

(1985) 03 GUJ CK 0023

In the Gujarat High Court

Case No : Income-tax Reference No. 209 of 1977

Bomin P. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-03-1985

Acts Referred:

Income Tax Act, 1961 — Section 256, 68

Citation : (1986) 160 ITR 477

Hon'ble Judges : D.H. Shukla, J;B.K. Mehta, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; R.P. Bhatt, for the Respondent

Judgement

B.K. Mehta, J.—The assessee is a private limited company having the business of manufacturing electric motors. The Income Tax Officer worked out the business loss for the assessment year 1963-64 at Rs. 31,164, but added income from other sources, including Rs. 20,000, which represented, according to him, bogus hundi loans. On appeal by the assessee, the Appellate Assistant Commissioner set aside this order of the Income Tax Officer, by his order dated May 15, 1971, and remanded the matter to the Income Tax Officer for re-examining the question about hundi loans after giving adequate opportunity to the assessee to produce oral as well as documentary evidence, as he may be advised. On remand, the Income Tax Officer passed a fresh order on March 25, 1974. In the fresh assessment which he made pursuant to remand, the Income Tax Officer reduced the addition on account of unexplained hundi loans to Rs. 15,000 comprising three loans of Rs. 5,000 each, said to have been advanced by S/Shri Gokuldas Narsuman, Bhagwandandas Nandlal and Tulsidas Bhojraj. The assessee carried the matter again in appeal challenging, inter alia, this addition of alleged three hundi loans. The Appellate Assistant Commissioner held that the assessee had failed to establish that these hundi loans were genuine and, therefore, confirmed the order of the Income Tax Officer. On further appeal to the Appellate Tribunal, challenging, inter alia, this addition, the Tribunal made a consolidated

order for the assessment years 1963-64 and 1964-65. Before the Tribunal, it was contended on behalf of the assessee that he has obtained these loans through hundi brokers who had confirmed these loan transactions and that the receipt or the repayment of the loan was by cheques, the encashment of which were certified by the concerned banks. The Income Tax Officer as well as the Appellate Assistant Commissioner could not have brushed aside this evidence on the short ground that since neither the persons advancing moneys nor the brokers could produce books of account, the transaction could not be held to be genuine. On behalf of the Department, these contentions were sought to be repelled by urging that these transactions were not genuine, though, admittedly, the transactions were more or less through banks, but this was merely a facade and the confirmation letters given by the brokers could not be relied upon since they were acting merely as conduit pipes to transfer the unaccounted moneys of the parties in their books of account. On appreciation of the relevant evidence produced before the Income Tax Officer, documentary as well as oral, the Tribunal concluded that the loan advanced by Hirachand Laxmandas was a genuine transaction, since the loan amount has been received and repaid by cheques. However, as regards the loan said to have been advanced by Bhagwandas Nandlal, though the repayment was by cheque through a bank the encashment of which was certified by the bank concerned, the assessee failed to prove the receipt of the loan which was by cash, and, therefore, the loan was not established. The Tribunal, however, noted that summons were served on the party advancing the loan, which established, according to the Tribunal, merely the fact of the existence of such a party. But since neither the loaners nor the brokers had been able to lead any evidence in support of the letter of confirmation which they have passed confirming the loan transaction, the genuineness of the transaction is not established though the parties were genuine. In that view of the matter, the Tribunal upheld the addition of Rs. 5,000 as unaccounted cash credit transaction. As regards the loan said to have been advanced by Tulsidas Bhojraj, the Tribunal noted that the evidence led before the Income Tax Officer showed that the loan amount was received by cheque, though the Income Tax Officer as well as the Appellate Assistant Commissioner had treated this as a cash loan on the basis of the statement furnished by the assessee. The Tribunal, therefore, held that the assessee has failed to establish the genuineness of this transaction, since the Department had no opportunity to examine and controvert the evidence led by the assessee. The Tribunal did not think it fit to give any credit to the so-called confessional statements made by the persons advancing loans, since the statements of these persons were not allowed to be subjected to cross-examination. In that view of the matter, the Tribunal upheld the addition of Rs. 5,000 said to have been advanced by Tulsidas Bhojraj as unexplained cash credit. In effect, the Tribunal confirmed the addition of Rs. 10,000. The assessee, therefore, sought the reference from the Tribunal which accepted the prayer of the assessee and referred the following question to us for our advice :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that (a) Rs. 5,000 in the name of Shri Bhagwandas Nandlal and (b) Rs. 5,000 in the name of Shri Tulsidas Bhojraj credited in the books of the assessee were taxable as income of the assessee u/s 68 of the Income Tax Act, 1961 ?"

2. At the time of hearing of this reference, a preliminary point was raised on behalf of the Revenue that this court has no jurisdiction to go into the findings of fact made by the Tribunal, since the assessee has not thought it fit to raise and seek a specific reference challenging such a finding of fact. It is, no doubt, a settled position in law that the primary facts found by the Tribunal and the factual inferences therefrom would not be open to review by the High Court, unless the party desiring to challenge the correctness of the finding given by the Tribunal either on the ground that the same is not supported by any evidence on record, or based on irrelevant or inadmissible evidence, or is unreasonable or perverse, seeks and obtains a specific reference raising any one of these grounds. The jurisdiction of the High Court on reference is only an advisory jurisdiction and it can pronounce its opinion only on questions referred to it. It cannot sit as an appellate court from the decision of Tribunal (see Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal, . When the question referred to the High Court speaks of "on the facts and in the circumstances of the case", it means on the facts and circumstances found by the Tribunal and not on facts and circumstances that may be found by the High Court on a reappraisal of the evidence, and in the absence of a question whether the findings were vitiated for any permissible reason, the High Court has no jurisdiction to go behind or question the statements of fact made by the Tribunal [see Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal, . It is well-established that the High Court is not a court of appeal in a reference 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. The High Court should confine itself to the facts as found by the Appellate Tribunal and to answer the question of law referred to it in the context of those facts. 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 the relevant section. It is the obligation of the party who applies for a reference to challenge those findings of fact 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 by any reason [see Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd., .

3. In SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS., , Venkatarama Ayyar J., speaking for the court, laid down the following propositions :

(a) An ultimate finding made by application of legal principle to an inference drawn from facts found is a mixed question of law and fact and such an inference is a question of law open to review by the court.

(b) Where the final determination of the issue does not involve the application of any legal principle, an inference from facts is a pure inference of facts, though drawn from basic facts.

(c) A pure inference of fact not being a mixed question of law and fact is not open to review unless it is challenged as erroneous, in the sense that there is no evidence to support it, or is perverse.

4. The learned advocate appearing for the assessee, however, made an alternative submission. In the first place, he urged a three-fold contention. Firstly, that the present case falls within the first principle enunciated in *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS.*, , since the ultimate finding that this is an unexplained cash credit is a finding on an issue by application of the legal principle contained in section 68 of the Income Tax Act to an inference drawn from basic facts. Secondly, he submitted that inasmuch as the departmental authorities and the Tribunal have not examined the merits of the assessee's case and had arbitrarily rejected the explanation given by the assessee, the High Court has jurisdiction to go into the question as raised and tender its advice, as it may think fit. In support of this latter contention, Mr. Shah relied on the decision of the Supreme Court in *The Commissioner of Income Tax, Kerala, Ernakulam Vs. K.S. Kannan Kunhi, Killara House, Kattoor.* . Thirdly, in any case, he urged that the question as raised is comprehensive enough to cover the challenge to the findings of fact which may enable the High Court to go into consideration of such findings. In the alternative, Mr. Shah urged that the Tribunal, being a fact-finding forum, has not acted as it was obliged to, since it is necessary that every fact for and against the assessee ought to have been considered with due care and the Tribunal must have rendered its findings in a manner which would clearly indicate what were the questions which arose for the determination and what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence before it, and on no account, whatsoever, the Tribunal should base its findings on suspicions, conjectures or surmises, nor should act on no evidence at all or on improper rejection of material and relevant evidence, or partly on evidence and partly on suspicions, conjectures and surmises, and if it does anything of the sort, its findings, even though on questions of fact, would be liable to be set aside by the court.

5. We are of the opinion that so far as the first two limbs of the contention made on behalf of the assessee are concerned, we do not think that they are well-founded. The legal position is well-settled and not capable of any debate. We are impressed with the first limb of contention emphasised on behalf of the assessee that in the present case, the question can be said to be a mixed question of law and fact and that the ultimate finding reached by the Tribunal was on application

of some legal principle to an inference drawn from basic facts. It is no doubt true that in the question as has been referred to us, there is reference to section 68 of the Income Tax Act, 1961. We do not think that this mere reference to section 68 necessarily involves application of any legal principle to the inferences drawn from facts established. Section 68 enjoins upon the assessee to offer an explanation about the nature and source of any sum found credited in the books of an assessee maintained for any previous year, and if there is no explanation or the explanation is unsatisfactory in the opinion of the Income Tax Officer, the sum so credited is to be treated as income and brought to tax accordingly. The opinion of the Income Tax Officer that the explanation submitted by the present assessee did not satisfy him is an inference drawn from the facts adduced before him. In reaching the conclusion of the explanation being satisfactory or otherwise, there is no question of any application of legal principle, much less any interpretation of the section or any legal principle for that matter. The first limb of the contention, therefore, does not impress us, for the aforesaid reasons.

6. The second limb of the contention that since the tax authorities and the Tribunal rejected the explanation without going into the merits of the same, the finding becomes arbitrary and, therefore, the High Court will have jurisdiction to go into it, is emphasised in the light of the decision of the Supreme Court in *The Commissioner of Income Tax, Kerala, Ernakulam Vs. K.S. Kannan Kunhi, Killara House, Kattoor*, . It is necessary to recall what were the facts before the Supreme Court in that case and what ultimately the Supreme Court did in that factual context. The assessee there was asked to explain the nature and source of an amount of Rs. 46,563 which was brought into the books for the new toddy business of the assessee. The assessee's explanation was that this amount was, inter alia, brought from past remittances from Ceylon and savings from agricultural property. This explanation did not find favour with the authorities as well as the Appellate Tribunal. On a reference to the High Court of Kerala, the High Court found that the Income Tax Officer did not examine the merits of this explanation and rejected it as unsatisfactory. The High Court was of the opinion that the explanation was not prima facie absurd and was capable of being examined by the Income Tax Officer. The Income Tax Officer could have gone into the question of remittances made by the assessee from Ceylon which he did not choose to do. The High Court also emphasised that it was not the Department's case that assessee had any business activity in India prior to the date when the said amount was brought into the books. The assessee's further explanation that he had derived income from agricultural property was also not examined. The Appellate Assistant Commissioner also did not choose to examine the explanation given, nor did the Tribunal care to go into that explanation. It had brushed aside that explanation with the observation that the assessee had no proper or satisfactory explanation for the source of the amount. The High Court answered the question, whether addition of the amount as the income of the assessee from undisclosed sources was justified, in the negative. On special leave being granted by the Supreme Court for appeal under article 136 of the

Constitution of India, the Supreme Court refused to interfere with the advice of the High Court, since in the opinion of the Supreme Court, the departmental authorities as well as the Tribunal had arbitrarily rejected the explanation given by the assessee and under those circumstances, the Supreme Court did not think it fit to go into the niceties of the law, whether the High Court was justified in going into the merits of the findings reached by the Tribunal, since it was urged on behalf of the Department by its counsel, Mr. Sen, that the High Court had no jurisdiction to go into the findings of fact on the question as framed. The Supreme Court observed that all it could say in the circumstances was that it was not a fit and proper case where it should exercise its appellate jurisdiction under article 136. No doubt, the Supreme Court has said that the Tribunal had arbitrarily rejected the explanation given by the assessee. It is also true that on behalf of the Department, the contention about the want of jurisdiction to go into findings of fact by the High Court on the question as framed was raised. Even then, we are afraid, we could not read this judgment in the manner in which the learned advocate for the assessee wants us to read it. In his submission, the refusal by the Supreme Court to exercise the appellate jurisdiction after observing that the Tribunal had arbitrarily rejected the explanation given by the assessee is sufficient to indicate that the contention of the Department that the High Court had no jurisdiction to go into the finding of fact on the question as raised before it, which question is in pari materia with the question raised before us as to whether the addition of the amount as an income of the assessee from undisclosed source was valid and justified in law, is baseless. In the submission of the learned advocate, therefore, this is a typical illustrative case of the Tribunal reaching ultimate conclusions in an arbitrary manner, where the High Court must interfere having regard to the ultimate view of the Supreme Court that it could not persuade itself to interfere with the advice given by the High Court by reappraisal of the entire evidence in rejecting the findings made by the Tribunal. The contention appears to be attractive, but on a close reading of the Supreme Court decision in *The Commissioner of Income Tax, Kerala, Ernakulam Vs. K.S. Kannan Kunhi, Killara House, Kattoor*, what we ultimately find at the most is that the Supreme Court could not persuade itself to go into the niceties of the law as to whether the High Court could have gone into the question of facts or not. What the Supreme Court ultimately did was that it refused to exercise its special appellate jurisdiction under article 136, which would not justify us in agreeing with the learned advocate for the assessee that this decision is an authority holding that even if no specific reference has been asked for challenging the findings of fact, the court can go into that question and reappraise the evidence so as to find out whether the finding reached by the Tribunal is without any evidence or that no reasonable man could have reached the conclusion as it did. The second limb of the contention also, therefore, does not commend itself to us. It is difficult to agree with the general submission made by the learned advocate for the assessee that the question is comprehensive enough and the challenge to the finding of fact is implicit in it and the court can go into it. This is too specious a contention which we cannot adhere

to, because if on the frame of such a question, the High Court enters into an examination of the validity of findings of fact, in our opinion, it would be exercise in its appellate jurisdiction to say the least. However, the alternative contention which has been urged appears to us to be well-founded. The reasons for our view are as under :

7. We should recall as to what were the precise contentions and counter contentions on behalf of the parties before the Tribunal. It was urged on behalf of the assessee before the Tribunal that either the receipt of the loan or the repayment is by cheque, the encashment of which has been proved from the banks concerned. Secondly, there were confirmatory letters from the parties who advanced the loans as well as the brokers through whom these loans were raised. The concerned parties so far as the two impugned transactions are concerned are Bhagwandas Nandlal and Tulsidas Bhojraj. The summons was served on Bhagwandas Nandlal. He, however, replied that he has no books of account to corroborate his confirmatory letters saying that he had advanced the amount of Rs. 5,000 to the assessee. The brokers, M/s. Mohanlal and Co., appeared and acknowledged the confirmatory letter saying that the loans were raised through them. They also produced some rough memorandum of accounts to show what brokerage they had charged for rendering the services. They, however, admitted that they were not maintaining regular books of account. Similarly, for the second impugned loan transaction of Rs. 5,000 from Tulsidas Bhojraj, the assessee led evidence before the Tribunal to show that the loan was received, in fact, by cheque, and the finding of the Income Tax Officer as well as the Appellate Assistant Commissioner noting that the amount was received in cash was not factually correct. On behalf of the Department, the departmental representative referred to various confessional statements to urge that the parties concerned had admitted that all the transactions were not genuine, and the transactions were carried through banks only in order to give appearance of genuineness, and though they had given confirmatory letters they were only working as conduit pipes to transfer unaccounted moneys of the parties in their books. In our opinion, the Tribunal did not consider every fact for and against the assessee with care and has not given a finding in a manner which would indicate as to what were the points which arose for determination before it, what was the evidence pro and contra in regard to each one of them and what was the evidence led before it. So far as Bhagwandas was concerned, this is what the Tribunal has said :

"The assessee was given an opportunity to establish that this was a genuine transaction. No evidence has been led in support of the same except that the payment was by way of cheque. Here we are concerned with the receipt of the moneys and not with the payment. According to the assessee, evidence in support of this sum is confirmation letter from the hundi banker or broker and the bank letter that cheque was payable to the debtor and was cashed as such. Again summons was served on the party, and that should establish that the parties are genuine. In our view, for the receipt of Rs. 5,000, there are no

adequate (facts ?) to establish that it was a genuine transaction. The banker or broker has not been able to lead any evidence in support of the confirmation. The party may be genuine and existing but that does not necessarily establish that the transaction was genuine. We hold that this sum has not been established..."

8. As regards the loan by Tulsidas, this is what the Tribunal found : "Regarding Shri Tulsidas Bhojraj, no doubt, Shri Shah led evidence before us to show that though the learned Income Tax Officer and the learned Appellate Assistant Commissioner have noted that this amount was received by cash, it was in fact received by cheque. However, the learned Income Tax Officer and the learned Appellate Assistant Commissioner came to the conclusion that the amount was received in cash only because of a statement furnished by the assessee. This prevented the Department from going behind the cheque transaction. Hence, in our view, it cannot be held that the amount (loan) has been established. The payment too is by cash. We would not take into consideration the so-called confessional statements made by this person but the only evidence led by the assessee consists of confirmation letter through broker and as indicated by us earlier, we are unable to accept that it is adequate to establish the loan to be genuine."

9. In our opinion. with respect to the Tribunal, the Tribunal has not given due care and consideration to every fact for and against the assessee. It has failed to identify what points arose before it, what was the evidence pro and contra in regard to each of them and what are the findings thereon. The most important aspect of the matter which would have clinched the issue one way or the other is the bank evidence. In the case of Bhagwandas, the repayment of loan is by cheque. In the case of Tulsidas, the receipt of the loan amount is by cheque. The bank has given certificates saying that these cheques were encashed, credited and/or debited to the concerned account, as the case may be. It is no doubt true that in the confessional statement, the parties have stated that these transactions were carried through the bank with the ulterior motive of giving an appearance of genuineness to these transactions. These confessional statements have been kept out of consideration and rightly so by the Tribunal. The Tribunal ought to have, therefore, considered as to whether the statements in the certificates of the bank were borne out from the bank accounts. The Tribunal has not cared to examine this aspect of the matter at all. It is no doubt true that the Tribunal was, inter alia, concerned with the question as to whether the loan has been, in fact, advanced and received by the assessee from Bhagwandas Nandlal. The evidence in the nature of cheque pertained to the repayment of the loan. The bank certificate is to the effect that the amount of the cheque has been encashed and debited to Bhagwandas Nandlal's account. If that is so, that evidence would have a backward projection to establish that the loan was paid, unless on examination of the relevant evidence, the Tribunal might have reached a conclusion that repayment was on other account and not on account of the loan advanced. The Tribunal has found that the loaner was a genuine party and

in existence. The brokers, Mohanlal & Co., have also appeared and acknowledged the confirmatory letter. It is no doubt true that the loaner and the broker have admitted that they were not maintaining regular books of account. Nevertheless, the Tribunal was under an obligation to consider as to whether the evidence of the loaner as well as the broker in giving the confirmatory letters confirming the advance inspires confidence of the court or not and if the evidence was found to be not acceptable, what the reason for it was. Not a word has been said by the Tribunal as to why it rejected the bank evidence or for that matter, the confirmatory letters, which the loaner as well as the broker had acknowledged, though they admitted that they had no books of account. Similarly, in the case of Tulsidas Bhojraj, the Tribunal has rejected such an important evidence which itself finds it satisfactory to show that the amount of loan was paid to the assessee by cheque by Tulsidas Bhojraj, because the Income Tax Officer as well as the Appellate Assistant Commissioner has no opportunity to examine this evidence and they proceeded on some statement given by the assessee that the loan amount was advance in cash. We do not find a word in the Tribunal's discussion that it has not granted the permission to the assessee to lead additional evidence. As a matter of fact, on reading the relevant portion pertaining to this aspect, we find that the Tribunal has allowed the assessee to lead additional evidence. If the Tribunal was of the opinion that this evidence was not processed by the authorities below, the Tribunal could have given an opportunity by remanding the matter. But if the Tribunal was satisfied, as it was, as recorded by itself in its order in paragraph 15, that in fact the amount was advanced by cheque, it would not have stopped short by refusing to consider it on the ground that this would be to the prejudice of the lower authorities, since they had no opportunity to process this evidence. We are, therefore, of the opinion that the findings of the Tribunal are clearly vitiated, since it has not discharged its obligation which has been prescribed by law, as explained by the Supreme Court.

10. The result is that there are no valid findings before us to answer the question which has been referred to us. In the circumstances, therefore, we decline to answer the question. This reference is accordingly disposed of. Having regard to the facts of the case, there would be no order as to costs.

11. We hope and recommend that having regard to the fact that the questions relate to the assessment years 1963-64 and 1964-65, the Tribunal will adjust its order after hearing the appeal afresh, without remanding the matter to the authorities below and if it thinks fit to do so, it may fix a time-limit. We hope and recommend that the Tribunal shall adjust its order by deciding the appeal afresh within three months from the receipt of this order by it.