

(1972) 04 MAD CK 0034

In the Madras High Court

Case No : Tax Case No"s. 300 of 1966 and 114 of 1969 (Reference No"s. 70 of 1966 and 27 of 1969)

S.N. Swarnammal

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 21-04-1972

Acts Referred:

Estate Duty Act, 1953 — Section 63

Citation : (1973) ILR (Mad) 585 : (1973) 88 ITR 366

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : C.S. Vidyasankar and N.C. Ananthachari, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

Ramanujam, J.—One K. S. Narayanaswamiah died on February 13, 1958, leaving behind him his two wives and six sons, one by the first wife and five by the second wife. The deceased had left a will bequeathing the various properties in his possession and enjoyment to his two wives and his sons. On the death of the said Narayanaswamiah, one Parasuraman, the eldest son by the second wife and who held a general power of attorney for other accountable persons submitted an account of the estate of the deceased in the prescribed form to the Assistant Controller of Estate Duty. The Assistant Controller of Estate Duty determined the principal value of the estate passing on the death of the deceased at Rs. 3,06,955 and the duty payable at Rs. 21,930.15. He had treated all the properties as having been held by the deceased in his individual capacity and not in his capacity as the karta of the Hindu undivided family, and this was in conformity with the stand taken by the accountable persons at the time of filing of the account of the estate.

2. The said Parasuraman thereafter preferred an appeal to the Central Board of Direct Taxes u/s 63 of the Estate Duty Act, 1953, and the contentions raised in the original grounds of appeal related to the valuation of certain properties

included in the assessment. However, later, he had filed an additional grounds of appeal urging two new grounds: (1) that the Assistant Controller had not given notices to all the accountable persons before completing the assessment and as a result, the actual status of the deceased as a member of an undivided Hindu family was lost sight of, and (2) that the properties, the valuation of which was disputed in appeal before the Board were received by the deceased as ancestral property at the time of the partition of the Hindu undivided family between himself and his brothers and as such the estate duty assessment should have been made on that basis. The Board disposed of the original contention relating to the valuation by allowing some reduction. "It, however, found that the question of status of the deceased raised in the additional grounds of appeal had not been agitated at any stage of the assessment proceedings and that there was nothing to show that the appellant was prevented by sufficient cause from raising this issue and producing necessary evidence before the Assistant Controller, and in that view it refused to admit the additional grounds of appeal. At the instance of Swarnammal, the second wife of the deceased and one of the accountable persons, the following questions have been referred to this court in the above tax cases.

(1) Whether, on the facts and in the circumstances of the case, the Board acted within their powers when they declined to admit the fresh contentions raised at the time of hearing of the appeal before them ?

(2) Whether, under the facts and circumstances of the case, the assessment is invalid because of failure to issue notice to Srinivasan, the eldest son of the deceased ? and

(3) Whether, under the facts and circumstances of the case, the assessment of the estate on the basis that it solely belonged to the deceased is valid in law ?

3. The second and third questions set out above will arise for consideration only if the first question is answered in favour of the assessee. Therefore, we proceed to consider the first question.

4. In our view the question does not appear to have been properly framed. The Board has certainly acted within their powers in declining to admit the additional grounds of appeal. There is no question of excess of jurisdiction or the Board acting in excess of its powers in refusing to entertain the additional grounds of appeal. The question is purely one of discretion and, therefore, we propose to reframe the question No. 1 thus :

" Whether, on the facts and in the circumstances of this case, there has been a proper exercise of judicial discretion by the Board in declining to admit the fresh grounds raised at the time of hearing of the appeal before them ? "

5. In this case we are concerned with the appeal provision as it then stood, that is, Section 63(3) which is as follows :

" The Board may, in disposing of any appeal, hold or cause to be held such

further inquiry as it thinks fit; and after giving the appellant an opportunity of being heard, pass, subject to the provisions of Sub-section (4), such orders thereon as it thinks fit, and shall send a copy of such orders to the appellant and the Controller. "

6. It is in the light of this provision in Section 63(3) the question as to whether the Board has properly exercised its discretion in rejecting the additional grounds of appeal has to be considered. In Ramgopal Ganpatrai and Sons Ltd. Vs. Commissioner of Excess Profits Tax, Chagla C.J., speaking for the Bench, while considering the scope of an analogous provision in Section 17 of the Excess Profits Tax Act, expressed thus :

" It is difficult to understand how it is possible to contend that an Appellate Tribunal has not the jurisdiction to deal with an order which is in appeal before it on any ground, even though such a ground was not taken in the trial court. If the appellant challenges the order of the trial court and wishes to contend that the order is wrong by certain provisions of the law, even though he had not taken that contention in the court below, it is impossible to urge that the appellate court has no jurisdiction to reverse that order on the ground urged by the appellant. We are not suggesting that the appellate court has no discretion to refuse the appellant to urge a ground not taken in the court below, but what we are concerned with in this reference is not the discretion of the appellate court but the competency and the jurisdiction of the appellate court to allow a point of law to be taken before it which was not taken in the court below. It must be borne in mind that when a statute confers a right of appeal and permits an order of a trial court to be challenged, the appellate court has full jurisdiction to reverse or modify that order on any ground which is open to it in law. The appellate court may even reverse or modify the order on a point of law taken by itself suo motu without being asked to do so by the appellant. "

7. In New India Life Assurance Co. Ltd. Vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City, the Bombay High Court, while dealing with Section 33(4) of the Indian Income Tax Act, held that the position of the Appellate Tribunal is the same as the court of appeal under the CPC and its powers are " identical " with the powers enjoyed by an appellate court under the Code. In Gangadas Sarda Vs. Commr. of Income Tax B. and O., the appellant before the Income Tax Appellate Tribunal urged an additional ground of law stating that all the cash credits which have been assessed as income from undisclosed source occurred prior to the accounting period and as such they could not have been taxed in the accounting year, which was not however entertained by the Tribunal. On the facts of that case the Patna High Court held that the Tribunal should have exercised its discretion judicially and entertained the additional ground urged by the assessee. In support of that view Rule 12 of the Appellate Tribunal Rules was referred to. That rule ran thus :

" The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal ;

but the appellate court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule. "

8. In PHOOL CHAND GAJANAND Vs. COMMISSIONER OF Income Tax, U. P., the Allahabad High Court held that the matter of granting or refusing leave to an appellant before the Tribunal to urge grounds which are not raised in the original grounds of appeal was at the discretion of the Tribunal ; that the Tribunal has to exercise that discretion judicially and that so long as it exercises the discretion for reasons which have some logical connection with the way in which it is exercised, it cannot be said to have acted arbitrarily. In the course of the judgment the learned judges say :

" That the ground was never urged before the Income Tax Officer, and in any case before the Appellate Assistant Commissioner, is also a fact which has some logical connection with the question whether the leave to urge it should be granted. The leave is required because the ground was not stated in the memorandum of appeal and would be required even if it had been urged before the Income Tax Officer and the Appellate Assistant Commissioner. It is relevant to consider the reason offered for the assessee's failure to urge the ground earlier ; its ignorance of the law is no excuse. There may be no substance in the department's contention that the assessee did not act bona fide in raising the ground at the late stage and there might be nothing in the conduct of the assessee which would justify refusal of the leave, but there are other grounds which cannot be brushed aside as irrelevant. So long as there is some logical connection between those grounds and the refusal to grant leave, it cannot be said that the Tribunal acted arbitrarily. "

9. In Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, their Lordships of the Supreme Court had occasion to consider the scope of the powers of the Appellate Tribunal u/s 33(4) of the Income Tax Act and they have expressed thus :

" The powers of the Appellate Tribunal in dealing with the appeals are expressed in Section 33(4) of the Income Tax Act in the widest possible terms. The word "thereon" in Section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words " pass such order as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred on the Appellate Assistant Commissioner by Section 31. Consequently the Tribunal has authority u/s 33 to direct the Appellate Assistant Commissioner or the Income Tax Officer to hold a further enquiry and dispose of the case on the basis of such enquiry. "

10. According to the learned judges Rules 12 and 27 of the Appellate Tribunal Rules, 1946, are not exhaustive of the powers of the Tribunal and they cannot in any way circumscribe or control its powers u/s 33(4). The above decision was rendered in the context of an objection taken by the assessee to the Revenue

taking an additional ground of appeal, and the Tribunal permitting the department to raise a new contention at the stage of appeal and remanding the matter for fresh enquiry. In UNION COAL CO. LTD. Vs. COMMISSIONER OF Income Tax, CALCUTTA., the Calcutta High Court considered the scope of the appellate powers conferred on the Appellate Assistant Commissioner u/s 30 of the Indian Income Tax Act, 1922, and stated that the right of appeal conferred by Section 30 of the Act includes the right of appeal against the "assessment" of income, and the assessee is entitled to challenge the assessment in appeal and argue even though he had not made the said claim in his return of income or before the Income Tax Officer.

11. It is well established that an appeal before the Appellate Assistant Commissioner or before the Tribunal is a rehearing, and the appellate authority has got all the powers of the assessing authority. But the difficulty is to ascertain its limitations. Normally, an assessee who has not put forward a particular claim or ground before the assessing authority, cannot seek to urge the same before the appellate authority except with the leave of the appellate authority. Of course, the appellate authority cannot refuse to entertain such a new ground arbitrarily but has to consider the reasons given by the assessee for not urging the new grounds before the initial authorities judicially. If the Tribunal comes to the conclusion that the reason given for not urging the points at an earlier stage is not germ(sic) or unreasonable, the Tribunal will be well within its discretion in refusing to entertain the new grounds of appeal.

12. In Connecticut Fire Insurance Company v. Kavanagh, [1892] A.C. 473 the Privy Council stated:

" When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But, their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

13. In Banbury v. Bank of Montreal, [1918] A.C. 626 it was said:

" It is a novel proposition that when the trial is over a Court of Appeal may be invited by the counsel on one side or the other to enter judgment on a point which they deliberately did not put forward at the trial. It was suggested by the respondents that in such a case it would be the duty of the Court of Appeal to ascertain whether the defect might have been cured by further evidence, and only in this case to refuse to entertain the objection. This would be most

inconvenient, and indeed impracticable. The introduction of such a practice might encourage unscrupulous litigants to abstain from raising a point at the trial because they thought this would improve their chances with the jury and then to bring it forward in the Court of Appeal in the hope that the other side might fail in satisfying the Court of Appeal that evidence might have been available to meet the point if it had been taken at the trial. " "

14. As pointed out by this court in *Kalayappa Chettiar v. Commissioner of Income Tax*, [1964] 5 ITR 51 though it is open to the Appellate Tribunal to permit an assessee to raise for the first time before it, even questions involving investigation of new facts, the matter is discretionary and the High Court will not ordinarily interfere with the discretion exercised by the Tribunal in this behalf. In that case the Tribunal declined permission to the assessee to raise a new ground as it was not raised earlier and that, in any event, the new ground raised would amount permitting the assessee to set up a case in conflict with the stand taken by him in the course of the assessment proceedings and the reasons given by the Tribunal were held to be sufficient for the rejection of the new grounds of appeal. In *Moti Ram Vs. Commissioner of Income Tax*, the Supreme Court expressed the view that the Appellate Tribunal can, in its discretion, refuse permission to an appellant to raise for the first time before it new questions of fact which cannot be decided without taking further evidence, and even if it had already given the appellant permission to produce an affidavit and other evidence pertaining to the new questions of facts, it is open to it not to accept them and not to permit the appellant to raise new questions of fact. The Supreme Court in a later decision in *Manji Dana Vs. Commissioner of Income Tax, Madhya Pradesh Bhandara and Nagpur*, had expressed that whether the discretion of the Appellate Tribunal has been properly exercised in a given case in refusing to allow a new ground of appeal, would normally be a question of fact. In that case the assessee submitted a return in the status of an individual pursuant to a notice u/s 34(1)(a) of the Income Tax Act. The Income Tax Officer accepted the status of the assessee as an individual and proceeded to make the assessment. Thereafter, at the appellate stage, it was contended that the status of the assessee has not been properly determined. The Supreme Court justified the order of the Tribunal refusing to entertain the additional ground, for the reason that the additional ground if allowed to be raised involves investigation of new facts on evidence, and that it would also be contrary to the admissions made by the assessee in his return submitted in his individual capacity.

15. In this case the accountable person submitted the accounts of the estate on the basis that all the properties belonged to the deceased individually and he also relied on the will left by the deceased. It is for the first time he has come forward with a case before the Central Board of Direct Taxes that some of the properties had been obtained by the deceased at a partition between himself and his brothers. It is not disputed that the properties said to have been obtained by the deceased at the partition between himself and his brothers had been dealt with under the will. Therefore, once the accountable person submitted the return

on the basis of a will executed by the deceased in respect of the properties left by him allowing the new point now urged by him at the appellate stage would mean that he will be putting forward an inconsistent case in respect of a portion of the properties left by the deceased. Further, as pointed out by the Tribunal, there is no reason given for not raising the new ground before the Assistant Controller. As a matter of fact in the reasons set out in the petition for additional grounds it is stated that as the Assistant Controller did not give notice to all the accountable persons who were in possession of the information regarding the deceased, the actual status of the deceased as a member of the Hindu undivided family was lost sight of. It has not been stated therein as to when and how they became aware of the actual status of the deceased and as to why the partition deed which was sought to be produced at the appellate stage had not been produced earlier. We, therefore, feel that the accountable person cannot be said to have properly explained the reason as to why the status of the deceased person as a member of the Hindu undivided family in respect of some of the properties left by him has not been urged earlier.

16. In these circumstances and in the light of the decisions in *Kalayappa Chettiar v. Commissioner of Income Tax* and *Manji Dana v. Commissioner of Income Tax*, we have to uphold the orders of the Central Board of Direct Taxes as having been made in the proper exercise of their jurisdiction.

17. As the first question has been answered against the assessee, the other two questions do not arise for consideration. We, therefore, answer the first question in favour of the Revenue and the reference in T.C. No. 114 of 1969, is returned. The Revenue will have its costs in T.C. No. 300 of 1966. Counsel's fee Rs. 250.