BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Deviprasad Khandelwal

(K.K. Desai and N Mody, J.)

26.03.1970

JUDGMENT

K.K. Desai, J.

1. In this reference made under section 66(2) of the Indian Income-tax Act, 1922, the question arising for decision is as follows :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of Rs. 1,35,000 (rupees one lakh and thirty-five thousand) credited to the account of Ramsaran Pyarelal did not constitute the income of the assessee-company ?"

2. The facts which require to be noticed are as follows :

The assessee-company had its office and carried on business at Lokhand Jatha, Carnac Road, Bombay. It was incorporated on February 22, 1943, with a paid-up capital of Rs. 2,00,000 divided into 2,000 ordinary shares of Rs. 100 each. This reference relates to the accounting year ending March 31, 1946, the assessment year being 1946-47. In August, 1945, the whole of the share capital of the company belonged to six shareholders, but as on March 31, 1946, two of the shareholders with a small holding had transferred their shares and the whole of the share capital belonged to four persons. Out of the 2,000 shares, one Lachhmandas Gaddarmal was the owner of 1,880 shares. Deviprasad Khandelwal was owner of 70 shares. For the first assessment year 1944-45, the assessee-company disclosed a loss, Rs. 16,000. For the assessment year 1945-46, it returned the income-profit of Rs. 2,529, but was assessed for the income of Rs. 5,514. In the assessment year 1946-47, the original assessment was only made on an income of Rs. 20,593. Prior to October 4, 1954, the Income-tax Officer began inquiries in connection with the reassessment of the assessee-company under section 34. He served the assessee-company with a letter dated October 4, 1954, containing several queries. This letter indicated that the questions

raised related to the ledger account. This letter indicated that the questions raised related to the ledger account standing in the name of one Ramsaran Pyarelal of Jaipur in the books of the assessee-company in the above accounting year. Now, the facts about this account may be summarized as follows :Prior to August 22, 1945, according to the case of the assessee-company, Ramsaran Pyarelal had effected forward transactions in gold in Bombay by taking assistance of the assessee-company. These transactions continued from some time prior to August 22, 1945, till March 6, 1946. In connection with the delivery of gold that was to be taken in the account of Ramsaran Pyarelal on August 24, 1945, the assessee-company having called upon Ramsaran to make payment, received on August 22, 1945, a sum of Rs. 1,00,000 by telegraphic transfer made in favour of the assessee-company by Jaipur Finance Corporation of Jaipur through the Punjab National Bank. In a similar manner, the assessee-company received on October 3, 1945, in this account another sum of Rs. 35,000. In this account, in the accordance with the instructions received from Ramsaran. In this account, in accordance with the instructions received from Ramsaran, delivery of gold was given and taken from time to time. The above sum of Rs. 1,35,000 was used up in connection with taking of delivery of gold. It appears that entries in respect of these forward transactions were in the first instance not made in the main books of accounts of the assessee-company. The case of the assessee-company was that in connection with the moneys received and other credits received in the account, credit notes were from time to time issued by the assessee-company to Ramsaran Pyarelal. The entries in respect of above two sums of Rs. 1,00,000 and Rs. 35,000 and other transactions were brought into the main books of account on November 30, 1945. The transactions became squared up and closed on March 6, 1946, by delivery of gold of the quantity of about 965 tolas by the assessee-company to a respective Ramsaran in Bombay. The account disclosed that in the transaction in gold effected between July - August, 1945, and March, 1946, profit of Rs. 29,742 was made. The account disclosed at least four debit entries for payments debited to Ramsaran Pyarelal as follows :

Rs. 60,000 by cheque drawn on December 14, 1945, on the Chartered Bank.

Rs. 10,000 by hawala adjustment made on December 22, 1945, in the accounts of Ramsaran on the one hand and Khandelwal Bros. Ltd. on the other.

Rs. 7,500 also by hawala adjustment made with Khandelwal Bros.

Rs. 87,464 being the price and/or value of the quantity of gold mentioned above and delivered to Ramsaran Pyarelal.

3. The Income-tax Officer served reminders in respect of his above letter dated October 4, 1954, on the assessee-company, but did not receive any reply till February 28, 1955. On that day, the Income-tax Officer received the letter dated February 26, 1955, from the assessee-company

giving point by point reply to the questions raised by the Income-tax Officer in his letter. In connection with Ramsaran Pyarelal, it was stated that he was residing at London and his London address was given. It was stated that he was an employee of Khandelwal Ltd. in London. It was further stated that tax was not deducted in respect of profits of Rs. 29,000 and odd, because, at the material time, Ramsaran was a non-resident. In this reply, the assessee-company also gave facts relating to the above ledger account of Ramsaran Pyarelal and forward transactions in gold effected in the dress of Ramsaran Pyarelal. It stated at the relevant time the address of Ramsaran Pyarelal was Johari Bazar Jaipur, and the same was the address of Jaipur Finance corporation. At the end of the transaction, gold was delivered to a munim of Ramsaran Pyarelal. They promised to dig out and produce correspondence of instructions given by Ramsaran and also similarly the cash book for the relevant period. The cash book was ultimately produced. The correspondence could not be produced. In the reassessment made, by his order dated February 10, 1956, the Income-tax Officer referred to the above facts and to the fact of a cable dated February 7, 1956, received from Ramsaran Pyarelal pointing out that he had sent the two amounts of Rs. 1,00,000 and Rs. 35,000 and that an affidavit made by the him was being forwarded to the Income-tax Officer in that connection. The Income-tax Officer refused to accept the explanation given by the assessee-company of the above ledger account. In that connection, he observed that Ramsaran Pyarelal was of the age of 30 years in 1956 and that Ramsaran Pyarelal was in relation with Ramprasad, being the husband of the sister of Ramsaran's father. Ramprasad was a brother of Deviprasad who was the shareholder and these facts had not been disclosed to the Income-tax Officer, In Khandelwal Ltd. of London, Ramprasad and Deviprasad were co-directors. In the Jaipur Finance Corporation Ltd., Jaipur, Ramprasad's wife was a director and she could not give any information to the Income-tax Officer about the transmission of moneys. Lachhmandas Gaddarmal who was the main shareholder of the assessee-company had not acted fair with the department. Lachhmandas had in his affidavits filed in his own case stated facts about the huge wealth amassed by him whilst doing business in Jaipur and Indore, but had not produced any books of accounts. He also referred to the fact of wealth in the possession of Ramprasad and the fact that Ramprasad had come to Bombay from Karachi on September 8, 1947. He stated :

> "The money received in the name of Ramsaran Pyarelal has to be viewed in the circumstances relating to Jaipur Finance Corporation Ltd. and also relating to Lachhmandas Gaddarmal and Ramprasad Khandelwal."

4. He held that the profits of Rs. 29,742 in the above account belonged the assessee-company and the above two sums of Rs. 1,00,000 and Rs. 35,000 were income from undisclosed sources belonging to the assessee-company and reassessed the income of assessee-company on that footing. The Appellate Assistant Commissioner confirmed the findings of the Income-tax Officer. In the appeal of the assessee-company before it, the Income-tax Appellate Tribunal, in

the first instance, made a remand order dated January 6, 1958, directing that the Appellate Assistant Commissioner should examine Deviprasad and Ramprasad and, if possible, Ramsaran Pyarelal. The department should also ascertain the financial position of Jaipur Finance Corporation Ltd. and Ramsaran Pyarelal by reference to the Income-tax Officer, Jaipur.

5. The Tribunal was furnished with a remand report which is annexure "D" to the statement of the case. Ramsaran Pyarelal who was out of India could not examined. He had in his letter dated August 25, 1958, stated that extensive business in ready and forward gold was done by him at Jaipur up to the year 1948 through Inderchand Juniwal and other parties of Jaipur. That business was closed in the year 1948. The business was the business of the family of Ramsaran Pyarelal. The Jaipur Finance Corporation had gone into liquidation on June 21, 1948.

6. By its order dated April 28, 1960, the Appellate Tribunal referred to the relevant facts and evidence on record and in paragraph 10 of the order held that the profit of Rs. 29,742 had not been shown to have been made by the assessee-company by getting instruction from Ramsaran Pyarelal and the profit had been shown to have been paid over to the customer. These profit were the profits of the assessee-company. In connection with these profits, it further held that even if the assessee's case was true the Income-tax Officer should have disallowed the debit for payment of this sum of Rs. 29,742 because the assessee had failed to deduct tax on the profits paid to "non-resident". The main reasons for coming to the above conclusion appear in paragraph 8 of the order. These reasons were that the transactions were effected at Bombay. The memos for purchase and sale were in the name of the assessee-company. Letters of instructions for effecting transactions stated to have been received from Ramsaran had not been produced. From settlements to settlements transactions were effected and deliveries were taken and given.

7. In connection with the amounts of Rs. 1,00,000 and Rs. 35,000, the Tribunal held that these amounts were received by telegraphic transfers and were the capital used for the transactions mentioned in the account and that these amounts represented secret cash of one or the other of the shareholders. The Tribunal refused to add this sum of Rs. 1,35,000 in the income of the assessee-company, having felt difficulties in that connection. The one difficulty that it pointed out was that, as had been observed by the Income-tax Officer in connection with Lachhmandas Gaddarmal, he had not come out in the open. He had close connection with the assessee-company and that "this money might belong to him". The Tribunal observed :

> "As this inference is not improbable on the basis of the assessment order, we find it difficult, if not impossible, to confirm the inclusion of this sum in the assessment of the assessee-company. Further, it seems that at the time when the assessment order was passed the investigations in the case of Lachhmandas Gaddarmal were not complete."

"... there is a reasonable probability that this money might belong to one or the other of the shareholders and not to the company."

8. Now, these findings of the Tribunal are sought to be challenged in this reference by seeking an answer to the above question in favour of the revenue.

9. The contentions advanced by Mr. Joshi on behalf of the revenue may be summarised as follows :The settled position in law was that, if a cash credit entry in the books of accounts of an assessee is not explained away to the satisfaction of the Income-tax Officer by the assessee, the amount in the entry should be treated as income of the assessee from undisclosed sources. In support of that proposition, Mr. Joshi relied upon the observations of the Supreme Court in Govindrajulu Mudaliar v. Commissioner of Income-tax, *Lakhmichand Baijnath v. Commissioner of Income-tax, Kale Khan Mohammed Hanif v. Commissioner of Income-tax and Sriram Jhabarmull (Kalimpong) Ltd. v. Commissioner of Income-tax*. Mr. Joshi's submission was that having held that the profits in the above ledger account of Ramsaran Pyarelal belonged to the assessee-company, the Appellate Tribunal was bound to make a finding that the whole of the account was benami account of the assessee-company. The capital with which the business in the account was shown to have been done should have been held to be of the ownership of the assessee-company. He submitted that the Appellate Tribunal's finding that the capital used in this account was of the ownership of one or the other of the shareholders of the assessee-company was an inference without any supporting evidence on record. The inference was accordingly entirely unwarranted and unreasonable and/or perverse. For this reasons, according to Mr. Joshi, the question raised in this reference was a question of law and within the jurisdiction of this court. The question was not merely a question of fact.

10. Mr. Dastur for the assessee-company has with some emphasis contended that in the application made to the Tribunal under section 66(1) of the Act, the revenue had not raised any question about the Tribunal having arrived at its finding without any evidence on record and/or in a perverse manner. That question accordingly cannot be raised before this court in this reference under section 66(2). He submitted that the attempt of Mr. Joshi was to convert this reference which was on a question of fact into a reference on a question of law. In this connection, he relied upon the observations of the Tribunal in its order dated January 6, 1961, rejecting the application for reference made under section 66(1). He mainly relied upon the findings of the Tribunal in the main order dated April 28, 1960, to the effect that it found it difficult to include the sum of Rs. 1,35,000 in the assessment of the assessee-company. In his submission, the Tribunal had made a definite finding of fact that this amount was not of the ownership of the assessee-company. That finding could never be challenged in a questions of fact could not be converted into questions of law, he relied upon the decision in the case of *Sree Meenakshi Mills Ltd. v. Commissioner of*

Income-tax, Relying upon the observations in that case, he further submitted that the fact that this court ordered that the reference be made under section 66(2) was no obstruction in holding in favour of the assessee-company that the question referred is a question of fact and does not require to be answered.

11. On the main questions, his submission was that the authorities relied upon by Mr. Joshi had not the effect of laying down that in every case where the Income-tax Officer rejects the explanation submitted by an assessee in respect of unexplained cash credits in his books of accounts, a finding against the assessee must be made that the cash credit entry represents the assessee's income from undisclosed sources. The submission was that after the tax authorities reject the explanation submitted by the assessee, the further question that must always arise for decision would be : "Whether it could justly in the facts and circumstances of the case, be held that the unexplained cash credit was the income of the assessee." In that connection, he relied upon Chaturbhuj & Co. v. Commissioner of Income-tax, and Orient Trading Co. Ltd. v. Commissioner of Income-tax which last decision is a decision of a Division Bench of this court. His submission was that, after rejecting the explanation of the assessee-company in respect of the cash credits in its books for Rs. 1,35,000, the Tribunal rightly applied as a last fact-finding Tribunal its mind to the question of including this amount in the assessable income of the assessee-company. The Tribunal was within its jurisdiction to hold that it was not satisfied that this amount was not income of the ownership of the assessee-company. The reasons mentioned by the Tribunal in that connection, whether reasons of facts and/or inferences, were not liable to be reconsidered by this court. The power and jurisdiction that the Tribunal had to include this amount in the income of the assessee-company included the power to refuse to do so. Here also, Mr. Dastur repeated that the question was only a question of fact.

12. In connection with his above submissions, Mr. Dastur relied upon the cases *of Commissioner of Income-tax v. Greaves Cotton & Co. Ltd. and Commissioner of Income-tax v. Smt. Anusuya Devi*.

13. Now, in connection with the authorities relied upon by Mr. Joshi and the law applicable, there is hardly any dispute between the parties. As has been held by the Supreme Court in the cases of Govindrajulu Mudaliar v. Commissioner of Income-tax, *Lakhmichand Baijnath v. Commissioner of Income-tax, and Kale Khan Mohmammad Hanif v. Commissioner of Income-tax, the*re is ample authority for the proposition that "where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."

> "The amounts of the cash credits could be assessed to tax as income from undisclosed sources in addition to the business income computed by estimate. The taxing authorities

were not precluded from treating the amounts of the credit entries as income from undisclosed sources simply because the entries appeared in the a books of a business whose income they had previously computed on a percentage basis." *(See Kale Khan Mohammad Hanif v. Commissioner of Income-tax,* "The burden of proving that a cash credit entry appearing in the assessee's account books does not represent income of the assessee is on the assessee and, though the burden may shift to the department in some circumstances, it is not correct to say that the Income-tax Officer is not entitled to reject the explanation of the assessee without some other positive evidence falsifying the assessee's case. The true view is that, while the Income-tax Officer is not bound to accept as true any possible explanation which the assessee may put forth, he cannot also arbitrarily reject the assessee's explanation." (See Sriram Jhabarmull (Kalimpong) Ltd. v. Commissioner of Income-tax.)

14. In this very connection, the observation of this court in the case of Orient Trading Co. Ltd. v. Commissioner of Income-tax was :

"When, however, in a case where the entry stands in the name of a third party the assessee satisfies the Income-tax Officer as to the identity of the third party and also supplies such other evidence which will lies on him can be said to be discharged by him. It will not, thereafter, be for the assessee to explain further how or in what circumstances the third party obtained money and how or why he came to be discharged by him. It will not, thereafter, be for the assessee to explain further how or in what circumstances the third party obtained money and how or why he came to make a deposit of the same with the assessee, The burden will then shift on to the department to show why the assessee's case cannot be accepted and why it must be held that the entry, though purporting to be in the name of a third party, still represents the income of the assessee from a suppressed source. In order to arrive at such a conclusion, however, the department has to be in possession of sufficient and adequate material."

15. In the case of Chaturbhuj & Co. v. Commissioner of Income-tax the Allahabad High Court referred to the decision of the Supreme Court in the case of Govindrajulu Mudaliar v. Commissioner of Income-tax and observed :

"The money in the books of account in that case, as we have stated earlier, showed these moneys as belonging to the assessee-partner and to have been received by the firm from him. No inference was drawn by the Supreme Court that the amounts deposited represented revenue receipts of the (assessee) firm..... The amounts having been found to belong to the assessee partner, the question then arose whether they were taxable revenue receipts in the hands of that assessee-partner ..... On the question of determination of the source, the burden was no doubt placed on the assessee. The case was decided on the

basis that it was for the assessee not only to explain the sources from which he had received the moneys but to affirmatively prove that those were the sources from which he had received the money."

16. Reference was then made to a decision of the Andhra Pradesh High Court and the court observed :

"In none of those cases was any inference drawn that the money appearing in the books of account in a firm as belonging to another person really belonged to the firm merely because the firm, when being assessed, failed to substantiate the correctness of entry by adducing sufficient proof for that purposes. The very basis of assessing an income in the hands of a persons is the ownership of the amount being taxed vesting in that very person and the burden of establishing that fact from some material rests initially on the income-tax department in case that sum is not admitted by the assessee to be his own income or receipt. In such a case, the assessee may be required to give an explanation given by him without a finding that the explanation is unsatisfactory or unreasonable or false, does not provide any material for an inference or finding that the money belongs to the assessee and not to the person to whom it purports to belong according to the entry in the books of account....."

17. The question is as to whether the submissions made by Mr. Joshi for the revenue and mentioned above involve decision on a question of law and whether the findings of the Tribunal could be held to be unjustified. The question is whether in that connection we can proceed to consider and decide the submission that the Tribunal's finding has been arrived at without any evidence on record and is perverse. It is difficult in this connection to reject the submission of Mr. Dastur that in the application made to the Tribunal on behalf of the revenue for a reference under section 66(1) a contention that the finding of the Tribunal was arrived at without there being any evidence on record and was perverse was not made. In that application, the question intended to be raised was mentioned in the same terms as the question before us. It is however true that in the application made under section 66(2) to this court, it was alleged that the finding of the Tribunal was perverse. On inquiries repeatedly made by us, Mr. Joshi has not been able to submit that in connection with the question of the cash credit in respect of the sums of Rs. 1,00,000 and Rs. 35,000 evidence was not on record. He was unable to state that the finding of the Tribunal rejecting the inclusion of the sum of Rs. 1,35,000 in the assessable income of the assessee-company was not in respect of a question of fact. His main submission was that the above finding of the Tribunal was mainly based on its inference that the above money might belong to one or the other of shareholders. The above money might belong to Lachhmandas Gaddarmal. In his submission, this inference which was the basis of the finding made by the

Tribunal, is not warranted on the evidence on record. The finding having been arrived at on the basis of this reference, which was not warranted, must be held to be perverse. We find it extremely difficult to accept this submission made by us Mr. Joshi. In refusing to hold this sum to be income of the assessee-company, the Tribunal was not called upon to apply any principles of law. Now, in this connection, the Tribunal considered a plethora of evidence which was on record. The Tribunal discussed the facts in respect of the ledger account in question. The Tribunal also in paragraphs 3 to 6 of its order referred to the relevant facts including the facts relating to the interest of Lachhmandas Gaddarmal in the assessee-company. It considered the relationship of Ramprasad and Deviprasad who were nephews of Lachhmandas and also the facts relating to Ramsaran who was alleged to be relation of these parties. The Tribunal considered all these facts not only in connection with its finding about the profits of Rs. 29,742, but also in connection with the question of including the sums of Rs. 1,00,000 and Rs. 35,000 (Rs. 1,35,000) in the assessable income of the assessee-company. On the basis of all the evidence of facts on record, the Tribunal found it difficult to accept the contention of the revenue that this money was income of the assessee-company from undisclosed sources. Having regard to these facts, in our view, the submission made by Mr. Dastur that the finding of the Tribunal was totally on a question of fact is correct. The question was regarding making an inference in favour of the revenue that this money belonged to assessee-company, because the explanation of the assessee-company in connection with this money was rejected. It was permissible on the basis of the evidence on record for Tribunal to hold that it found it difficult to include this money in the assessable income of the assessee-company. That finding was entirely on a question of fact.

18. Now, as has been held in the case of *Commissioner of Income-tax v. Greaves Cotton & Co. Ltd. a*nd in the case of *Kale Khan Mohammed Hanif v. Commissioner of Income-tax, "It is well* established that the High Court is not a court of appeal in a reference under section 66 of the Indian Income-tax Act, 1922, and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Appellate Tribunal.... A finding of fact may be defective in law if there is no evidence to support it or if the finding is unreasonable or perverse, but it is not open to the assessee to challenge such a finding of fact unless he has applied for a reference of the specific question under section 66(1). It is for the party who applies for a reference to challenge those findings of fact first by expressly raising the question about the validity of the findings of fact, and if he has failed to do so, he is not entitled to urge before the High Court that the findings of the Appellate Tribunal are vitiated for any reasons."

19. These observations of Supreme Court in the case *of Commissioner of Income-tax v. Greaves Cotton & Co. Ltd.* are wholly applicable to the contentions made by Mr. Joshi. The revenue failed to raise any question about the findings of the Tribunal having been arrived at without any

evidence on record or being perverse in the application under section 66(1). As the revenue had failed to do so, it was not permissible for Mr. Joshi to raise these question indirectly in support of the case of the revenue on the question raised before us.

20. In the case of *Commissioner of Income-tax v. Smt. Anusuya Devi, the Supreme Courtobserved :*

> "There is also no ground for restricting that power (to decline to answer the question) when by an erroneous order the High Court has directed the Tribunal to state a case on a question which does not arise out of the order of the Tribunal to state a case, the High Court is not bound to answer the question without considering whether it arises out of the order of the Tribunal, whether it is a question of law, or whether it is academic, unnecessary or irrelevant."

21. In our view, the question that the Tribunal made its finding without any evidence on record and/or that its finding was perverse was never raised in the application under section 66(1). Such a question could, therefore, not be allowed to be raised at the hearing of this reference made under section 66(2) of the Act. No question of law has been raised and arises for consideration in this case.

22. In connection with the question raised, we will only record the following :

We cannot go behind the finding of the Tribunal that the sum of Rs. 1,35,000 is not the income of the assessee-company from undisclosed sources. In that connection, it is not within our jurisdiction to sift the evidence on record as must be done in connection with investigation of the submissions and contentions made by Mr. Joshi. The Tribunal's inference that this amount may belong to one or the other of the shareholders and/or to Lachhmandas Gaddarmal was only towards its inability to exercise its powers for making a finding that on the evidence on record it must be held that the sum of Rs. 1,35,000 was income of the assessee-company from undisclosed sources. It is impossible to hold that the Tribunal could not legitimately proceed to decide this question in the manner that it did. The amount in question was large. The Tribunal had accordingly made in the first instance a remand or dated January 6, 1958. After all the further evidence was brought on record, the Tribunal appears to have felt it extremely difficult to accept the case of the revenue that this sum was income of the assessee-company from undisclosed sources. Merely because the Tribunal had not accepted the explanation of the assessee-company in connection with the cash credit entries in respect of this amount it was not obligatory on the Tribunal to accept the case of the revenue that this cash credit was the income of the assessee-company from undisclosed sources. Under the above circumstances, we reject the submissions made by Mr. Joshi that the Tribunal's finding has been arrived at without any evidence on record

and in a perverse manner.

23. The question before us is a question of fact and the question is accordingly not answered. The Commissioner to pay costs.