
(1967) 09 CAL CK 0027
In the Calcutta High Court

Metal Press Works Limited

APPELLANT

Vs

Ram Pratap Kayan

RESPONDENT

Date of Decision : 29-09-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 139
Companies Act, 1956 — Section 10D(1)(b), 111(3), 111(4)(a), 111(4)(b), 155
Income Tax Act, 1961 — Section 10(2)(vii), 66, 66(1), 66(2), 66(5)
Notaries Act, 1952 — Section 8
Wealth Tax Act, 1957 — Section 27

Citation : 72 CWN 594

Hon'ble Judges : S.K. Mukherjea, J;A.K. Mukherjea, J

Bench : Division Bench

Advocate : S.C. Sen, for the Appellant;Ranadeb Chaudhuri, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mukherjea, J.—This is an appeal against a judgment and order of the Company Law Tribunal dated December 15, 1960 by which the Tribunal directed Metal Press Works Limited, the Appellant before us, to register in the name of R.P. Kayan, the Respondent, the transfer of 21900 equity shares of the Appellant company. The order was made in an appeal preferred by the Respondent Ram Pratap Kayan u/s 111(3) of the Companies Act. The Respondent's case before the Tribunal, as appears from the petition used as grounds of the appeal, is that on 16th March, 1966 his Solicitors lodged share scrips for 21,900 shares together with applications for transfer and relative transfer deeds duly stamped and executed, for registration of the transfer in the Respondent's name. It was stated in the petition that the Respondent did not hear anything from the Appellant company for about 58 days and ultimately by three letters all dated 14th May, 1960, the Appellant intimated to the Respondent its refusal to transfer the shares.

2. The petition used as grounds of the appeal before the Tribunal was verified by an affidavit which was affirmed on 7th July, 1966 by the Respondent before a

Notary. The appeal was filed before the Tribunal on July 19, 1966 or shortly thereafter.

3. The company did not file before the Tribunal any affidavit in answer to the appeal so that the Tribunal had no material except the petition and the annexures on the basis of which it could decide the appeal. After long and not infrequent adjournments, the appeal was fixed for hearing at Calcutta on 14th December, 1966. On that date, the appeal was again adjourned for a day at the request of Mr. Jhunjhunwala who appeared on behalf of the Appellant company. On December 15, 1966, Mr. Jhunjhunwala asked for a further adjournment for 15 days to enable the company to file their affidavit. The Tribunal refused the prayer for adjournment. Therefore, Mr. Jhunjhunwala asked for the Tribunal's leave to retire. The leave was granted. By a judgment and order of December 15, 1966, the Tribunal directed the company to transfer the shares.

4. The company has come up before us on appeal against that order u/s 10-D(1) (b) of the Companies Act which provides that an appeal will lie on a question of law arising out of any decision, finding or order of the Tribunal.

5. Mr. S. C. Sen, appearing in support of the appeal, attacked the order of the Tribunal on questions, which he claimed to be questions of law arising out of the order of the Tribunal. He contended that the appeal, not having been filed within two months from the date of intimation of the refusal, was barred by limitation, having regard to the provisions of Section 111(4)(b) of the Companies Act and the Tribunal ought to have dismissed the appeal. Moreover, the petition which was used as ground of the appeal before the Tribunal was not verified by an affidavit in conformity with the relevant Rules of the Company Law Tribunal and therefore, it ought to have been rejected by the Tribunal. If the petition were rejected as it should have been there could have no material before the Tribunal on the basis of which the Tribunal could have allowed the appeal.

6. Mr. R. Chaudhuri appearing for the Respondent contended that these are questions which cannot be agitated in an appeal u/s 10-D(1)(b) of the Companies Act as they are not questions which arise out of the decision, finding or order of the Tribunal. For a proper construction of the words "questions of law arising out of an order", he strongly relied on the decision of the Supreme Court in (1) Commissioner of Income Tax, Bombay v. Scindia Steam Navigation Company Limited AIR 1961 S.C. 1933. In that case, the question arose whether a portion of compensation money received by the Respondent from the Government for requisition of a ship was liable to be included in the income of the year of assessment 1946-47 u/s 10(2) (vii) of the Income Tax Act. The Tribunal referred the question to the High Court for its opinion. The Respondents, for the first time, raised the contention before the High Court that the proviso to Section 10(2) (vii) under which the Respondents were sought to be made liable, could not be taken into account in making the assessment, as the proviso had been introduced by the Income Tax Amendment Act, 1946 which came into on May, 1946, whereas the liability of the Respondents to be taxed fell to be

determined as on April 1, 1946.

7. The Appellant raised a preliminary objection that this question could not be raised for the first time before the High Court, as it did not arise out of the order of the Tribunal, having been neither raised before nor dealt with by it. It was further urged that the question did not arise out of the order of the Tribunal, because it had not been referred by the Tribunal to the High Court.

8. The High Court overruled the objection and expressed the view that the question referred to, was sufficiently wide to include within its ambit the fresh contention and even if that particular aspect of the question had not been argued before the Tribunal, it was implicit in the question as framed, and the Assessee could raise it.

9. On appeal, the Appellants renewed their contentions before the Supreme Court. The Respondents contended that all questions of law which arise on the findings of the Tribunal in its order can properly be said to arise out of the order. In order to pronounce on the construction, the Court had to consider in detail, the scheme of Section 66(1) of the Income Tax Act and the relevant Rules.

10. u/s 66(1) of the Act, the Assessee and the Commissioner may apply to the Tribunal in the manner prescribed by the Income Tax Rules to refer any question of law arising out of its order for the opinion of the High Court. On the receipt of the application, the Tribunal has to make a statement of the case and refer it to the High Court. The applicant, in house application, has to state the facts which are admitted or found by the Tribunal and which are necessary for drawing up a statement of the case. The questions of law which arise out of the order of the Tribunal have also to be specified and the applicant has to require u/s 66(1) of the Act that a statement of the case be drawn up and that some or all of those questions of law be referred to the High Court.

11. On a review of the decided cases the Court found that all the High Court agreed that Section 66 of the Act creates an advisory jurisdiction, that the power of the Tribunal to make a reference and the right of the litigant to require it to do so must be sought within the four corners of Section 66(1) and that the jurisdiction of the High Court is limited to questions which are properly referred to it u/s 66(1). The High Courts differed only as regards the question whether it is competent for the Tribunal to refer, or the High Court to decide, a question of law which was either not raised before the Tribunal or decided by it, where it arises on the facts found by it.

12. In support of the construction for which they contended the Respondents relied on (2) Attorney General v. Avelino Aramayo and Company, (1925) 1 KB 109, where Atkin, L.J. observed:

All that the section provides is that if the Appellant is dissatisfied with the determination as being erroneous in point of law he may require the Commissioners to state and sign a case, and the case shall set forth the facts

and the determination, and upon that being done the Court has to decide whether or not the determination was or was not erroneous in point of law, and any point of law that can be raised properly upon the facts found by the Commissioners the Court can decide. No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all and cannot be raised without further facts on either side, the Court may very well refuse to give effect to it, and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. Those questions, of course, have to be considered. But apart from that, if the point of law or the erroneous nature of the determination of the point of law is apparent upon the case as stated, and there are no further facts to be found, the Court can give effect to the law.

13. Venkatarama Aiyar, J., in delivering the judgment of the majority, pointed out that the British Statute does not cast, as does Section 66(1) of the Act, a duty on the Assessee to put in an application stating the question of law which he desires the Commissioner to refer to the Court and requiring him to refer the question which arises out of the Order. Under the English Statute when once a decision is given by the Commissioner, it is sufficient that the Assessee should express his dissatisfaction with it and ask the matter to be referred to the decision of the High Court. It is then for the Commissioner to draw up a statement of the case and refer it for the decision of the Court.

The learned judge observed: -

The attempt of the Respondents to equate the position u/s 66(1) of the Act with that under the British statute on the ground that the Tribunal has to draw up a statement of the case and refer it, and that the court is to decide questions of law raised by it, must break down when the real purpose of a statement in a reference is kept in view. A statement of case is in the nature of pleading wherein all the facts found are set out. There is nothing in it which calls for a decision by the Court. It is the question of law referred u/s 66(1) that calls for decision u/s 66(5) and it is that that constitutes the pivotal point on which the jurisdiction of the court hinges. The statement of the case is material only as furnishing the facts for the purpose of enabling the Court to decide the question referred." In that case the court was called upon to construe the words "arising out of the order" in Section 66(1) of the Income Tax Act. That the courts did not overstep the limits of what was strictly necessary for the purpose of the case, will appear from these observations of Venktarama Aiyar, J. . . . "there AIR certain features, which distinguish the jurisdiction u/s 66 and they have to be taken into consideration in ascertaining the true import of the words, "any question of law arising out of such order." The jurisdiction of a court in a reference u/s 66 is a special one, different from its ordinary jurisdiction as a civil court. The High Court, hearing a reference under that section, does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal. It acts purely in an

advisory capacity, on a reference which properly comes before it under Sections 66(1) and 66(2). It is of the essence of such a jurisdiction that the Court can decide only questions which are referred to it and not any other question. If the true scope of the jurisdiction of the High Court is to give advice when it is sought by the Tribunal, it stands to reason that the Tribunal should have had an occasion to consider the question so that it may decide whether it should refer it for the decision of the court. How can it be said that the tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the court should be sought?

14. The court concluded that u/s 66(1) of the Act, a question of law arising out of an order of the Tribunal is (i) a question raised before the Tribunal and dealt with by it, (ii) a question raised before the Tribunal but not dealt with by it, (iii) a question not raised before the Tribunal but dealt with by it.

15. The court therefore held that when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

16. The discussion on the special aspects of a reference u/s 66(1) of the Act and the distinction made between the English and the Indian Statutes in construing the words "arising out of the order of the Tribunal" make it amply clear that the construction adopted of the words "a question of law arising out of an order" was adopted only with reference to Section 66(1) of the Income Tax Act. In our opinion, there is nothing in the judgment to warrant the view that the Court was construing the words "arising out of the order" for all purposes or that their Lordships were laying down any rule of construction which is of general application.

17. If the tests laid down by the Supreme Court in (1) Commissioner of Income Tax, Bombay v. Scindia Steam Navigation Company Limited (Supra) were to apply to the present case we should have held that it is not open to the Appellant to raise the question of limitation for the first time in this appeal. We are, however, of the opinion that those tests, though applicable to a reference u/s 66(1) of the Income Tax Act, are not exhaustive in their application to an appeal u/s 10-D(1)(b) of the Companies Act. A proceeding u/s 10-D (1)(b) is an appeal and not a reference. The jurisdiction is appellate, not advisory. No questions of law are framed and referred to the court for decision and the jurisdiction of the court is not circumscribed by any of those questions. u/s 66(1) of the Income Tax Act the Tribunal is to refer to the High Court a question of law arising out of its order. u/s 10-D(1)(b), an appeal lies not only out of an order of the Tribunal but also out of any decision or finding of the Tribunal on a question of law. The Supreme Court held that a question of law arising out of an order of the Tribunal notwithstanding that it may arise on the findings given by it is not a question of law arising out of the order if it has neither been raised nor considered by the Tribunal. That this statement of the law is inapplicable to an appeal u/s 10-D(1)

(b) appears clearly from the text of the statute itself which says that an appeal will lie on a question of law from the findings of the Tribunal. We are, therefore, of the view that a question of law arising out of the findings in the judgment of the Companies Tribunal may be raised for the first time in an appeal u/s 10-D(1)(b) although the question of law neither been raised before nor dealt with by the Tribunal in its judgment or order. In our opinion, in construing the words arising out of an order, decision or finding" in the context of Section 10-D(1)(b) the observations of Atkin, L.J. which have been cited elsewhere are apposite.

18. Mr. Chaudhuri also relied on the decision of the Supreme Court in (3) Commissioner of Wealth-tax Madras Vs. Ramaraju Surgical Cotton Mills Ltd., where the construction of the words "any question of law arising out of the order" adopted in (1) Commissioner of Income Tax v. Scindia Steam Navigation Company Limited (Supra) was followed. This case is of no assistance to the Respondent for the same reason as the other case because the construction adopted here was with reference to Section 27 of the Wealth Tax Act which in *pari materia* with its prototype, which is Section 66(1) of the Income Tax Act.

19. The question now arises whether there is any finding in the judgment of the Tribunal on the basis of which the Court should hold that the appeal before the Tribunal was barred by limitation. In its judgment the Tribunal found, on the basis of the statements made in the petition by the Respondent himself, that "for about 58 days nothing was heard from the company and ultimately it appears that the company wrote three letters to the Appellant dated 14th May 1966 informing the Appellant about its refusal to transfer the shares." It is true that the judgment does not indicate, any more than the petition does, when the intimation of refusal was received by the Respondent. Be that as it may, the inference arises on the finding of the Tribunal that on the expiry of 58 days, on or about May 14, 1966, the Respondent heard from the company about its refusal. After all, it was for the Respondent to plead the facts by reason of which the appeal could be held to have been filed within the time prescribed by Section 111(4) (a) of the Companies Act. Not only has he failed to do so but he has stated in his appeal - a statement which has been repeated in the findings of the Tribunal - that the silence on the part of the company was broken by the letters of May 14, 1966. In these circumstances, it must be held that having regard to Section 111(4)(a) of the Companies Act, the appeal before the Tribunal was barred by limitation on July 29, 1968 when it was received by the Tribunal.

20. In support of his contention that the appeal before the Tribunal was not in order, Mr. Sen relied on Rule 4 of Chapter VII and Rule 1 of Chapter XVI of the Companies Tribunal Regulations, 1964. He argued that the affidavit, having been affirmed before a Notary ought to have been rejected by the Tribunal. Rule 4 of Chapter VII provides that every petition or application shall be verified by an affidavit made by the Petitioner. Rule 1 of Chapter XVI says that every affidavit shall be sworn in the manner prescribed by the CPC and by the Court or Authority before which it is sworn. The affidavit has not been affirmed before a

Court or a Magistrate or an officer of the description contemplated by Section 139 of the Code. On that ground, we are invited to treat the affidavit as non establishment. If the affidavit is out of the way, he argued, the petition is out of the way. The appeal is also therefore out of the way.

21. A question raised as to compliance with Rules relating to verification of affidavits is, in our opinion, more a question of procedure than a question of law. Assuming it is a question of law, it may be pointed out that the manner in which affidavits are to be sworn is prescribed in Order XIX and not in Section 139 of the Code. Section 139 prescribes by whom oaths are to be administered, not how affidavits are to be sworn. Moreover, Rule 1 of Chapter XVI contemplates that affidavits may be sworn not only before a court but also before an Authority other than a Court. The Authority contemplated in Rule 1 is not necessarily the officer contemplated in Section 139 of the Code. u/s 8 of the Notaries Act, 1952 a Notary may take affidavit from any person and administer oaths. It is also to be noted that although a distinction is made between appeals, applications and petitions in Chapter VII, Rule 4 does not speak of appeals. It requires only petitions and applications to be verified by affidavits. There is nothing in the Rules by which appeals are required to be verified at all. It is also not a little strange that although in the Rules, procedure is prescribed for applications u/s 240, petitions under Sections 155, 397 and 398 and appeals u/s 635-B, no procedure is prescribed for an appeal u/s 111(3) of the Companies Act. In the present case, the appeal was preferred by way of a petition, not because the Respondent was required to do so under the Rules but because he chose to do so. In these circumstances, we are unable to hold that the appeal before the Tribunal.

22. As we have held that the appeal before the Tribunal was barred by limitation, the appeal succeeds and by order of the Tribunal is set aside. The Respondent will pay the costs of this appeal. The order is made without prejudice to the rights of the Respondent to take such proceedings as are open to him in law for registration of the transfer of the shares.

Arun k. Mukherjea, J.

23. I agree.