BOMBAY HIGH COURT

Sidhramappa Andannapa Manvi

Vs.

Commissioner of Income Tax

Income-tax Ref. No. 1 of 1951

(Chagla, C.J. and Tendolkar, J.)

28.08.1951

JUDGMENT

Chagla, C.J.

1. The joint family, of which the assessee was at one time a member, had advanced certain loans to the Warad family. On partition of that joint family, the debts due to the family came to the share of the assessee. A suit was filed by the assessee for recovery of those debts against the Warad estate, but the suit was dismissed by the trial Court. There was an appeal to this Court, but this Court dismissed the appeal on 29-9-1941. The question that arose for consideration by the income-tax authorities was as to when these loans advanced by the family to the Warad estate became a bad debt. The Income-tax Officer held that the loans were not advanced in the course of the joint family business and therefore the claim of the assessee to deduct this amount as a bad debt was disallowed. The Appellate Assistant Commissioner on appeal held that the debt had become a bad debt many years prior to the year of assessment. Then there was an appeal to the Tribunal, and the Tribunal held that the debt had become a bad debt on 29-9-1941, when the judgment of the High Court was delivered. Now the assessment year which the Tribunal was considering was the year 1943-44 and the accounting year was Shake 1863-61 which corresponds to 21-10-1941, to 8-11-1942. The Tribunal erroneously took the view that 29-9-1941, fell within the shake year 1863-64 when obviously it did not. On that erroneous assumption, the Tribunal allowed the appeal of the assessee and permitted him to include the bad debt in the assessment year 1942-43. The Commissioner then applied to the Tribunal for rectification of its order under Section 35 and the Tribunal acceded to the application of the Commissioner and rectified the order, holding that as 29-9-1941 did not fall within the accounting year, the asessee could not claim to include this bad debt in the assessment for the year 1942-43. On that view the Tribunal dismissed the appeal of the assessee. Then the assessee also applied to the Tribunal under Section 35, his grievance being that after the judgment of the High Court he had applied to the High Court for leave to appeal to the Privy Council on 5-1-

1942, and on his petition a rule was granted by the High Court on 7-1-1942. This rule was not prosecuted and nothing further happened to the petition filed by the assessee, According to the assessee the fact of this application for leave to appeal to the Privy Council was before the Tribunal and this fact appeared on the record, but the Tribunal did not take this fact into consideration. As a matter of fact, the Tribunal states in the statement of the case that this fact was not brought to its notice at all. The application of the assessee was that the Tribunal should rectify its order by taking into consideration this particular fact and then giving its judgment as to when the debt became a bad debt in light of the fact that the petition for leave to appeal to the Privy Council was made by the assessee on 5-1-1942. The Tribunal rejected the application of the assessee. It is on these facts that three questions have been referred to us by the Tribunal.

2. The first question is with regard to the power of the Tribunal to rectify under Section 35. Mr. Kolah's contention is that what the Tribunal has done is tantamount to exercising a power of review or revision and not a power of rectification. He says that the Tribunal had at first allowed the appeal of the assessee and then purporting to act under Section 35 it has dismissed that appeal. According to him this is exercising the power of review or revision which is not conferred upon the Tribunal. It is also contended by Mr. Kolah that the power of rectification can only be exercised by the Tribunal on its own motion. The Tribunal cannot exercise the power of rectification at the instance of the Commissioner. Now, when we turn to Section 35 (2), the power of rectification which is conferred upon the Tribunal is the same as the power which is conferred upon the Commissioner and the Appellate Assistant Commissioner under Section 35 (1), and that power is to rectify on its own motion its own mistake appearing on the face of the record. Now, it is in my opinion impossible to contend that if a tribunal is given a power to rectify its own mistake on its own motion, that power excludes the power to rectify the same mistake at the instance of a party or when the attention of the tribunal is drawn to its mistake by a party appearing before it. The power to rectify on its own motion is a larger power than the power to rectify on the application of a party. When a statute confers a power upon a tribunal to make an order on the application of a party, that is a limited power. The power is limited to rectification on an application being made by a party. If an application is not made, even if the Tribunal realizes its own mistake or finds out its own mistake, it has no power to correct it. But when a statute confers a power upon a tribunal to rectify a mistake suo motu, that power is a wider power, a larger power, and can be exercised without an application being made by any party. Therefore, when the tribunal exercises this power on the application of the Commissioner or at the instance of the Commissioner, it is doing something which it can do on its own motion, and in doing the same at the instance of the Commissioner, it is exercising a narrower power than the power conferred upon it by Section 35(2). Mr. Kolah's grievance is that the notice served upon him under the proviso to Sub-Section (1) specifically mentions that the application for rectification was made at the instance of the Commissioner and he would be heard by the Tribunal. Now, I do not understand how the assessee can be prejudiced by the notice being served upon him in these terms. The reason why an assessee is served with a notice when an application for rectification is made is that he should be heard before an order is made to his

prejudice, that is to say, before enhancing his assessment, and so long as a notice was served on the assessee and so long as the assessee was heard, it does not make the slightest difference whether the notice mentions, that the Tribunal was acting suo motu or whether it was acting at the instance of the Commissioner or on the application of the Commissioner.

3. But the more substantial question raised by Mr. Kolah is as to the power of the Tribunal to rectify the mistake. Now the power is undoubtedly a limited power; it is not a power of revision or review, but it is limited to correcting only those mistakes which are apparent on the record. A mistake must be patent on the record; it must not be a mistake which can be discovered by a process of elucidation or argument, or debate. The mistake being patent on the record, rectification must be limited to correcting that mistake only without any further argument or debate. The rectification must follow as a necessary logical consequence of the mistake being found on the record. But Mr. Kolah contends that even though the Tribunal may rectify a mistake it cannot pass an order which is contrary to the order already passed. According to him in dismissing his appeal after having allowed it what the Tribunal was doing was not rectifying a mistake but was revising or reviewing its own decision. Now, it is obvious that the power of the Tribunal is not confined to mere rectification of a mistake which is patent on the record. After the mistake is corrected, the consequential order must follow, and the Tribunal has the power to pass all consequential orders. This is clear from the proviso itself, because the proviso contemplates that in correcting or rectifying the error and in passing the consequential orders prejudice may be caused to the assessee by his assessment being enhanced. In such cases, the law requires a notice to be served upon the assessee under Section 35. In this case the result of the rectification of the error was that the Tribunal had to pass an order to the prejudice of the assessee. The result of the rectification was that the aasessment was enhanced, and because of that a notice had to be served upon the assessee which in fact was served. Our attention has been drawn to a judgment of the Madras High Court in *Commissioner of Income Tax, Madras v. Sevugan, Madras*[1], In that case the Madras High Court was not considering at all what was the effect of the order under Section 35. It is true that they did say that Section 35 had a limited application and it does not enable an order to be reserved, revised, or reviewed, but permits only such error which is on the face of the record to be corrected. With respect that position in law is undisputable. But the real decision was that when an order is made under Section 35, it does not lend itself to a reference under Section 66 (1). It was held that inasmuch as an order under Section 35 is not an order in revision or review of the original order under Section 33 (4) no reference is competent under Section 66 (1), because the order under Section 35 is a new order and not an order in revision or review under Section 83 (4). We express no opinion as to whether this is a correct view or not, but in any case it does not in any way help us to construe an order made under Section 35 so as to decide what is the effect of an order under Section 35. Therefore, in our opinion, the Tribunal was perfectly competent in rectifying the mistake made by it under Section 35 (1), and having rectified it, it was equally competent to pass consequential order which was that the appeal was to be dismissed and not to be allowed.

4. The second question is whether the application of the aseessee to rectify the order under Section 35 was competent. Mr. Kolah says that the mistake which was apparent on the face of the record was the failure on the part of the Tribunal to take into consideration the application made by the assessee to the High Court for leave to appeal to the Privy Council on 5-1-1942. Now, it is difficult to understand how this failure to take into consideration a fact, or an argument, or a decision of a Court can ever be an error apparent on the face of the record. There must be some fact which can be corrected with reference to the record, just as in the case of the Commissioner's application there was an error of fact in the judgment of the Tribunal that 29-9-1941, fell within the year of assessment. Now, that fact could be corrected by a reference to the fact on the record, viz., the assessment year Shake 1863.4, In the case of the application of the assessee there is no fact in the judgment of the tribunal which can be rectified with reference to the

[1]1948-16 ITR 53

record. It is true and we will assume that the application of the assessee to the High Court was on record of the Tribunal, but I fail to see which particular fact in the judgment or the decision of the tribunal Mr. Kolah wishes to have rectified with reference to this particular fact on the record. There is no error patent or apparent on the record which can be corrected by reason of the existence on the record of the application of the assessee to the High Court for leave to appeal to the Privy Council. Mr. Kolah says that if the Tribunal had taken into consideration this application it would not have come to the conclusion that the debt had become bad on 29-9-1941. It may be tbat the Tribunal might have taken a different view if they had considered this application, but in asking the Tribunal to come to a different conclusion on a consideration of this fact the assessee is really asking the Tribunal to revise or review their own decision and not rectify an apparent error on the face of the record. Therefore, in our opinion, the Tribunal was equally right in refusing to rectify its order at the instance of the assessee.

5. The final question which arises for our consideration is on the merits of the application viz. whether the Tribunal was right under the circumstances of the case in holding that the bad debt was not a permissible deduction in the assessment year 1943-44. Now, it was not possible for the assessee to realize this debt once a competent Court of the land held that the debt was not realizable. That was held in the first instance by the trial Court and that view was confirmed by this Court on 23-9-1941. It is true that the judgment of the High Court was subject to appeal to the Privy Council. The position might have been different if an appeal in fact had been preferred to the Privy Council. It may then have been stated that the finality of the judgment of the High Court was affected by the fact that the judgment was subject to an appeal and the appeal had been preferred. But so long as no appeal was preferred, the finality of the judgment of the High Court remained unaffected, and if the judgment of the High Court was final, as in fact it was then on 29-9-1941, there was no possibility of the debt being realized by the assessee from the Warad estate. Now the question as to whether a debt is bad debt or not is a question of fact and that question should be determined from the point of view of the possibility of the realisation of the debt. If there is any possibility that the debt can be realized, then the debt does not become a bad debt, but when there is no possibility at all and when it is ascertained as a fact that on a particular

date the debt became finally irrecoverable, that is the date when the debt becomes a bad debt. A decision of fact may be challenged before us if it is vitiated by any error or by refusal to take into consideration any material evidence, and we have allowed Mr. Kolah to argue this matter because the fact of the application to the High Court for leave to appeal to the Privy Council was not taken into consideration by the Tribunal. But, even when we take that into consideration, we still feel that the judgment of the Tribunal was right and that the debt became a bad debt on 29-9-1941. Mr. Kolah says that the assessee did not make the necessary entries in his books of account till long after 29-9-1941, and that fact should be taken into consideration in determining when the debt became a bad debt. In my opinion, it cannot be left to the volition of the assessee to decide by his own conduct as to when the debt becomes a bad debt. His making entries in his books of account is an exercise of his own volition. It is not left to his option to fix the date as to when the debt becomes a bad debt. Whether a debt becomes a bad debt is an objective fact to be determined objectively and the determination must be left to the Income-tax Officer. If the finding of that question of fact is vitiated by any factor then undoubtedly this Court would consider whether the Income-tax Officer was right in coming to the conclusion that a particular debt was a bad debt. Mr. Kolah relies on a judgment of the Lahore High Court, *B. C. G. A. (Punjab) Ltd. v. Com. of Income Tax Punjab, N. W. F. Delhi Provinces*[2], in support of the proposition that if there is any ray of hope left in the assessee to recover a debt, then the debt cannot be considered to be a bad debt. Now, when we carefully examine the particular ray of hope on which the Lahore High Court relied in that case we find that the debtor had become insolvent and his estate had become vested in the Official Assignee and the creditor was receiving small dividends from the Official Assignee. On these facts the Lahore High Court held that the debt was in the process of realisation and it could not be considered a bad debt. These are entirely different facts from the facts before us. Here when the High Court delivered the judgment on 29-9-1941, the debt became incapable of realisation and therefore, according to me the Tribunal was right in fixing that date as the date on which the debt became a bad debt.

6. The assessae to pay the costs of the reference.
Answer accordingly.

[2]1937-5 ITR 279 FB