
(1979) 03 CAL CK 0008
In the Calcutta High Court
Case No : C.R. No. 12865 (W) of 1975

Krishna Gopal Bhadra

APPELLANT

Vs

Income Tax Officer, "E" Ward and Others

RESPONDENT

Date of Decision : 30-03-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148, 253(2)

Citation : (1980) 124 ITR 580

Hon'ble Judges : Bimal Chandra Basak, J

Bench : Single Bench

Advocate : Soumen Kumar Ghosh, for the Appellant; A.K. Sengupta and R.N. Mitra, for the Respondent

Judgement

B.C. Basak, J.—In this application under Article 226 of the Constitution of India, the petitioner is challenging an order of assessment dated March 24, 1969, passed by the respondent No. 1 for the assessment year 1956-57, under Section 144 read with Section 147(a) of the I.T. Act, 1961 (hereinafter referred to as the "said Act"), the order dated December 11, 1973, passed by the respondent No. 2 and the order dated March 26, 1975, passed by the respondent No. 4.

2. The facts of this case are as follows :

For the assessment year 1956-57, the petitioner was assessed u/s 23(3) of the Indian I.T. Act, 1922. By his order dated 25th of February, 1964, the ITO issued notice u/s 148 of the Act. By his order dated 24th of March, 1969, the respondent No. 1 completed the assessment u/s 144 of the Act. There was non-compliance with the notices issued asking the petitioner to file returns for the assessment year 1956-57. The petitioner filed a petition u/s 146 of the Act for reopening the said assessment but the said application was rejected on 24th of February, 1970. The petitioner preferred an appeal against the said assessment order on various grounds before the AAC. From the grounds of appeal, it appears that no question of limitation was raised before the AAC. The AAC passed his

order on 11th of December, 1975, rejecting the appeal. It also does not appear from his order that any such contention was raised before him. Thereafter, the petitioner preferred an appeal before the Income Tax Appellate Tribunal. The grounds of appeal before the AAC do not show that any such question of limitation had been raised. The Income Tax Appellate Tribunal set aside the order of the AAC and restored the matter to his file for fresh consideration on the ground that the AAC has not given any finding with regard to the contentions raised before him. Accordingly, the appeal was treated as allowed. It appears from the order of the Tribunal that the representative of the petitioner appearing for the first time sought to submit before the Tribunal that the assessment was barred by the law of limitation. The Tribunal did not allow the petitioner to raise the ground relating to jurisdiction of the respondent No. 1 to make assessment on 24th of March, 1969, as it was raised neither before the ITO nor before the AAC as it required investigation of facts. Being aggrieved by the said order this application has been made against the orders passed by the ITO, the AAC and the Income Tax Appellate Tribunal.

3. Mr. Ghosh, the learned advocate appearing in support of the rule, has contended that the Tribunal has acted wrongly. The point sought to be argued before the Tribunal was a pure question of law. The office files regarding service of notices for the assessment year in question would show when such notice was served as referred to in Section 253(2). Even if no such point of remand was raised by the petitioner at any stage before, it was incumbent upon the Tribunal to go into this point. He has further submitted that the matter has been remanded by the Tribunal only in respect of the submissions which were sought to be raised by the petitioner and which were not dealt with by the AAC. He has submitted that though a reference application lies from the order of the Tribunal, that is, though he had an alternative remedy that is no bar to this application.

4. In support of his contention Mr. Ghosh has relied on the following decisions : J.S. Parkar Vs. V.B. Palekar and Others, , RAMENDRA NATH GHOSH Vs. COMMISSIONER OF Income Tax AND OTHERS., , Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd., , Beharilal Ramcharan Cotton Mills Ltd. Vs. Commissioner of Income Tax, Bombay City-I, , SHAIK IBRAHIM Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH., , PONKUNNAM TRADERS Vs. ADDITIONAL Income Tax OFFICER, KOTTAYAM, AND ANOTHER., , Additional Income Tax Officer Vs. Ponkunnam Traders, , Syed Yakoob Vs. K.S. Radhakrishnan and Others, , L. Hirday Narain Vs. Income Tax Officer, Bareilly, and William Jacks & Co. Ltd. v. Addl. CCT [1976] Tax LR 1436 (Cal).

5. Mr. Sengupta, appearing on behalf of the respondents, has submitted that in this particular case this point was never raised either before the ITO or before the AAC. No such point was taken in the ground of appeal before the AAC or in the ground of appeal before the Appellate Tribunal, For the first time before the Tribunal this point was sought to be raised. He has drawn my attention to the provisions of Section 253(2) and has submitted that the question as to whether

the jurisdiction of the ITO is barred by limitation or not is not a pure question of law. This question depends on ascertainment of various facts including the question of date of service of notices. He has submitted that these questions are questions of fact, viz., as to whether the notice was served within the particular date or not, and whether the papers relating thereto were not part of the records before the Tribunal. Accordingly, it cannot be said that this could be ascertained from the records before the Tribunal itself. It was also submitted that the petitioner did not make any application bringing the true facts relating to the question before the Tribunal. The contention was raised before the Tribunal by the petitioner's representative. Under these circumstances, the Tribunal was not bound to go into this question. In any event, he has submitted that the matter has been remanded by the Tribunal and if the law entitles him to do so the petitioner would be entitled to agitate the same before the AAC, but it cannot be said that in the facts and circumstances of this case the Tribunal has acted wrongly.

6. On the question of the validity of the order of the ITO and the AAC Mr. Sengupta has said that having regard to the fact that the petitioner has resorted to the statutory remedy provided under the Act, the petitioner cannot now fall back upon the original order. It requires investigation of facts and the court should not go into that question in the present case.

7. In support of his contention, Mr. Sengupta has relied on a judgment of the Supreme Court in the case of The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd., .

8. In my opinion, this application is misconceived. No such point was raised in the grounds of appeal before the AAC or before the Tribunal. For the first time, it was sought to be raised before the Tribunal at the time of the argument. The Tribunal found that it involves the question of investigation into facts. Accordingly, the Tribunal did not allow the petitioner to urge this contention. The question whether in a particular case the assessment is time-barred or not is not purely a question of law. Certain investigation of facts is called for including the question of date of service of notice u/s 148 of the I.T. Act. Before the Tribunal, there was no material on the basis of which the correctness of this fact could be ascertained. Merely because, it was a question of service of notice and it formed a part of the record of the assessment proceedings, it cannot be said that all the documents relating to such service of notice automatically form part of the records before the Tribunal. Accordingly, the Tribunal did not act wrongfully in declining to go into this question which involves investigation of facts. Moreover, it is to be pointed out that on that basis the appeal of the petitioner was not rejected. On the other hand, the appeal has been allowed and the matter has been remanded to the AAC. Even if it could be said that the Tribunal should have allowed the petitioner to agitate this point, the petitioner has not suffered thereby. The appeal has not been dismissed but the appeal has been allowed in his favour. The matter has been remanded to the AAC. It is true that it has been

so remanded on the ground that various points urged before the AAC were not so urged. But if the petitioner is entitled under the law to agitate this question of limitation before the appellate authority under the said Act, in the present case, the AAC, then he would not be prevented from doing so merely because of the order of remand of the Tribunal. In the present case, there is no order in existence which prejudicially affects the petitioner on account of the decision of the Tribunal not to allow the petitioner to urge the point of limitation before the same.

9. It is true that the statutory remedy provided is no bar when it is a question of jurisdiction. However, the court in its writ jurisdiction is not bound to consider such points in all the cases. Whether the assessment proceedings in the present case is barred by limitation or not is not purely a question of law. It is a mixed question of fact and law. The Tribunal has not made any error of law in not considering this question at that stage. There is no question of the Tribunal refusing to exercise jurisdiction. Even if it is a question of jurisdictional fact, this court is not bound to go into this question itself. Even the jurisdictional fact should be left to be investigated into by the subordinate authority at the first instance.

10. In my opinion, the petitioner is not entitled to agitate this point at this stage. Further, the petitioner is not entitled to agitate the question of jurisdiction of the ITO and the AAC on the ground of limitation because he has availed of this statutory remedy which is still pending. Further, it is not a pure question of law. If the petitioner is entitled to do so under the law, then he will be entitled to raise this question of limitation before the AAC but at this stage I cannot hold that any order passed by any authority is illegal or without jurisdiction, on the basis of the facts before me.

11. So far as the decisions which are referred to hereinabove, the principle is well settled. It is the question of application of the same in the facts and circumstances of each case. The Tribunal or any other authority under the law is, no doubt, bound to decide also on a new point. But there is no law laid down saying that even if it is a question of fact and not a pure point of law and even if there is no material before the Tribunal or such fact is not part of any record of material before the Tribunal, even then the Tribunal must go into that question. I must point out that in this particular case there is no application before the Tribunal for production or consideration of any new or further evidence.

12. I shall now deal with some of the decisions cited before me. In the case of J.S. Parkar Vs. V.B. Palekar and Others, it was held as follows (headnote) :

"The Appellate Tribunal erred in law in not allowing the petitioner to raise the plea that the price of the gold which had been confiscated was a business or trading loss. The Tribunal held that the petitioner was trying to set up an entirely new case not even hinted at in any of the proceedings earlier and that fresh facts would have to be gathered and investigated. The plea of set-off did not require

any fresh facts. As a pure question of law, or a plea which could be considered on the evidence already on record, the Tribunal was under a statutory obligation to entertain the plea and decide the same, no matter at what stage it was taken. "

13. This case can be distinguished on the basis that in the present case the point sought to be raised is not a pure question of law, i.e., a plea which could be considered on the evidence already on record.

14. In the case of RAMENDRA NATH GHOSH Vs. COMMISSIONER OF Income Tax AND OTHERS., it was held that the exceptions stated in the decision of the Supreme Court in Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, that in Income Tax matters, where there is a right of appeal against the order complained against, writ petitions to the High Court will be permitted when questions of infringement of fundamental rights arise or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they did not possess are only illustrative and not exhaustive. Where a Tribunal has acted contrary to the principles of natural justice, the High Court can properly exercise its power to issue a writ. This has no application in the facts of the present case.

15. In the case of Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd., , the Supreme Court held that under the provisions of Section 34 of the old Act there is nothing in the I.T. Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions, whether of law or of facts, which relate to the assessment of an assessee may be raised before the Tribunal. If for reasons recorded by the departmental authorities in respect of a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.

16. The facts of this case are different. Grant of relief on the ground of limitation would not have been justified in the present case in the absence of the necessary materials being brought on the record.

17. In the case of Beharilal Ramcharan Cotton Mills Ltd. Vs. Commissioner of Income Tax, Bombay City-I, , where the assessee based his claim for depreciation before the ITO and the AAC on certain grounds but in the grounds of appeal to the Appellate Tribunal raised an alternative claim that on the materials on record the assessee was entitled to the depreciation claimed u/s 12(3), but the Tribunal declined to consider this point on the ground that the assessee was setting up a new case. It was held that the assessee was not setting up a new case but was only calling in aid one more provision of law to support his claim for depreciation on the same set of facts and the Tribunal was not justified in not considering the case of the assessee u/s 12(3) of the Act on the material already on the record. In the present case, the petitioner was setting up a new case not

on the same set of facts.

18. In the case of SHAIK IBRAHIM Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH., , the Andhra Pradesh High Court held that an assessee was entitled to raise a question of law for the first time before the Tribunal though he did not raise it before the ITO or the AAC. In the present case it is not a pure question of law.

19. In the case of The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd., , the Supreme Court held that as neither was any claim made before the ITO regarding the relief u/s 84 nor was there any material on record in support thereof, and from the mere fact that such a claim had been allowed in subsequent years it could not be assumed that the prescribed conditions justifying a claim for exemption u/s 84 were also fulfilled, the Tribunal was not competent to hold that the AAC should have entertained the question of relief u/s 84 or to direct the ITO to allow the relief.

20. In that view of the matter, I reject the contention of Mr. Ghosh.

21. This application is dismissed and the rule is discharged.

22. Interim order, if any, is vacated.

23. There will be no order as to costs.

24. I make it clear, however, that I have not gone into the question "as to whether the assessment order was made without jurisdiction, i.e., whether it is barred by the law of limitation. If the petitioner is entitled to agitate this point before the AAC, then he will be entitled to do so irrespective of the question as to whether such point was taken before or not and whether the order of remand was passed on some other ground or not.