

(1984) 11 MP CK 0009

In the Madhya Pradesh High Court

Case No : M.C.C. No. 49 of 1984 & Miscellaneous Civil Case No. 50 of 1984

Commissioner of Income Tax

APPELLANT

Vs

Mithalal Ashok Kumar

RESPONDENT

Date of Decision : 29-11-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Income Tax Act, 1961 — Section 254(2), 256

Citation : (1985) 49 CTR 372 : (1985) 45 CTR 302 : (1986) 158 ITR 755

Hon'ble Judges : V.D. Gyani, J; P.D. Mulye, J

Bench : Division Bench

Advocate : R.C. Mukati, for the Appellant; M.S. Chaudhary, for the Respondent

Judgement

P.D. Mulye, J.—The Commissioner of Income Tax, Bhopal, has submitted this application u/s 256(2) of the Income Tax Act, 1961, with a prayer to direct the Income Tax Appellate Tribunal, Indore, to send the statement of the case and refer the question of law quoted below :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in recalling its order passed on January 15, 1982 in ITA No. 744/Ind/81 and setting it aside for fresh disposal ? "

2. Facts: The assessee, M/s. Mithalal Ashok Kumar, claimed the status of a registered firm on the basis of a deed of partnership dated October 21, 1976. The application for registration was filed on March 21, 1977, The constitution of the said partnership firm was shown as below :

(1) Shri Mithalal, karta, representing the Hindu undivided family styled as "Mithalal Chhaganlal"

...

35% share

(2) Smt. Pyaribai w/o Mithalal

...

30% share

(3) Smt. Pushpabai w/o Abhayakumar

...

30% share

(4) Shri Ashok Kumar s/o Mithalal

...

5% share

3. The Income Tax Officer noticed that there was already in existence a firm styled as M/s. Abhayakumar Jaswant Kumar, Indore. It was assessed by another Income Tax Officer at Indore. The partners and their shares are as under :

(1) Shri Mithalal, in his individual capacity

...

35% share

(2) Shri Chhaganlal, father of Shri Mithalal

...

10% share

(3) Shri Abhayakumar s/o Mithalal

...

30% share

(4) Shri Ashok Kumar s/o Mithalal

...

25% share

4. The Income Tax Officer noticed the following peculiar features about these two entities:

(1) The two entities are constituted by the members of the same family. They are related closely to each other, either as husband and wife, brothers or father and son.

(2) The capital investment is also traceable to a common source. Mithalal brought in capital of Rs. 20,576.90 from Hindu undivided family funds, Shri Ashok Kumar introduced a capital of Rs. 12,486 by transfer from Mithalal Chhaganlal, Hindu undivided family, and a sum of Rs. 2,125.50 from M/s. Abhayakumar Jaswant Kumar. Smt. Pyaribai brought in her capital of Rs. 6,000 by withdrawing from M/

s. Abhayakumar Jaswant Kumar. Capital of Rs. 6,000.99 of Smt. Pushpabai consists of Rs. 5,000 received by her as gift, a little before the formation of this firm, from Shri Chhaganlal, father of Shri Mithalal, who is the karta of the Hindu undivided family.

(3) Both the entities are doing cloth business.

(4) Business is carried on by both in the same premises.

5. The Income Tax Officer also found that the business of the assessee was run by Shri Mithalal and Ashok Kumar, who were common partners. From the statement of the two lady partners recorded by the Income Tax Officer, he found that they did not have any knowledge of business of the alleged firm. They were only housewives. Smt. Pyaribai, when shown the partnership deed by the Income Tax Officer, displayed ignorance thereof.

6. On a consideration of the material gathered by the Income Tax Officer, he came to the conclusion that no genuine firm styled as " Mithalal Ashok Kumar " has come into existence. He held that this entity is only a branch business of the firm already existing, namely, M/s Abhayakumar Jaswant Kumar. The Income Tax Officer completed the assessment of the assessee in the status of an " AOP " as a protective measure. He further held that the income of the assessee will be included in the assessment of M/s. Abhayakumar Jaswant Kumar.

7. Against the order of the Income Tax Officer, the assessee went up in appeal before the Appellate Assistant Commissioner who examined the matter in detail and upheld the order of the Income Tax Officer. According to him, the two lady partners were benami for their husbands.

8. The assessee went up in further appeal before the Tribunal, before whom it was argued on behalf of the assessee that active participation by the ladies in the conduct of the business of the assessee is not essential. It was also contended that one of the partners was assessed on the share income as a partner of this firm, before the assessment of the assessee. However, the Tribunal held that it could be safely inferred that the management of the two entities was being conducted by Shri Mithalal, the business premises were common and the nature of business of both was also common. They also noted that some constituents of the assessee were quite ignorant about its business activities. It also found that the entire arrangement appears to be a sham and thus dismissed the appeal.

9. Thereafter, the assessee filed Misc. Application u/s 254(2) of the Income Tax Act, 1961, before the Tribunal for rectification on the ground that the Tribunal failed to consider the material placed on record about which submissions were also made. The Tribunal by its order passed on August 24, 1982, held as under :

" For the reasons discussed above, we are of the view that there are mistakes in our order. The same are apparent from the record. We have already held in preceding paras that Section 254(2) of the Income Tax Act, 1961, specifically empowers the Tribunal to rectify any order passed by it. As discussed above, the

Tribunal has inherent power to rectify a wrong committed by itself. In such cases, really speaking, the Tribunal will not be exercising the power of review. We have pointed out the circumstances under which we have committed a wrong or error in deciding the appeal. In our opinion, the mistakes committed are apparent from the record.

In view of the aforesaid facts, we set aside our order and accordingly the order is set aside. The appeal shall be heard again and the same shall be discussed after hearing the parties. Since the matter has become very old, the Asstt. Registrar is directed to fix the hearing of the appeal as early as possible."

10. Thus, the Tribunal set aside its own order dated January 15, 1982, and directed that the appeal which had been decided and disposed of on January 15, 1982, shall be reheard. Accordingly, the Tribunal allowed the miscellaneous petition.

11. The Revenue, therefore, submitted an application before the Tribunal u/s 256(1) of the Income Tax Act for reference of the question referred to above. The Tribunal rejected the said application. Hence, this application.

12. The learned counsel for the Revenue contended that the Tribunal had no power to review its own order as it is not contemplated by the provisions of the Income Tax Act, 1961. Section 254(2) provides for correction of mistakes and not review. According to the learned counsel, the Tribunal on finding that there are some mistakes could rectify the same by amending the said order, but it could not itself set aside the same on that ground and rehear the appeal afresh as it clearly amounts to a review for which there is no such provision or power under the Income Tax Act. The learned counsel for the Revenue further submitted that after the Tribunal had decided the appeal on January 15, 1982, the assessee ought to have submitted an application u/s 256(1) of the Income Tax Act and, consequently, the order of rectification has virtually resulted in a review and, consequently, the Tribunal had no jurisdiction to allow the miscellaneous application filed by the assessee and, in support of his submissions, he placed reliance on the decisions reported in *Niranjan and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others*, , *Commissioner of Income Tax Vs. R. Chelladurai*, , *Commissioner of Income Tax Vs. Kelvin Jute Co. Ltd.*, , *Shew Paper Exchange Vs. Income Tax Officer, "C" Ward and Others*, , *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay*, and *Oriental Investment Co. (P) Ltd. Vs. Commissioner of Income Tax, Bombay*, .

13. On the other hand, the learned counsel for the assessee submitted that from the original order of the Tribunal dated January 15, 1982, it is apparent that though the assessee had placed all the material on record on the basis of which submissions were also made, the Tribunal, even after quoting those points raised, had not at all taken into consideration certain relevant facts and material which were on record and consequently when those mistakes were pointed out

by moving an application for rectification u/s 254(2) of the Income Tax Act, the Tribunal was satisfied and convinced that it had really committed mistakes in dismissing the appeal by not properly looking into the record as also the material produced by the assessee in this connection. He, therefore, submitted that the Tribunal itself having found that they had committed certain mistakes, this being purely a question of fact, the question proposed by the Revenue does not arise at all in this case, as it would always depend on the facts of each case in what manner and to what extent the rectification could be ordered whenever it is found that the Tribunal has committed some mistakes. He, therefore, submitted that there is no question of review as the question of rectification under the Income Tax Act cannot be viewed from the angle as mentioned in Order 47, Rule 1, CPC. He, therefore, submitted that, in the present case, the only question involved was whether the assessee was a genuine firm or not and when the mistakes committed by the Tribunal were pointed out, what the Tribunal had done was that it has found that it has committed mistakes in not considering the material which was already on record and that it is in these circumstances that after allowing the application for rectification, it has set aside its own order and refixed the case for hearing by pointing out that any observation made in deciding that application will not affect the merits of the appeal which shall be decided in accordance with law.

14. The learned counsel for the assessee submitted that no sooner the Tribunal found that it had committed certain mistakes, the natural effect thereof was that it had to set aside that order and refix the appeal for hearing on merits in which they were to consider the merits of that material which they had failed to look into in the initial order dated January 15, 1982. He, therefore, submitted that this is not a case of review at all. He, therefore, stated that there being no question of law as such being involved, the proposed question as suggested by the Revenue being purely a question of fact, cannot be referred to this court considering the facts and circumstances of the present case. He also submitted that there is a difference between "point of law" and "question of law" and even on that basis, there being no question of law involved, the application filed by the Revenue deserves to be dismissed and, in support of his various submissions, he placed reliance on the decisions reported in Commissioner of Income Tax Vs. Sheolal, , K.M. Shanmugam Vs. The S.R.V.S. (P) Ltd. and Others, , T.S. Rajam Vs. Controller of Estate Duty, Madras, , The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye, , Income Tax OFFICER, A-WARD, DEHRA DUN, AND ANOTHER Vs. Income Tax APPELLATE TRIBUNAL, A-BENCH, DELHI, AND ANOTHER., , Commissioner of Income Tax Vs. K.N. Oil Industries, , Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal, , Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia, , COMMISSIONER OF Income Tax, (M.P.), BHOPAL Vs. NATIONAL NEWSPRINT AND PAPER MILLS LTD., and Commissioner of Income Tax Vs. Basanta Kumar Agarwalla and Another, .

15. In order to appreciate the rival contentions, it is necessary to refer to the

relevant provisions of Section 254(2) of the Income Tax Act, which is as follows:

"254. (2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Income Tax Officer :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard. "

16. A bare reading of this section would make it clear that the Tribunal has the power to rectify any mistake apparent from the record and amend any order passed by it under Sub-section (1), and this mistake can be amended if it is brought to its notice by the assessee or by the Income Tax Officer, subject to the provision mentioned therein. Therefore, it is no doubt true that the Tribunal has not got any power to review its own order, but it can certainly correct its mistakes by rectifying the same, in case it is brought to its notice that the material which was already on record before deciding the appeal on merits was not considered by it. Therefore, what would be the effect of rectifying a mistake and thereby amending its original order would always depend on the facts of each case.

17. A resume of the cases cited on behalf of the parties may be stated, in brief, thus:

18. In K.M. Shanmugam Vs. The S.R.V.S. (P) Ltd. and Others, , it has been held as under (p. 1629):

" 7. (4) An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law.

This view was followed in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, ; Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, ; Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another, and The Provincial Transport Service Vs. State Industrial Court, . But the more difficult question is, what is the precise meaning of the expression " manifest error apparent on the face of the proceedings " ? Venkatarama Ayyar J. attempted to define the said expression in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , thus :

"Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla C.J. in Batuk K. Vyas Vs. Surat Borough Municipality and Others, , that no error could be said to be apparent on the face of the record it"

it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case".

19. It would be seen from the said remarks that the learned judge could not lay down an objective test, for the concept necessarily involves a subjective element. Sinha J., as he then was, speaking for the court, in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, , attempted to elucidate the point further and proceeded to observe at pp. 1269-70 (of SCR), (at pp. 412) of AIR), thus:

"It is clear from an examination of the authorities of this court as also of the courts in England, that one of the grounds on which the jurisdiction of the High Court on certiorari may be invoked, is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior court, in exercise of its statutory powers as a court of appeal or revision."

20. This decision assumes that the scope of a writ in the nature of certiorari or as order or direction to set aside the order of an inferior Tribunal under article 226 of the Constitution is the same as that of a common law writ of certiorari in England: we do not express any opinion on this in this case. This decision practically accepts the opinion expressed by this court in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, . The only addition it introduces is the antithesis it made between "error of law and error of fact" and "error of law apparent on the face of the record". But the question still remains in each case whether an error is one of law or of fact and that falls to be decided on the facts of each case. Das Gupta J, makes yet another attempt to define the expression when he says in *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*, , thus:

"An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self-evident and if it can be established, it has to be established by lengthy and complicated arguments,"

21. The learned judge here lays down the complex nature of the arguments as a test of an apparent error of law. This test also may break, for what is complex to one judicial mind may be clear and obvious to another; it depends upon the equipment of a particular judge. In the ultimate analysis, the said concept is

comprised of many imponderables; it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of error, to a large extent, being dependent upon the subjective element. So too, in some cases, the boundary between error of law and error of fact is rather thin. A Tribunal may hold that 500 multiplied by 10,000 is 5 lakhs (instead of 50 lakhs); another Tribunal may hold that a particular claim is barred by limitation by calculating the period of time from 1956 instead of 1961 ; and a third Tribunal may make an obvious error deciding a mixed question of fact and law. The question whether the said errors are of law or fact cannot be posited on a priori reasoning, but falls to be decided in each case. We do not, therefore, propose to define with any precision the concept of "error of law apparent on the face of the record" ; but it should be left, as it has always been done, to be decided in each case.

22. Niranjana and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others, (headnote):

"Held, that since the petitioner's contention was that there was a mistake in the Tribunal's order because it did not correctly record the facts, the Tribunal had to consider and decide whether there was any such mistake or not, but instead the Tribunal went into the merits of the appeal again and found that its order was sound even on the basis of the materials sought to be relied upon. The Tribunal had no such power to review the earlier order."

23. Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia, (headnote) :

"Held, it is true that there must be a question of law arising out of the order of the Tribunal before a reference can be made, but it is not every question of law that is required to be referred by the Tribunal to the High Court. Where the answer to the question is self-evident or is concluded by a decision of the Supreme Court, it would be futile to make a reference and in such a case the Tribunal would be justified in refusing to refer the question to the High Court."

24. ADDL. COMMISSIONER OF Income Tax, M. P. Vs. NATIONAL NEWSPRINT AND PAPER MILLS LTD., (headnote)

"Held, as the answer to the question is self-evident, no useful purpose would be served by requiring the Tribunal to state a case."

25. Commissioner of Income Tax Vs. Kelvin Jute Co. Ltd., (headnote):

"The amplitude of the expression "any order" in Section 254(2) of the Income Tax Act, 1961, includes a final order disposing of an appeal. If there is a mistake apparent from the record even though it is found in an order finally disposing of an appeal, the Tribunal would have the power to rectify it u/s 254(2)."

26. T.S. Rajam Vs. Controller of Estate Duty, Madras, (headnote):

"Though taxing statutes are sometimes highly sophisticated and artificial, they have to be strictly construed as there cannot be any intendment in a tax."

"Mistake" is an ordinary word but in taxation law it has a special signification. It is not an arithmetical or clerical error that comes within its purview. It comprehends errors which are discerned after a judicious probe into the record from which it is supposed to emanate. It is difficult to axiomatise and lay down dictas for the discovery of a mistake from official records. It is inherently indefinite in scope and mostly subjective, the dividing line being thin and undiscernible. In the ultimate analysis, the conclusion a well-equipped and trained judicial mind will reach after scrutinising the record will govern and its finding whether it is a mistake or not has to be accepted.

For a rectification of an error which is said to be apparent from the record, the mere complexity of the problem or that genuine argument is necessary to discover the same may not by themselves be sufficient to oust the jurisdiction of the Tribunal to rectify such a mistake. If it could be discerned with some precision after a fair probe into the assessment records and a reasonable and probable conclusion can be arrived at and the court's conscience has been shaken in that there appears an error on the face of the record which has to be certainly corrected, then the jurisdiction of the Tribunal vesting it with the power to rectify such mistake arises. The essence of rectification is to bring the order which was expressed and intended to be in pursuance of the existing law into harmony with such law. Once the Tribunal or authority is able to predicate with certainty as to in what manner and how the order suffers by a mistake apparent from the record supported by irrefragable evidence then it would enable them to bring the order complained against or impugned against in conformity with the law and the facts on the record."

27. Income Tax OFFICER, A-WARD, DEHRA DUN, AND ANOTHER Vs. Income Tax APPELLATE TRIBUNAL, A-BENCH, DELHI, AND ANOTHER., (headnote) :

"Where in a judgment or order of the Appellate Tribunal, an error has crept in, not as a result of any fault of the assessee, but attributable entirely to the Tribunal in having lost sight of a material fact at the time of writing its order or judgment, which fact was duly brought to its notice by the assessee, there would be an error apparent from the record which could be rectified u/s 35 of the Indian Income Tax Act."

28. Commissioner of Income Tax Vs. K.N. Oil Industries, (headnote):

"The record of the assessment is not confined to the return. Section 154 of the Income Tax Act, 1961, which confers jurisdiction for rectifying a mistake enables the Income Tax Officer to assume jurisdiction when he finds "any mistake apparent from the record." The word "record", as used in Section 154, will include all material which forms part of the assessment proceedings and not only the return. If an assessee omits to claim the relief allowable to him under the provisions of the Income Tax Act, 1961, it could not be said that he is not entitled to get that relief. It is the duty of the Income Tax Officer and other officers administering the Act to inform the assessee that he is entitled to a

particular relief if it is apparent that he is so entitled from the material available in the proceedings of assessment."

29. Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal, (headnote) :

"Where the question of law raised is not substantial and the answer to the question is self-evident, the High Court is not bound to require the Tribunal to refer the question."

30. T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, (headnote) :

"A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record."

31. Commissioner of Income Tax Vs. Basanta Kumar Agarwalla and Another, (head-note) :

"Although Section 256(2) has been couched in a mandatory form to indicate as if the Tribunal were obliged to refer any question of law arising out of such order, it does not mean that the Tribunal is bound to refer a case in which it has merely referred to certain provisions of law and determined the point on the basis of the provisions. A "point of law" cannot be equated with the expression "question of law". The question must be a disputed or disputable question of law. The object of a reference is to get a decision from the High Court on a problematic or debatable question and not on an obvious and simple point of law, although somehow the determination is somewhere linked up with a provision of law. The meaning of the term "question" in the context, means a subject or point of investigation, examination or debate, a problem, as a delicate or doubtful question. The Tribunal need not refer every "point of law". The Tribunal is obliged to refer only a question of law which calls for investigation, examination, debate or when it is a dubious problem. However, if a point of law decided by the Tribunal is positive, certain, definite and sure, there is no obligation on the part of the Tribunal to refer the matter, as the point cannot be termed as a question of law. When a decision is apparently correct and there is no scope for any debate or dispute or difference, it does not fall within the expression "a question of law"."

32. Commissioner of Income Tax Vs. Sheolal, (headnote):

"Rectification within the meaning of Section 35 of the Income Tax Act means the correction of an error apparent on the face of the record. That error must be demonstrable without the taking out of any additional evidence and without any detailed argument pro and con."

33. The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye,

(headnote):

"The restrictive operation of the power of review under Order XLVII, Rule 1, Civil Procedure Code, was not applicable in the case of Section 35 of the Income Tax Act."

34. Therefore, whether in a particular case, the order amounts to a review or rectification, to some extent, would depend on the facts of the case and considering the facts and circumstances of the case, it does not appear that the Tribunal has reviewed its order, but when pointed out, it has admitted its mistake. As held earlier, such mistakes have not to be strictly considered according to the provisions of Order 47, Rule 1, Civil Procedure Code, but have got to be taken into consideration depending on the facts of each case which may vary as also the points involved because, out of some points raised, the Tribunal might think it fit to rectify its mistake regarding only one of those points raised or items disputed.

35. Thus, in the present case, we are of the opinion that the Tribunal itself has found that it has committed certain mistakes in not considering the material which was already on record which has the effect of deciding the appeal on merits. In the present case, the effect of rectifying its mistake, no doubt, has resulted in setting aside the original order, but the only question involved in this case was whether the assessee-firm was a genuine firm or not and in order to decide that point, if it felt that it had committed certain mistakes in not looking into the material already on record, the effect of the error had been that it had to consider the matter on that basis. Therefore, this cannot be said to be a case of review in the strict sense of the term. Consequently, we are of the opinion that the Tribunal was right in refusing to make a reference to this court as urged on behalf of the Revenue because no question of law as such is involved, the Tribunal admittedly having the jurisdiction to rectify its own mistakes.

36. In the result, we see no merit in this petition which is dismissed with no order as to costs and we decline to call upon the Tribunal to make a reference to this court as urged on behalf of the Revenue.