Commissioner of Income-Tax

Vs

Dhadi Sahu

Civil Appeals Nos. 1788 and 1789 of 1977

(Yogeshwar Dayal, Dr. A.S. Anand JJ)

18.11.1992

ORDER

YOGESHWAR DAYAL J. –

These are two appeals in view of the special leave granted by this court by order dated August 4, 1977, against the judgment and order dated December 5, 1975 (see [1976] 105 ITR 56), of the Orissa High Court in S. J. C. Nos. 176 and 177 of 1974 rendered in its advisory jurisdiction on a consolidated case stated by the Income- tax Appellate Tribunal, Cuttack Bench, on a question of law arising out of the Tribunal's consolidated appellate order dated December 19, 1973, in I. T. A. Nos. 153 and 154 (CTK) of 1973-74.

The facts giving rise to these appeals, briefly stated, are as follows :

> The respondent (hereinafter referred to as "the assessee"), is an individual and the proceedings relate to the imposition of penalty under section 271(1) (c) read with section 274(2) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), for the assessment year 1968-69 and 1969-70. For those two years, the assessee had disclosed in his return only his own share of the profits from a firm of which he was a partner but, failed to disclose the income falling to the share of his minor children from house property which ostensibly stood in the name of his wife but really belonged to the assessee, the wife being only a benami. The income returned and assessed were as follows :
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> #----------Assessment Year Income returned Income assessed---------- Rs. Rs.1968-69 6,940 30,8401969-70 7,020 14,472----------##

The assessment orders were passed on February 28, 1970. The Income-tax Officer initiated proceedings for the imposition of penalty under section 271(1) (c) of the Act and the matter was referred to the Inspecting Assistant Commissioner under section 274(2) of the Act.

On February 28, 1970, i.e., the date of the assessment orders, section 274(2) of the Act provided as follows :

> "Notwithstanding anything contained in clause (iii) of sub-section (1) of section 271, if in a case falling under clause (c) of that sub- section, the minimum penalty

> imposable exceeds a sum of rupees one thousand, the Income-tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty."

Pending reference of the case before the Inspecting Assistant Commissioner, section 274(2) of the Act was amended with effect from April 1, 1971, by the Taxation Laws (Amendment) Act, 1970 (hereinafter referred to as "the Amending Act"), so as to read as follows :

> "Notwithstanding anything contained in clause (iii) of sub-section (1) of section 271, if in a case falling under clause (c) of that sub- section, the amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty five thousand rupees, the Income-tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty."

The fact of concealment as found in the assessment order was not disputed in the penalty proceedings.

Thereafter, on February 15, 1973, the Inspecting Assistant Commissioner passed orders imposing penalties of Rs. 24,000 and Rs. 12,500, respectively, for the assessment years 1968-69 and 1969-70.

The assessee preferred appeals to the Income-tax Appellate Tribunal and the Tribunal, by its consolidated order dated December 19, 1973, allowed the assessee's appeals and cancelled the penalties holding that, in view of the amendment made to section 274(2) of the Act with effect from April 1, 1971, the Inspecting Assistant Commissioner had lost his jurisdiction.

On the Revenue's application, the Appellate Tribunal stated the consolidated case to the Orissa High Court under section 256(1) of the Act and referred the following question of law :

> "Whether, on the facts and circumstances of the case and on a true interpretation of section 274, as amended by the Taxation Laws (Amendment) Act, 1970, the Inspecting Assistant Commissioner to whom the case was referred prior to April 1, 1971, had jurisdiction to impose penalty ?"

By judgment dated December 5, 1975 (see [1976] 105 ITR 56), a Division Bench of the Orissa High Court answered the question in favour of the assessee.

The appellant thereupon preferred application under section 261 of the Act for certificates of fitness for appeal to this court but the High Court rejected those applications. That is how the matter has come up to this court by way of special leave petitioners and this court granted the special leave, as stated earlier, by its order dated August 4, 1977.

We had the advantage of hearing, Mr. J. Ramamurthy, Senior Advocate, on behalf of the appellant who argued the matter very fairly in spite of the fact that nobody appeared on behalf of the respondent despite service.

The learned judges of the Orissa High Court agreed with the appellate order of the Income-tax Appellate Tribunal, Cuttack, dated December 19, 1973, and took the view thus (see [1976] 105 ITR 56, 62) :

> "If the Inspecting Assistant Commissioner had passed final orders prior to the Amending Act of 1970, there would have been no question of loss of jurisdiction, but as the matter was still pending and by change of procedure the reference became incompetent, the Inspecting Assistant Commissioner had no jurisdiction to complete the proceedings because he had no longer jurisdiction to deal with the matter of this type. We are of the view that the Tribunal came to the right conclusion on the facts of the case. Our answer to the question referred to us, therefore, is :
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> On the facts and in the circumstances of the case and on a true interpretation of section 274, as amended by the Taxation Laws (Amendment) Act of 1970, the Inspecting Assistant Commissioner to whom the case had been referred prior to 1971 had no jurisdiction to impose penalty."

It will be seen that the power to impose penalty under section 271 is conferred on the Income-tax Officer and the Appellate Assistant Commissioner. The power of the Income-tax Officer, however, is subject to the provisions made in section 274 of the Act. The provisions of section 274 before its amendment by the Amending Act have already been noticed earlier. By section 49 of the Amending Act which came into force on April 1, 1971, for the words "the minimum penalty imposable exceeds a sum of rupees one thousand" in section 274(2), the words and brackets "the amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees" were substituted.

It will be seen that till April 1, 1971, the Income-tax Officer had no jurisdiction to impose penalty under section 271(1) (c) of the Act, if the minimum penalty imposable exceeded Rs. 1,000 and, in such a case, he was bound to make a reference to the Inspecting Assistant Commissioner who, on such reference, exercised all the powers conferred under Chapter XXI for the imposition of penalty. From April 1, 1971, the Income-tax Officer could impose penalty under section 271(1) (c) if the amount of income in respect of which the particulars were concealed or inaccurate particulars were furnished did not exceeds Rs. 25,000. If the amount of such income exceeded Rs. 25,000, the Income-tax Officer was required to refer the case to the Inspecting Assistant Commissioner who then got jurisdiction to impose penalty. Now, in the present case, the minimum penalty imposable exceeded Rs. 1,000, but the amount of income in respect of which the particulars were concealed did not exceed Rs. 25,000 and the order of the Inspecting Assistant Commissioner was passed on February 15, 1973, i.e., after the coming into force of the Amending Act which amended section 274(2) of the Act.

Learned counsel for the appellant submitted that, although the order of imposition of penalty was passed by the Inspecting Assistant Commissioner after the Amending Act come into force, yet if the reference made by the Income-tax Officer was validly made before that date, the Inspecting Assistant Commissioner continued to have jurisdiction to impose penalty. In other words, the argument is that the amendment brought out in section 274(2) with effect from April 1, 1971, was not applicable to pending references.

The view of the High Court, on the other hand, is that, even in a reference which was pending under section 274(2) on the date when the section stood amended, the Inspecting Assistant Commissioner could not pass any order imposing penalty if the amount of income concealed did not exceed Rs. 25,000.

It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless an intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change over of proceedings from the court or the Tribunal where they are pending to the court or the Tribunal which, under the new law, gets jurisdiction to try them.

Section 274(2) as it stood prior to April 1, 1971, required the Income-tax Officer to refer the case of Inspecting Assistant Commissioner, if the minimum penalty imposable exceed Rs. 1,000. The Inspecting Assistant Commissioner, on a reference made by the Income- tax Officer, got jurisdiction to impose penalty in such case. The jurisdiction on the Inspecting Assistant Commissioner was conferred by virtue of the reference. The reference was validly made by the Income- tax Officer before April 1, 1971. The question is did the amendment to section 274 divest the Inspecting Assistant Commissioner of his validly acquired jurisdiction or did the amendment oust his jurisdiction merely because the amount of concealed income did not exceed Rs. 25,000, and the case did not satisfy the requirement of section 274(2) as amended.

It will be noticed that the Amending Act did not make any provision that the reference validly pending before the Inspecting Assistant commissioner shall be returned without passing any final order if the amount of income in respect of which the particulars have been concealed did not exceed Rs. 25,000. This supports the inference that, in pending references, the Inspecting Assistant Commissioner continued to have jurisdiction to impose penalty. The previous operation of section 274(2) as it stood before April 1, 1971, and anything done thereunder continued to have effect under section 6(b) of the General Clauses Act, 1897, enabling the Inspecting Assistant Commissioner to pass orders imposing penalty in pending references. In our opinion, therefore, what is material to be seen is as to when the reference were initiated. If the reference was made before April 1, 1971, it would be governed by section 274(2) as it stood before that date and the Inspecting Assistant Commissioner would have jurisdiction to pass the order of penalty.

It is also true that no litigant has any vested right in the matter of procedural law but, where the question is of change of forum, it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the Tribunal or the court of first instance and, unless the Legislature has, by express words or by necessary implication, clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different Tribunals or forums.

This view of ours finds support in two decisions of the Gujarat High Court in CIT v. Royal Motor Car Co. [1977] 107 ITR 753; CIT v. Balabhai and Co. [1980] 122 ITR 301, a decision of the Patna High Court in CIT v. Ganga Dayal Sarju Prasad [1985] 155 ITR 618, a decision of the Punjab and Haryana High Court in CIT v. Raman Industries [1980] 121 ITR 405. The Bombay, Calcutta and Madhya Pradesh High Courts have also taken the same view. The Bombay High Court in the case CIT v. Deorao Shrawan Maundekar [1988] 169 ITR 19, speaking through Bharucha J. (as his Lordship then was), expressly dissented from the judgment under appeal before us and preferred to follow an earlier judgment of the Bombay High Court in CIT v. Rizumal Pherumal [1988] 169 ITR 25. A Division Bench of the Calcutta High Court also took the same view in CIT v. Eastern Development Corporation [1982] 135 ITR 516. A Division Bench of the Madhya Pradesh High Court in CIT v. A. N. Tiwari [1980] 124 ITR 680, followed the view of the Gujarat High Court an dissented from the judgment under appeal.

The Allahabad High Court in the case CIT v. Om Sons [1979] 116 ITR 215, however, followed the judgment under appeal and dissented from the view expressed by the Gujarat High Court. The Allahabad High Court had taken the view that a court or Tribunal deciding a matter must not only be possessed of jurisdiction initially but must also be clothed with the power to decide the matter when the final order is passed.

The Karnataka High Court in Addl. CIT v. M. Y. Chandragi [1981] 128 ITR 256 took the same view as the Allahabad High Court and held that the question of jurisdiction will depend on the law prevailing as on the date when the penalty is imposed.

In Manujendra Dutt v. Purnedu Prasad Roy Chowdhury, AIR 1967 SC 1419, at page 1421-1422, this court considered the effect of the deletion of section 29 of the Calcutta Thika Tenancy Act, 1949, by the Calcutta Thika Tenancy (Amendment) Act, 1953, in the context of the pending action. The suit for rejectment against a tenant was instituted in a civil court in 1947. In view of section 29 of the Thika Tenancy Act, 1949, the suit was transferred to the Controller. During the pendency of the suit before the Controller, section 29 was deleted by the Amending Act. The question that arose was whether by deletion of section 29, the jurisdiction of the Controller over a pending suit was taken away. It was held by this court that the deletion of section 29 did not deprive the Controller of his jurisdiction to try the suit pending before him on the date when the Amending Act came into force. It was pointed out that, though the Amending Act did not contain the saving clause, the savings contained in section 8 of the Bengal General Clauses Act, 1899, corresponding to section 6 of the Central Act, applied and the transfer of the suit having been lawfully made under section 29 of the Act, its deletion by the Amending Act did not affect its previous operation or anything duly done thereunder. Similarly, in Mohd. Idris v. Sat Narain, AIR 1966 SC 1499, the question was whether the Munsif who was trying a suit under the U. P. Agriculturists Relief Act ceased to have jurisdiction after the passing of the U. P. Zamindari Abolition and Land Reforms (Amendment) Act, 1953, which conferred jurisdiction on the Assistant Collector. This court held that the jurisdiction of the Assistant Collector was itself created by the Abolition Act and as there was no provisions in that Act that the pending cases were to stand transferred to the Assistant Collector for disposal, the Munsif continued to have jurisdiction to try the suit. It was observed that the provisions for change-over of proceedings from one court to another are commonly found in a statute which takes away the jurisdiction of one court and confers it on another in pending actions.

Surely the Amending Act does not show that the pending proceedings before the court on reference abate.

We are thus of the considered view that the advisory opinion given by the High Court on the question referred to it was wrong and the answer should be in favour of the appellant and it is held that the Inspecting Assistant Commissioner to whom the case was referred prior to April 1, 1971, had jurisdiction to impose the penalty. The view expressed by the Allahabad High Court in CIT v. Om sons [1979] 116 ITR 215 and the Karnataka High Court in CIT (Addl.) v. M. Y. Chandragi [1981] 128 ITR 256, does not, therefore, lay down the correct law.

The result is that the appeals succeed and the order of the High Court dated December 5, 1975 (see [1976] 105 ITR 56), is set aside. However, in view of the difference of opinion among the different High Courts, the parties are left to bear their own costs of the present proceedings.

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