

(1965) 09 CAL CK 0015
In the Calcutta High Court

Case No : Appln. for leave to appeal to Supreme Court in Appeal No. 193 of 1964

Indra Singh and Sons Private Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 10-09-1965

Acts Referred:

Constitution of India, 1950 — Article 133(1)
Income Tax Act, 1922 — Section 34, 35
Income Tax Act, 1961 — Section 154

Citation : AIR 1967 Cal 14 : (1967) 64 ITR 501

Hon'ble Judges : H.K. Bose, C.J.; B.C. Mitra, J

Bench : Division Bench

Advocate : R. Banerjee, for the Appellant; Sabyasachi Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Mitra, J.—This is an application for a certificate under Article 133(1) (a) and (b), in the alternative for a certificate under Article 133(1)(c) of the Constitution. On September 25, 1963, a notice was served upon the petitioner u/s 35 of the Income Tax Act, 1922, for rectification of an order of assessment and on September 28, 1963, an order was made by the Income Tax Officer for rectifying the assessment order for the assessment year 1958-59 by adding back Rs. 13,37,370. As a result of certain proceedings, to which it is not necessary to refer for the purpose of this application; an order was made by the Income Tax Appellate Tribunal on November 10, 1962, by which a sum of Rupees 13,37,370 was held to have been actually distributed by the petitioner, by crediting the accounts of the share-holders as dividends on shares held by them. It was further held by the Tribunal that the said sum had been actually distributed prior to the relevant year and for that reason the super tax rebate at 30 per cent should not be reduced in respect of the said sum of Rs. 13,37,370. This order of the Tribunal was followed by a notice u/s 35 of the 1922 Act being the said notice dated September 25, 1963, for rectification of the assessment order for the

assessment year 1958-59 In this notice it was stated, inter alia, that in the assessment year 1958-59 dividend declared had been taken to be Rs. 6,00,000 for the purpose of reduction of rebate from corporation tax, but in accordance with the order of the Appellate Tribunal a sum of Rs. 13,37,370 was to be taken as dividend declared for the purpose of reduction of rebate from corporation tax. Objection was filed to this notice by the petitioner, contending that Section 35 of the 1922 Act could not be invoked as there was no error apparent on the records. On September 28, 1963, the hearing of the case pursuant to the said notice took place and an order was made on the same day whereby the assessment order for the assessment year 1958-59 was rectified by adding back the said sum of Rs. 13,37,370

2. The petitioner's case was that the said sum of Rs. 13,37,370 was distributed as dividend on December 19, 1957 In the original order of assessment, that is to say, the order as it stood before rectification, for the assessment year 1958-59, a sum of Rs 6,00,000 was taken as dividend declared for the purpose of reducing rebate on super tax in accordance with the Finance Act, 1959. But owing to the distribution of a further dividend of Rs. 13,37,370 the total amount of dividend declared and distributed came to Rs. 19,37,170. According to the respondents the total amount that should have been taken as dividend declared for the purpose of reducing rebate on super tax should therefore be the said sum of Rs 19,37,170 It was this mistake which was sought to be rectified by the proceedings u/s 35 of the 1922 Act.

3. The judgment of this Bench, from which the petitioner now seeks to prefer an appeal to the Supreme Court, is a judgment of affirmance. The petitioner, therefore, has to satisfy us that the amount or value of the subject matter in dispute between the parties in the appeal and still in dispute was and is not less than Rupees 20,000, or that the judgment or order involves directly or indirectly some claim or question in respect of the property of the like amount or value. The petitioner has further to satisfy us that there is some substantial question of law. As to the valuation test there is no difficulty as undoubtedly the subject matter of the dispute was and still is a sum exceeding Rs. 20,000. So far as the prayer for a certificate under Article 133(1) (a) and (b) is concerned, the petitioner, therefore, has to satisfy us that the question involved in the appeal is a substantial question of law.

4. The first question involved in the appeal is whether the Income Tax Officer could for the purpose of assessment of one particular year, look into the records of the assessee of other years for the purpose of making out the case of mistake apparent on the face of the records as contemplated by Section 35 of the 1922 Act On this question the pronouncements of the Supreme Court in *Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar*, *Income Tax Officer V Circle, Madras v. S.K. Habibulla* AIR 1962 SC 918 and *Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others*, appear to us to be conclusive. It cannot therefore be said that the question whether the Income Tax

Officer could look into the records of the assessee himself in respect of the assessment of other years is a substantial question of law.

5. The next question involved in the appeal was whether the mistake contemplated by Section 35 of the 1922 Act must be a mistake which was glaring, obvious and self-evident and not a mistake which could be discovered only by an elaborate & long drawn process of reasoning on points where there might be two opinions. In other words, the argument on behalf of the petitioner was that the jurisdiction of the Income Tax Officer to proceed u/s 35 of the Act depended upon the existence of a mistake apparent from the record. In the facts of this case, however, there is hardly any scope for argument that there was no error on the records. The date of distribution of the dividend admittedly is December 19, 1957, and that being so and also having regard to the order of the Income Tax Appellate Tribunal mentioned above, there could be no doubt or scope for debate or argument about the existence of a mistake on the records. The statute makes certain provisions for reduction of rebate on super tax and the provisions in the statute have to be complied with. In our opinion, the contention of the learned advocate for the petitioner that there was scope for debate or doubt on the question if there was an error apparent on the records is not tenable.

6. The next question involved in the appeal is whether Sections 34 and 35 of the 1922 Act are mutually exclusive. In our view however, this question cannot be regarded as a substantial question of law. The Income Tax Officer had jurisdiction to proceed both u/s 34 and Section 35 of the 1922 Act and he chose to proceed under the latter Section. It cannot be said that he had no jurisdiction to proceed u/s 35 of the Act merely because he had also the jurisdiction to proceed u/s 34 of the Act.

7. The next contention of Mr. Banerjee was that the impugned order was made u/s 154 of the Income Tax Act, 1961. This Section, it was argued, had no retrospective application, and could not therefore be invoked for the purpose of rectifying the assessment made in respect of the assessment year 1958-59. It appears to us that this question cannot also be treated as a substantial question of law. It is now well settled that procedural law when amended had retrospective operation and this doctrine of retrospective operation of procedural law meant that pending cases though instituted under the old Act would be governed by the new procedure under the amended law. The assessment case was a pending case after service of the notice u/s 35 of the 1922 Act, on the date when the impugned order was made namely, September 28, 1963, when the Income Tax Act, 1961 had already come into operation. The amended procedural law, therefore, should apply to the pending proceedings. This point is also covered by the decision of the Supreme Court in *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, in which it was held that the exercise of the power will be referable to a jurisdiction which conferred validity upon it and not the jurisdiction under which it would be nugatory. The Income Tax Officer undoubtedly had the power to rectify the error u/s 154 of the

1961 Act and even if the proceedings were initiated by a notice u/s 35 of the 1922 Act it can no longer be said that the order made u/s 154 of the 1964 Act was bad

8. The learned advocate for the petitioner, however, relied upon a decision of this Bench in *Kalawati Debi Haralalka v. Commissioner of Income Tax, West Bengal*, (1965) 1 ITR 200(Cal), in which it was held that a notice issued u/s 33-B of the 1922 Act for revising certain assessments which were completed on February 3, 1961 before the 1961 Act came into operation was a valid notice and the power to issue such a notice was preserved u/s 297(2)(a) of the 1961 Act in respect of returns filed under the old Act notwithstanding the repeal of the same. It was argued that since this Bench has taken a view in this appeal which was different from the view taken in *Kalawati Debi Haralalka's case*. (1965) 1 ITJ 200 a substantial question of law was involved in this case. There is no substance in this contention. In the first place the facts in *Kalawati Debi Haralalka's case*, (1965) 1 ITJ 200 (Cal) are entirely different from the Facts involved in this appeal. In the second place the issue of a notice u/s 33-B of the 1922 Act in *Kalawati Debi Haralalka's case* (1965) 1 ITJ 200 (Cal) was upheld by this Bench and the issue of the notice u/s 35 of the 1922 Act has been held to be valid in this case. For these reasons we cannot accept the petitioner's contention that there are substantial questions of law involved in this appeal.

9. Turning now to the prayer for certificate under Article 133(1)(c) of the Constitution, I should at once point out that the learned Advocate for the petitioner did not advance any argument to satisfy us that case is of such importance as to be treated as a fit case for appeal to the Supreme Court. We are not satisfied that this is a fit case for a certificate under Article 133(1)(c) of the Constitution.

10. For the reasons mentioned above, this application is dismissed with costs.

11. Let this order be drawn up expeditious.

Bose, C.J.

12. I agree.