M. B. Abdulla

Vs

Commissioner of Income-Tax, Kerala

Special Leave Petition (Civil) No. 4973 of 1989 With S. L. P. No. 12763 of 1989

(Sabyasachi Mukharji, M. M. Punchhi JJ)

19.03.1990

JUDGMENT

SABYASACHI MUKHARJI C. J. I. -

This is a petition under article 136 of the Constitution for leave to appeal against the orders of the Tribunal and the High Court. The High Court, vide its order dated January 31, 1989, had dismissed the application for reference. There is also an order of the Tribunal refusing to make a reference under section 256(1) of the Income-tax Act, 1961 (hereinafter called "the Act"). This petition also seeks leave to appeal directly from the said order of the Tribunal.

However, in order to appreciate the controversy in this case, the facts reiterated by the High Court of Kerala in its said judgment and order are important. It had observed as follows :

> "For the assessment year 1969-70, the petitioner filed a return declaring a total income of Rs. 9,571. In completing the assessment, the assessing authority proceeded on the basis that the assessee was the owner of the gold seized on October 9, 1968, and confiscated by the Custom authorities worth Rs. 20 lakhs and, accordingly, the Income-tax Officer treated the sum of Rs. 20 lakhs as income from undisclosed sources applying the provisions of section 69A of the Income-tax Act, 1961. On appeal, the Appellate Assistant Commissioner held that the assessee was not the owner of the contraband gold seized by the Central Excise authority and, therefore, reduced the assessee's total income by Rs. 20 lakhs. The Revenue filed a second appeal before the Appellate Tribunal, Cochin Bench. After going through the evidence, the Tribunal came to the conclusion that the car belonged to the assessee and the special places of concealment had been provided by a design in the car. Further, the assessee himself was driving the car in which the gold was found. The assessee also had not attributed the ownership to anybody else. The assessee also had not established that the gold was given to him by any third party. In view of all these, the addition of Rs. 20 lakhs made by the Income-tax Officer but deleted by the Appellate Assistant Commissioner was restored. The additional ground raised by the Revenue that the appeal is not maintainable before the Appellate Assistant Commissioner was rejected. The assessee, thereafter, filed a miscellaneous petition for rectification of the order of the Tribunal. The rectifications sought to be made are:
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> (1) business loss to the tune of Rs. 20,00,000 incurred by the assessee due to investment in gold and the confiscation of the gold by the Customs authorities be

allowed for the assessment year 1969-70, in view of the decision of the Supreme Court in CIT v. Piara Singh, decided on May 8, 1980, and reported in [1980] 124 ITR 40:

(2) the income-tax and special surcharge amounting to Rs. 16,19,395 and Rs. 20,00,000; and

(3) as the tax has already been collected from the amount of Rs. 20,00,000, no interest was payable."

The High Court noted that the Tribunal could not accede to the requests of the petitioner as there could not be considered as mistakes apparent from the record. These points had not been raised by way of a cross-appeal or cross-objections. Thereafter, the assessee filed a petition under section 256 of the Act seeking reference of the following questions of law:

"1. Whether the Tribunal in right in law in its view that the right to file an application under section 254(2) of the Income-tax Act, 1961, is open to be exercised only by the applicant and not by the respondent in the appeal before it?

2. Whether the Tribunal is right in law in rejecting the application under section 254(2) on the ground that the applicant was not the appellant before it and that he had also not filed any memo of cross- objections in the appeal against him?

3. Whether, on the facts and in the circumstances of the case, the assessee was bound to raise before the Tribunal, at the stage when he was only supporting the order appealed against him, of his case for deduction which he was legally entitled to claim in case of allowance of the appeal against him?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the claim of loss on account of confiscation of the gold was not the subject-matter of the appeal?"

The Tribunal dismissed the petition holding that none of the questions sought to be raised was decided by the Tribunal and that as such they did not arise out of the order of the Tribunal. Aggrieved by these two orders, one being refusal by the Tribunal to refer the question as aforesaid under section 256(1) and the other of the High Court directing the Tribunal to refer the questions and state the case to the High Court directing the Tribunal to come up this court. We find that it can legitimately be argued, in the facts and the circumstances of the case, that the question which essentially arose which had to be borne in mind and which was argued before the Tribunal was whether the sum of Rs. 20 lakhs could be subject to taxation in the context as found by the Tribunal as the income of the assessee. The assessee's further contention was that, in view of the decision of this court in CIT v. Piara Singh [1980] 124 ITR 40, even if Rs. 20 lakhs could be treated as the income of the assessee inasmuch as this has been ordered to be confiscated, there was a business loss as held in the said decision of this court. Therefore, this question should have been gone into which was sought to be raised by a miscellaneous application before the Tribunal after disposal of the appeal by the Tribunal.

The principle by which this should be determined has been fairly laid down by this court in CIT v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589, wherein this court, at page 612, had observed as follows:

"Section 66(1) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be simple one, having its impact at one point, or it may be complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that section 66(1) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66(1) of the Act. That was the view taken by this court in CIT v. Ogale Glass Works Ltd. [1954] 25 ITR 529 and in Zoraster and Co. v. CIT [1960] 40 ITR 552, and we agree with it. As the question on which the parties were at issue, which was referred to the court under section 66(1), and decided by it under section 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested of the question, and the High Court rightly entertained it.

It is argued for the appellate that this view would have the effect of doing away with limitations which the Legislature has advisedly imposed on the right of a litigant to require references under section 66(1), as the question might be framed in such general manner as to admit of new questions not argued being raised. It is no doubt true that sometimes the questions are framed in such general terms that, construed literally, they might take in questions which were never in issue. In such cases, the true scope of the references will have to be ascertained and limited by what appears on the statement of the case. In this connection, it is necessary to emphasise that, in framing questions, the Tribunal should be precise and indicate the grounds is sufficiently specific, we are unable to see any ground for holding that only those contentions can be argued in support of it which had been raised before the Tribunal. In our opinion, it is competent to the court in such a case to allow a new contention to be advanced, provided it is within the framework of the question as referred."

Mr. Venugopal, appearing for the petitioner, drew our attention to the observations of Justice Shah, as the learned Chief Justice then was, at p. 617 which are to the following effect:

"The sources of the question must be the order of the Tribunal; but of the question it is not predicated that the Tribunal must have been asked to decide it at the hearing of the appeal. It may very well happen and frequently cases arise in which the question of law arises for the first time out of the order of the Tribunal. The Tribunal may wrongly apply the law, may call in aid a statutory provision which has no application, may even misconceive the question to be decided, or ignore a statutory provision which expressly applies to the facts found. There are only illustrative case: analogous cases may easily be multiplied. It would indeed be perpetrating gross injustice in such cases to restrict the assessee or the Commissioner to the questions which have been raised and argued before the Tribunal and to refuse to take cognisance of questions which arise out of the order of the Tribunal, but which were not argued, because they could not (in the absence of any indication as to what the Tribunal was going to decide) be argued."

As mentioned hereinbefore, this is an application for leave to appeal from the decisions of the Tribunal and the High Court under article 136 of the Constitution. The real and substantial question posed and canvassed before the Tribunal in its appellate order in the appeal, as is manifest from the facts stated before, was, whether a sum of Rs. 20 lakhs could, in the facts and the circumstances, be considered as part of the income of the assessee and as such suffer taxation. Now the question sought to be raised is, whether in view of the decision of this court in Piara Singh's case [1980] 124 ITR 40, the amount of Rs. 20 lakhs could be treated as legitimate business loss of the assessee.

It is possible to take the view that this is substantially a different question, namely, whether an amount is a business loss even assuming that it was income. It is possible and conceivable to consider two different questions, namely, whether a certain sum of money is the income of the assessee, and, secondly, whether even assuming that such was the income, was that income liable to be deducted in view of the provisions of the Act. It is possible to take that these are substantially different questions and not merely different aspects of the same question. Considerations which go into the determination of whether an amount should be treated as income and the considerations which are relevant to determine whether, even assuming that that was income, the amount was deductible, are different. The question in this form was not canvassed before the Tribunal at any point of time, even as an alternative.

It may be reiterated that the Central Excise Officers at Valayar checkpost seized gold weighing 16,000 gms. from car No. MYX 9432, which was being driven by the petitioner along with the documents and took the petitioner into custody. The Collector of Central Excise, Madras, had confiscated the gold in question and found that the petitioner was in possession of the gold. The assessment of the petitioner for the year in question was originally completed at a total income of Rs. 1,571. Subsequent to the completion of the original assessment, the petitioner filed a return declaring a total income of Rs. 9,571. The Income-tax Officer issued notice under section 148 of the Act.

The Tribunal ultimately had accepted the Revenue's contention, restored the addition of Rs. 20 lakhs made by the assessing authority, inter alia, holding that the onus was on the petitioner to prove that the gold was not owned by him which onus the petitioner had failed to discharge. The Tribunal had gone into and adjudicated on the question substantially raised by the petitioner that the confiscated gold could not be treated as the income of the petitioner. The Tribunal rejected the application of the petitioner on the ground that the claim of loss on account of the confiscation of the gold was not the subject-matter of the appeal. The principles of law have been discussed by this court in Scindia Steam Navigations Co. Ltd.'s case [1961] 42 ITR 589.

In the facts and circumstances of the case, the Tribunal and the High Court have taken the view that whether a certain sum of money can be treated as the income of an assessee and whether that sum of money can be treated as the income of an assessee and whether that sum of money could be deducted as loss are different questions of law and not different aspect of the same question. The Tribunal and the High Court have taken a particular view. They have borne in mind the correct principle that are applicable in the light of the law laid down by this court in Scindia Steam Navigations's case [1961] 42 ITR 589.

In the background of the facts and circumstances of the case, as mentioned hereinbefore, if the aforesaid view of the Tribunal and the High Court is a possible view, we are not inclined to interfere with that view under article 136 of the Constitution in the light of the facts and circumstances of this case. We are not prepared to say that injustice has been done to the petitioner. The view taken by the

Tribunal and the High Court is a possible view. The Tribunal and the High Court have borne in mind the principles of law laid down by this court.

In the aforesaid view of the matter, in the facts and the circumstances of the case, this application is rejected and, accordingly, dismissed.

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