BOMBAY HIGH COURT

Keshavlal Premchand

Vs.

Commissioner of Income-Tax

I.T. Ref. No. 29 of 1956

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

03.09.1956

JUDGMENT

Chagla, C.J.

1. The question that we have to consider and decide in this reference lies in a very narrow compass, although it has given rise to a very interesting debate at the Bar. There was a loss of Rs. 19,723 in a speculative business carried on by the assessee in the year of account and the assessee's contention was that he was entitled to take this loss into account in arriving at the profits and gains of his business. The Taxing Department rejected that contention on the ground that by reason of the first proviso to Section 24(1), Income-tax Act the assessee was not entitled to take into consideration a speculative loss, and that contention has been upheld by the Tribunal. The assessee also had raised an issue before the Tribunal that this was not a speculative loss, but that issue has not been pressed before us by Mr. Palkhivala.

2. Now Section 24(1) deals with set off of a loss in computing aggregate income and, as is now well settled, the scheme of that section is to entitle an assessee to claim a set off in respect of a loss under one head against a profit under another head, and the proviso to that section which was incorporated in the Income-tax Act in 1953 is to the following effect :

> "Provided that in computing the profits and gains chargeable under the head 'Profits and gains of business, profession or vocation', any loss sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions".

Mr. Palkhivala's contention is that this section only refers to a case where an assessee is claiming the right to set off a loss which he has suffered under one head against a profit which he has

earned under another head. The section has no application when the assessee wishes to adjust or set off a loss against a profit under the same head, and the whole of Mr. Palkhivala's argument is this that as in this case the assessee is claiming to set off his speculative loss against his business profits under the same head he is not claiming the right conferred upon him by Section 24 (1) and therefore the proviso has no application. It is said that the proviso would only come into operation in those cases where the assessee seeks to come within the ambit of Section 24(1), but if the assessee does not claim any rights conferred upon him under Section 24 (1) it is not permissible to the Taxing Department to take the view that a liability can be imposed upon the assessee under proviso to Section 24(1).

3. Mr. Palkhivala has drawn our attention to the basic principles which have been well settled by now, which a Court adopts in construing a proviso to a section. A proviso, which is in fact and in substance a proviso, can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso. The section deals with a particular field and the proviso ex cepts or takes out or carves out from the field a particular portion, and therefore it is perfectly true that before a proviso can have any application the section itself must apply. It is equally true that the proviso cannot deal with any other field than the field which the section itself deals with. The duty of the Court also must be to give to the proviso as far as possible a meaning so restricted as to bring it within the ambit and purview of the section itself. If a proviso is capable of a wider connotation and is also capable of a narrower connotation, if the narrower connotation brings it within the purview of the section then the Court must prefer the narrower connotation rather than the wider connotation. But - and this is equally clear - a Legislature may enact a substantive provision in the garb or guise of a proviso and if the Court is satisfied that the language used in the so-called proviso is incapable of making it applicable to the section, then the Court, if the proviso has a clear meaning, must look upon the proviso as a substantive provision enacted by the Legislature and give effect to it as such.

4. In order to emphasise these principles Mr. Palkhivala referred to various decisions of this Court and also certain English cases. It will be sufficient if we just glanced at them as briefly as possible. He first referred to a judgment of this Court in - *'Commissioner of Income Tax v. Murlidhar Mathurawalla Assn[1].',* where we were considering a different proviso to Section 24(1) and in that judgment we pointed out that the proviso can have no application unless in the first place the section itself was applicable. What was sought to be contended there was that Section 24(1) did not merely apply to a set off as between two different heads, but it also applied to a set off in respect of the same head. We rejected that contention pointing out that the language of the proviso which we were construing was capable of being construed so as to bring it within the field covered by the section itself, and we also sounded a note of warning that a section cannot be construed in the light of the proviso to that section, because really the attempt of the Taxing Department was to extend the scope of Section 24(1) by asking us to look at the language of the proviso. This decision of ours has been followed by various High Courts. The Nagpur High Court has followed it in - *'Mohanlal Hiralal v. Commissioner of Income Tax[1]',* and in -

'Commissioner of Income Tax v. C. P. Syndicate[2]', the Punjab High Court has followed it in - *'Commissioner of Income Tax v. Hira Mall Narain Dass[3]',* the Madras High Court has followed it in - *'Parasram Jethanand v. Commissioner of Income Tax[4]',* A discordant note has been struck by the Allahabad High Court, where it has not followed this decision, in - 'In re. Mishrimal Gulabchand', 1950-18 ITR 75 : AIR 1950 Allahabad 270, and i*n - 'Raghunath Prasad v. Commissioner of Income Tax[5]',*

[1]1952-22 ITR 448 : AIR 1953 Nag173 [3]1953-24 ITR 199 : AIR 1953 Pun284 [5]1955-28 ITR 45 (All)
[2]1952-22 ITR 493 : AIR 1953 Nag77 [4]1956-29 ITR 818 (Mad) .

The view taken by the Allahabad High Court seems to be that the proviso to Section 24(1) which we were construing and which could be construed as a proviso should not be restricted to a proviso to that section, but may be looked upon as a proviso to another section of the Income-tax Act. With respect, we adhere to the view we took in 1948-16 ITR 146 and which view, we are happy to note, has been accepted by the three High Courts to which reference has just been made.

5. Mr. Palkhivala also referred to the well known dictum of Lord Macmillan in the decision of the Privy Council in - *'M. and S. M. Railway v. Bezwada Municipality[6]',* and the learned Law Lord, at page 589, with the terseness for which he was famous, states :

> "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms." Reference was also made to Craies on Statute Law at p. 202 where the learned author cites the case of - *'Rex v. Dibdin[7]',* and the observations of Moulton L. J. at p. 125:
> "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in - 'Ex. P. Partington', (1844) 6 QB 649, - 'Re. Brocklebank', (1889) 23 QBD 461 and - *'Hill v. East and West India Dock Co[8].',* have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us which depend solely on taking words absolutely in their strict literal sense disregarding the fundamental consideration that they appear in a proviso."

The learned author also refers to a case of - *'Dormer v. Newcastle-on-Tyne[9]',* where, although the section of the Act was to the effect "Provided that nothing in the Act shall authorise the corporation of Newcastle-on-Tyne to commit a nuisance", the proviso was read in a restricted sense and it was held that it was only a proviso to a group of sections which preceded the section in which the proviso appeared and was not a proviso to the whole enactment.

6. Now, really, there is no dispute about the principles, for which Mr. Palkhivala is contending and undoubtedly the Legislature having enacted a proviso to Section 24(1) prima facie we must look upon it as a proviso and not as a substantive enactment. Therefore, our first effort must be to see whether this enactment can be fitted in appropriately with the language of the section itself so as to constitute a proviso.

It is only when we fail in this attempt that we must then consider whether what the Legislature was aiming at was not to enact a proviso to Section 24(1), but a substantive enactment, although the Legislature gave to that substantive enactment the nomenclature of a proviso.

[6] 27 Bom LR 587 [8] (1884) 9 AC 448

[7] 1910 Probate 57 [9] (1940) 2 KB 204

7. When we turn to the proviso, it is clear that the key words which have to be construed are, "in computing the profits and gains chargeable under the head, "Profits and gains of business, profession or vocation", and when we look at the scheme of the Act it is clear that these words can bear only one interpretation. "Total income" is defined in Section 2(15) as an amount of income, profits and gains referred to in Sub-Section (1) of Section 4 computed in the manner laid down in this Act. Section 3, which is the charging section, charges to tax in respect of total income of the previous year, and Section 4 deals with the application of the Act and applies it to the different sources from which total income is derived. Section 6 deals with the heads of income chargeable to income-tax, and the heads at present are five among which is, "Profits and gains of business, profession or vocation." When we come to the head of business, profession or vocation, which is Section 10, Sub-Section (1) makes the tax payable by an assessee under this head in respect of profits and gains of any business, profession or vocation carried on by him, and Sub-Section (2) provides that such profits or gains shall be computed after making the following allowances, and then follow the various allowances. Section 16(1) deals with exemptions and exclusions which have to be provided in computing the total income, and Section 16(3) deals with notional income which is to be added in computing the total income. Chapter III in which these sections appear is headed "Taxable Income", and then comes Chapter IV which deals with deductions and assessment, and then we come to Section 24 which deals with set off of loss in computing aggregate income. It is therefore clear that the question of set off only arises after the profits and gains of a business, profession or vocation have been computed in the manner laid down in Chapter III. The process of computation as understood by the Income-tax Act is antecedent to the question of the right of the assessee to claim any set off under Section 24. The question of set off only arises when there is a loss under one head, the loss having been arrived at in the manner of computation laid down in Chapter III, and there is a profit under another head, the profit having been arrived at in the manner laid down in Chapter III.

8. Therefore, it is impossible to accept Mr. Palkhivala's contention that when the Legislature referred in the proviso to the computation of profits and gains chargeable under the head 'Profits and gains of business, profession or vocation', the Legislature was referring to the loss to be ascertained for the purpose of a set off under Section 24(1). It was entirely unnecessary to compute the profits and gains of a business, profession or vocation for the purpose of Section

24(1) because that had already been done under Section 10(2). If it was intended to convey by the proviso that the resultant loss in the business had to be ascertained, then the language used by the Legislature would have been very different from the language actually used: Mr. Palkhivala wants to paraphrase the proviso to mean that in the loss suffered in a business if there is any loss due to a speculative transaction then that loss cannot be set off against another head. Now, to do this is not to paraphrase the proviso but to re-write it and to substitute an entirely different provision for what the Legislature has done. It is clear, therefore, on the language of the proviso itself and on the scheme of the Act, that the Legislature in enacting the so-called proviso was enacting a substantive provision dealing with the mode of computing the profits and gains chargeable under the head "Profits and gains of business, profession or vocation", and what the Legislature provided was that when you compute these profits and gains, the loss sustained in a speculative transaction must not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of a speculative transaction.
It is not as if the proviso has no connection whatever with Section 24(1). In one sense it has because what is available for being set off is the resultant profit or loss under Section 24(1) and the proviso sets out the mode of arriving at the resultant profit or loss in the computation of profits and gains of a business, profession or vocation.

9. Mr. Palkhivala says that the proviso to Section 24 (1) can and should only be looked at as an abridgement of the right of set off given to the assessee under Section 24(1) and that abridgement can only deal with the question of setting off a loss under one head against a profit under another head. It is true that the proviso, as we have construed it, does not deal with the abridgement of the right of the assessee to set off a loss under one head against profit under another head, but it does in one important sense abridge the right of the assessee to set off under Section 24(1) and that abridgement consists, if one might so put it, in the quantum of profit or loss which can be set off and the proviso really deals with the quantum of profit or loss on which the assessee can rely for the purpose of claiming a set off under Section 24 (1) against another head. Therefore, although in the larger sense the proviso is a substantive enactment, it cannot be said that the Legislature in placing it after Section 24(1) in the shape and form of a proviso has done something for which there is absolutely no justification.

10. One may also consider, and one is entitled to consider, the mischief that was aimed at by the Legislature in enacting this proviso. One might take judicial notice of the fact that in recent times business men have been known to buy speculative losses in order to reduce their profits and clearly the Legislature was aiming at that mischief and that mischief could only be removed by preventing the assessee from reducing his profits by these speculative losses, and that is exactly what the Legislature has done in enacting the proviso. Mr. Palkhivala drew our attention to the anomaly of the Taxing Department taxing the gains of a speculative business and not giving any reduction for speculative losses. Apart from the fact that the taxing statute is full of anomalies, we do not think that in this particular case the anomaly is very serious. If, as we have already pointed out, the object of the Legislature was to prevent this buying of speculative losses in order

artificially to reduce profits, then whatever anomaly it might have created, the only way the mischief could have been defeated was by enacting the proviso in the manner in which the Legislature has done.

11. In our opinion, therefore, the Tribunal was right when it held that the assessee was not entitled to deduct the sum of Rs. 19,723/-, being the losses from speculation, from its business profits. The answers therefore to the questions submitted to us will be : Question (1) was not pressed for the purpose of this reference. Question (2) in the negative. The assessee to pay the costs of the reference.
Reference answered accordingly.