to the appellant-plaintiffs the aforesaid sum of Rs. 12,282.11 together with pendente lite and further interest at 6 per cent per annum from the date of the institution of the suit till realisation.

23. The appellants shall be entitled to costs in proportion to their success in the suit Respondent, however it left to bear and pay its own costs throughout. The appeal is disposed of accordingly.

</html