

(1952) 12 OHC CK 0006
In the Orissa High Court
Case No : S.J.C. No. 135 of 1951

Jagadindra Kumar and Others

APPELLANT

Vs

Revenue Commr.

RESPONDENT

Date of Decision : 03-12-1952

Acts Referred:

Constitution of India, 1950 — Article 372(1)

Income Tax Act, 1922 — Section 66(2)

Orissa Agricultural Income Tax Act, 1947 — Section 28(2), 29(2)

Citation : AIR 1953 Ori 117

Hon'ble Judges : Jagannadhadas, C.J;Narasimham, J;Mohapatra, J

Bench : Full Bench

Advocate : P.K. Bose and H.K. Bose, for the Appellant; B. Mohapatra, for the Respondent

Judgement

Narasimham, J.—This Special Bench was constituted to hear the preliminary question as to whether the decision of a Division Bench of this Court in—"Sri Rama Chandra v. Collector of Agricultural income tax", AIR 1962 Orissa 281 (A) regarding the construction of the words "an order u/s 28 enhancing an assessment or otherwise prejudicial to him" occurring in Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act, requires revision in view of the decision of the Privy Council in-- AIR 1943 102 (Privy Council) which unfortunately was not cited before the said Division Bench of this Court.

2. The petitioner was assessed to agricultural Income Tax by the Agricultural Income Tax Officer, Balasore. He appealed against the assessment to the Collector of Agricultural Income Tax u/s 25, Orissa Agricultural Income Tax Act. The Collector gave him partial relief and directed revision of the assessment in accordance with the instructions contained in his order dated 8-12-49. Against the appellate order of the Collector of Income Tax, the petitioner had two remedies (i) a petition in revision before the Revenue Commr. u/s 28 of the Act and (ii) a petition under Sub-section (2) of Section 29 before the Revenue Commissioner for stating a case on a question of law arising out of the appellate

order of the Collector of Agricultural Income Tax for reference to the High Court. The petitioner, however chose the former remedy and applied to the Revenue Commissioner in revision. The Revenue Commissioner granted some relief to the petitioner as regards deduction charges on produce rent, but in other respects he maintained the order of the Collector of Agricultural Income Tax. Then the petitioner applied to the Revenue Commr. under Sub-section (2) of Section 29 for stating a case. But the Revenue Commissioner rejected the application observing that his order in revision was not prejudicial to the petitioner and that consequently a reference to the High Court against his order was incompetent.

3. The provisions of the Orissa Agricultural Income Tax Act are almost identical with the provisions of the Indian Income Tax Act as it stood in 1940. u/s 32 of that Act an assessee had a right of appeal to the Appellate Assistant Commissioner of Income Tax. u/s 33 the Commissioner had the powers of review which were very similar to the powers of revision conferred on the Revenue Commissioner by Section 28, Orissa Agricultural Income Tax Act. u/s 66 (2) of the old Indian Income Tax Act the Commissioner could refer a case on a question of law for the decision of the High Court. I am giving below the provisions of Sub-section (2) of Section 66 of the old Indian Income Tax Act and the provisions of Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act, for easy comparison.

I. T. ACT. OR. AG. I. T. ACT.

"S. 66 (2)-Within sixty days of the date on which he is served with notice of an order under S 31 or S. 32, or of an order under S. 33 eohaneiiig an assess-ment or otherwise pre-judicial to him, or of a decision by a Board of Reference under S. 33A, the assessee in respect of whom the order or decision was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision and the Commissioner shall, "within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court :

"S. 29 (2)-Within sixty days of the date on which he is served with notice of an order under S. 25 or S- 26 or 01 an order under S 28 enhancing an assessment or otherwise pre-judicial to him, or of a decision by the Revenue Commissioner under S. 27, the assesses in respect of whom the order or decision was passed may by application accompanied by a fee of one hundred rupees or such lessor sum as may be prescribed, require the Re-venue Commissioner to refer to the High Court any question of law arising, out of such order or decision, and the Revenue Com-missioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his owe opinion thereon to the High Court :

Provided that a reference shall lie from an order under S. 33 only ona question of law arising out of that order itself, and nut on a question of law arising out of a

previous order under S. 31 or S. 32, revised by the order under S. 33 :

Provided that a reference shall lie from an order under S 28 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order under S. 25 or S. 28 revised by the order under S. 28 :

Provided further that, in the case of reference from an order under 825 or S. 26 in computing the period of sixty days from the date on which the assessee was served with the notice of the said order the time during which any proceedings under S. 28 in respect of the said order were pending, shall be excluded :

Provided further that, if, in exercise of his power of revision under S. 33, the Commissioner decides the question, or if the Commissioner rejects the application on the ground that it is time-barred or otherwise incompetent, or if, in exercise of his powers under sub-s. (3), the Commissioner refuses to state the case, the assessee may within thirty days from the date on which he receives notice of the order passed by the Commissioner withdraw his application, and if he does so, the fee paid shall be refunded.

Provided further that, if, in exercise of his power of revision under S. 28 the revisional authority decided the question, or if the Revenue Commissioner rejects the application on the ground that it is time-barred or otherwise incompetent, or if, in exercise of his powers, under sub-s. (3), the Revenue Commissioner refuses to state the case, the assessee may, within thirty days from the date on which he receives notice of the order passed by the revisional authority or by the Revenue Commissioner as the case may be, withdraw his application and if he does so, the fee paid shall be refunded."

It will be noticed that the language of the two sub-sections is almost identical and the only difference is in the presence of another proviso in the Orissa Act which is not found in the old Income Tax Act.

4. The construction of the expression "otherwise prejudicial to him" in Sub-section (2) of Section 66 of the old Indian Income Tax Act was a matter of some difficulty and divergent views were expressed by the various Courts in India. The question was whether an order in review by the Commissioner of Income Tax under old Section 33 declining to interfere with the order of the Appellate Assistant Commissioner was an order prejudicial to the assessee. It is unnecessary to cite the various decisions reflecting the conflicting views. The Privy Council set the controversy at rest in -- AIR 1948 102 (Privy Council) . While observing that a decision of this question was not necessary in the case actually before them their Lordships thought that they should express the clear conclusion to which they have come, especially in view of the conflicting decisions in the Courts of India. They held that an order by the Commissioner u/s 33 of the old Indian Income Tax Act would not be prejudicial to the assessee unless he was placed in a worse position than before the order was made. Thus an order u/s 33 which merely confirmed the order of the Appellate Assistant Commissioner or which gave some extra relief to the assessee which was not

given by the Appellate Asstt. Commr. while maintaining his order in other respects would not be an order prejudicial to the assessee. It is unnecessary to repeat the reasons given by their Lordships for taking this view. It is sufficient to note that one of the main considerations which weighed with their Lordships was that the period of limitation to the Commissioner for review u/s 33 of the old Indian Income Tax Act could be enlarged by the voluntary act of the assessee in applying to the Commissioner for review u/s 33 of that Act. Their Lordships also took into consideration the first proviso to Sub-section (2) of Section 66 of the old Indian Income Tax Act.

5. The decision of the Privy Council in -- AIR 1948 102 (Privy Council) was not cited before us when we decided M. J. C. No. 121 of 1951 -- Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, . We followed the earlier Full Bench decision of the Madras High Court reported in -- VOORA SREERAMULU CHETTY Vs. COMMISSIONER OF Income Tax, MADRAS., and took a contrary view.

6. Mr. Mohanti on behalf of the petitioner urged that the said Privy Council decision being admittedly in the nature of "obiter dicta" and not being binding on this Court after the advent of the Constitution, need not be relied upon for reversing the view taken by us in -- Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, . I am unable to accept this argument. Prior to the advent of the Constitution even the "obiter dicta" of the Privy Council were binding on all Indian Courts See -- AIR 1925 272 (Privy Council) and -- K. Hoshide and Another Vs. Emperor, and though their binding nature might have undergone some change after the advent of the Constitution their persuasive value still remains and adequate reasons should be shown for us to take a contrary view. The reasons given by their Lordships (if I may say so with great respect) appear to be unassailable. Under Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act, the assessee is given an option of applying to the Revenue Commissioner within sixty days from the receipt by him of the order of the appellate authority u/s 25 or of the revisional authority u/s 28.

If, therefore, instead of straightway applying to the Revenue Commissioner u/s 29(2) against the order of the appellate authority the assessee voluntarily chooses the alternative remedy of applying to the revisional authority u/s 28 he should not be permitted to enlarge the period of limitation of sixty days prescribed in the statute. Moreover, the first proviso to Sub-section (2) of Section 29 which limits the question of law on which a reference lies to the High Court to the order passed by the revisional authority is identical with the first proviso to Sub-section (2) of Section 66 of the old Indian Income Tax Act and in view of the reliance placed by their Lordships on that proviso, similar reliance can be placed on the first proviso to Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act also. An additional ground for following the Privy Council decision is found in the second proviso to Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act, which is not found in the old Indian Income Tax Act. That proviso allows the assessee to deduct the period during which a revision petition

was prosecuted by him before revising authority u/s 28 in computing the period of sixty days for the purposes of that sub-section. Therefore, no hardship is likely to enure to the assessee if instead of applying to the Revenue Commissioner straightway under Sub-Section (2) of Section 29 against the appellate order he first applies to the revisional authority u/s 28 and then applies to the Revenue Commissioner under Sub-section (2) of Section 29, within the enlarged period of limitation.

7. In the concurring judgment of Das J: (as he then was) in -- Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, , reliance was placed on the following proviso to Subsection (2) of Section 28, Orissa Agricultural Income Tax Act.

"Provided that he shall not pass any order prejudicial to an assessee other than an order declining to interfere without hearing him or giving him a reasonable opportunity of being heard."

He thought that the words "other than an order declining to interfere" in that proviso indicated in the context that the Legislature thought that such an order would itself be prejudicial to the assessee. He relied on the effect of this proviso in construing the word "prejudicial" occurring in Sub-section (2) of Section 29. It is true that words and phrases should ordinarily be given the same meaning throughout a statute. But this is not an invariable rule and there may be something in the context to indicate the contrary. The proviso to Sub-section (2) of Section 28 may lend support to an argument that for the purposes of that section the Legislature thought that an order of the revising authority declining to interfere may be considered to be prejudicial to the assessee. But in construing the word "prejudicial" occurring in Subsection (2) of Section 29 the words preceding and following it have also to be given due weight namely "enhancing an assessment or otherwise prejudicial to him".

The word "otherwise" has generally "ejusdem generis" significance and may restrict the meaning of the word "prejudicial" occurring in that subsection to those cases which are somewhat akin to enhancement of assessment. On the other hand, the words "other than" occurring in the proviso to Sub-section (2) of Section 28 do not have "ejusdem generis" significance and would indicate only a separate category. Therefore, the word "prejudicial" occurring in Sub-section (2) of Section 29 should be given a narrower interpretation than the same word occurring in the proviso to Sub-section (2) of Section 28. It is true that in the corresponding proviso to Sub-section (2) of Section 33 of the old Indian Income Tax Act the words "other than an order declining to interfere" were not found and consequently their Lordships of the Privy Council in AIR 1948 102 (Privy Council) " had no occasion to consider the effect of those words in construing Section 66(2), Indian Income Tax Act. But I think that the absence of those words in the Indian Income Tax Act does not "materially affect the construction put by the Privy Council on the words "otherwise prejudicial to him" occurring in Sub-section (2) of Section 66 of the old Indian Income Tax Act. In

the subsequent amendment to the Indian Income Tax Act in Section 33-A the following proviso was inserted.

"Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee."

This amendment set the controversy at rest so far as the Indian Income Tax Act was concerned. It could not, however, affect the construction of Sub-section (2) of Section 66 because that sub-section was also amended and at present the right of reference against the decision of the Income Tax Appellate Tribunal does not depend on whether the order of the Tribunal amounts to enhancement or otherwise prejudicial to the assessee. The new Sub-section (1) of Section 66, Indian Income Tax Act, allows a reference to the High Court on any question of law arising out of an order of the Income Tax Appellate Tribunal irrespective of whether the order is prejudicial to the assessee. But in the Orissa Agricultural Income Tax Act the provisions of the old Indian Income Tax Act are retained and consequently the decision of the Privy Council in AIR 1948 102 (Privy Council) " would apply with full force.

8. I would, therefore, hold that the decision taken by the Division Bench of this Court in "M.J.C. No. 121 of 1951: Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, " regarding the construction of the words "otherwise prejudicial to him" occurring in Sub-section (2) of Section 29, Orissa Agricultural Income Tax Act, is no longer good law in view of the Privy Council decision AIR 1943 102 (Privy Council) ". Unless the order of the revising authority places the assessee in a worse position than what it was prior to the passing of that order, it cannot be said that the order of the revising authority is prejudicial to him. The reference is answered accordingly.

Jagannadha Das, C.J.

9. I agree that our decision in Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, " must be overruled. It is regrettable that our attention was not then drawn to the decision of the Privy Council in AIR 1948 102 (Privy Council) . That no doubt was a case which arose under the Indian Income Tax Act, but as pointed out by my learned brother, the provisions of the said Act which came in for consideration before the Privy Council, are almost identical within those in the Orissa Agricultural Income Tax Act which we are called upon to consider. It is true that the view expressed by the Privy Council was statedly one which was not necessary for the final decision of that case. But as has been pointed out in K. Hoshide and Another Vs. Emperor, ", citing AIR 1925 272 (Privy Council) ", even the obiter dicta of the Privy Council must be treated as binding on the Indian Courts. The position is the same even now in the absence of a contrary decision by the Supreme Court.

10. In my concurring judgment in Sri Rama Chandra Mardaraj Deo Vs. Collector of Agricultural Income Tax, " I relied on two distinguishing features and the attempt strenuously made now is to persuade us that by reason of those

features it is still open to us to treat the previous decision as correct. I do not agree with this contention. The two features noticed by me are: (1) that the proviso to Sub-section (2) of the new Clause 33-A which stated as follows:

"provided further that an order by the Commissioner declining to interfere shall be deemed not to be prejudicial to the assessee,"

indicated that the Legislature enacted the proviso on the view that an order declining to interfere must, in the absence thereof, be a prejudicial order. Stress was laid in my judgment then, on the use of the word "deemed". It must be recognised, however, that such an argument is not infallible. The enactment of a proviso of that kind may well have been merely "ex abundanti cautela". What, however, was not noticed, at the time, even with reference to the true view to be taken of that proviso was that, it was enacted at the same time when Section 66, Indian Income Tax Act, underwent a radical change. By the new section, Section 66, the Income Tax Appellate Tribunal was provided with the authority to refer a case to the High Court and they were given the power to make a reference with reference to any question of law that arose out of their own appellate order whether prejudicial or not. In those circumstances, it became necessary to provide clearly in Section 33 as to whether the Income Tax Commissioner was to give notice when he passed an order merely dismissing a revision. Since the entire conflict of decisions was with reference to the phrase "prejudicial order" in Section 66, as it was before the amendment which was completely omitted from the new Section 66, it may well have been considered necessary by way of caution to clarify that no notice was necessary for merely dismissing a revision.

11. The other feature that was relied on by me in my previous decision was that the very fact of the Agricultural Income Tax Act, 1947, having a proviso to Sub-section (2) of Section 28 of the Act stating that "he shall not pass any order prejudicial to an assessee other than an order declining to interfere, without hearing him or giving him a reasonable opportunity of being heard" throws light on the question as to what was a prejudicial order for the purpose of Section 29, Agricultural Income Tax Act. In the context of change in the corresponding proviso in the Indian Income Tax Act, that is, by way of the proviso to Sub-section (2) of Section 33-A, it appears to me to be clear now that this proviso to Section 28 of the Agricultural Income Tax Act was meant to serve no other purpose than that of the above-mentioned proviso to Sub-section (2) of Section 33-A, Indian Income Tax Act. Further, as pointed out by my learned brother, there is a distinction in the significance of the use of the phrase "other than" and the word "otherwise".

12. I am, therefore, of the opinion that the two special features relied on by me in my previous judgment (even then with some hesitation) are not enough to prevail against the reasoning and the decision of the Privy Council in -- AIR 1948 102 (Privy Council) --.

13. I agree, therefore, to answer the reference as stated by my learned brother.

This case will have to be posted before a Division Bench for final disposal in the light of the opinion given in the answer to the reference.

Mohapatra, J.

I agree.