

BOMBAY HIGH COURT

Income-Tax Appellate Tribunal

Vs.

S.C. Cambatta

Appeal No. 2 of 1955 and Misc. No. 377 of 1954

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

05.10.1955

JUDGMENT

Chagla, C.J.

1. The question that arises for our consideration in this appeal does not seem to have been considered by any Court. Perhaps the reason is so it seems to us that the answer is very obvious. It appears that the petitioner company transferred to a subsidiary company the business of Eros Theatre and Restaurant and the subsidiary company paid Rs. 5,00,000/- for goodwill. An application was made to the Appellate Tribunal under Section 66(1) of the Income-tax Act with regard to the assessment of the petitioner company, the income-tax authorities having held that in respect of the petitioner company's chargeable accounting period 1943 the Excess Profits Tax Officer was not bound to take into consideration the value of the goodwill in computing the average capital for the purpose of Section 6(1) of the Excess Profits Tax Act. As the tribunal rejected the application the petitioner company approached the High Court under Section 66(2) and we directed the tribunal to state a case and the question of law on which we asked the tribunal to state a case was whether in the computation of capital employed in the business of the assessee the Tribunal erred in not including the value of the goodwill or any portion thereof.

We answered this question in favor of the assessee. The Appellate Tribunal then passed an order valuing the goodwill of the Eros Theatre and Restaurant at Rs. 2,00,000/- and the petitioner company applied to the Tribunal under Section 66(1) to refer a question of law which arose out of this decision of the Tribunal. The Tribunal took the view that the application was misconceived and dismissed it. On that the petitioner company presented a petition before Desai, J. for a writ directing the Tribunal to hear this application which had been dismissed by the Tribunal. The learned Judge granted the relief sought, to the petitioners and the Income-tax Authorities have now come in appeal.

2. Mr. Joshi who appears for the Income-tax Authorities is perfectly right when he contends that

the power of reference is a limited power conferred upon the High Court under Section 66 and that we should not extend the ambit of that power. He is equally right when he contends that a reference only lies under Section 66 provided that a question of law arises out of an order passed by the Tribunal under Sub-Section (4) of Section 33, and his whole attempt has been to satisfy us that the second order passed by the Tribunal was not an order passed under Section 33(4).

His submission is that the powers that the Tribunal exercises under Section 33 and under Section 66(5) are separate and distinct powers and they should not be confused and when the High Court disposes of a reference and exercises its advisory jurisdiction and gives directions to the Tribunal to give effect to its judgment, it is exercising a function which falls under Section 66(5) and not under Section 33(4), and inasmuch as no reference can arise out of an order passed by the Tribunal under Section 66(5) the application of the petitioners was incompetent.

3. Looking to the scheme of the Act, under Section 33 the Appellate Tribunal is constituted the appellate authority over the decisions of the Appellate Assistant Commissioner, and under Sub-Section (4) it is provided :

"The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Sub-Section (6) provides :

"Save as provided in Section 66 orders passed by the Appellate Tribunal on appeal shall be final."

Therefore it is clear that except in cases which may go up to the High Court on, a reference,' the decision of the Appellate Tribunal under Section 33 is final. But where a reference does go up to the High Court, no finality attaches to the decision of the Appellate Tribunal because by reason of the decision of the High Court the decision given by the Appellate Tribunal is liable to be reopened and it will be the duty of the Appellate Tribunal to give effect to whatever decision the High Court gives. When we turn to Section 66, Sub-Section (5) provides :

"The High Court upon hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment."

Mr. Joshi has laid great emphasis on the expression used in this sub-section that the Appellate Tribunal has to dispose of the case and he says that the Legislature does not provide that the Appellate Tribunal has to dispose of the appeal which has already been disposed of under Section

33. It is clear that the expression "case" used in the latter part of Sub-Section (5) has not the same connotation as the expression used in the earlier part of that sub-section. The case that the High Court hears is the case stated to it under Section 66 by the Tribunal. The case that the Appellate Tribunal has to dispose of is the matter before it or the appeal which has lost its finality by reason of Section 33(6).

Therefore, reading Section 33(6) and Section 66(5) together, the scheme is fairly clear that when a reference is made to the High Court either under Section 66(1) or Section 66(2) the decision of the Appellate Tribunal cannot be looked upon as final; in other words, the appeal is not finally disposed of.

It is only when the High Court decides the case, exercises its advisory jurisdiction, and gives directions to the Tribunal on questions of law, and the Tribunal reconsiders the matter and decides it, that the appeal is finally disposed of. In one sense, as the learned Judge rightly points out, it may be said that on the High Court giving its decision there is a continuation of the appeal under Section 33 in another sense it may be said that there is a rehearing of the appeal by the Appellate Tribunal, but it is clear that what the Appellate Tribunal is doing after the High Court has heard the case is to exercise its appellate powers under Section 33. Any other construction which might be put upon Section 66(5) will lead to absurdities. For instance, under Section 33(4) an obligation is cast upon the Appellate Tribunal to hear both the parties and to communicate any order that it has passed to the assessee and to the Commissioner. It is suggested that when the Appellate Tribunal disposes of the matter after the reference has been heard by the High Court, the obligation cast upon it under Section 33(4) does not attach to the further hearing contemplated by Section 66(5). Take this very case where pursuant to the directions of the High Court the Tribunal had to value the goodwill and it put a value of Rs. 2,00,000/- upon the goodwill. Can it be seriously suggested that in computing the value of the goodwill the Appellate Tribunal was under no obligation to give an opportunity to both the parties to be heard? It is clear therefore that the appeal has not been finally disposed of whenever there is a reference to the High Court. The shape that the appeal would ultimately take and the decision that the Appellate Tribunal would ultimately give would entirely depend upon the view taken by the High Court. The High Court may accept the view of the law taken by the Tribunal, in which case the decision of the Appellate Tribunal would stand. The High Court may reverse the decision of the Appellate Tribunal on a question of law, in which case the appeal would have to be disposed of in accordance with the opinion of the High Court. Therefore, in all cases where Section 66 comes in to play the final decision in appeal has only to be given by the Appellate Tribunal after the reference has been made and that decision can only be given under Section 33(4).

It would indeed be curious that if questions of law were to arise when the Appellate Tribunal was giving effect to the directions of the High Court that those questions of law could not be referred to the High Court and that the Appellate Tribunal would only be subject to the control of the High Court up to a particular stage of the appeal and that control would disappear as soon as the reference was disposed of. We wish to make it clear that the questions of law which can be agitated in what we might for convenience describe as the second reference, could only be those questions which do not arise out of the first order passed by the Appellate Tribunal and which

have not been considered by the Appellate Tribunal in its first order. If a question has been considered and no reference is sought, then it is not open to the assessee or the Commissioner to seek a reference at a subsequent stage because that reference would be barred. But if in giving effect to the decision of the High Court, the Tribunal passes an order out of which a question of law arises, which question never arose out of the first order, then there is no reason why the assessee or the Commissioner should not have the right of coming to the High Court under Section 66(1) or Section 66(2).

4. In our opinion, the learned Judge below was right in the view that he took. The result is that the appeal fails and must be dismissed with costs.

Appeal dismissed.