1960

Shri Ambica Mills Co., Ltd. v. Shri S. B. Bhatt & Another

Gajendragadkar J.

folders. That was the finding made by the authority on an earlier occasion when Punamchand and Vishnuprasad had moved the authority under s. 15 of the Act. The learned Attorney-General has strenuously contended that it is unfair to give the same pay to the three workmen who are doing the work of cut-lookers only for a part of the time and were substantially doing the work of bleach-folders; that, however, has no relevance in determining the present dispute. The only point which calls for decision is whether or not the work done by the three respondents takes them within the category of cut-lookers specified under cl. 5, and as we have already pointed out, on an earlier occasion the authority has found in favour of two of the three respondents when it held that they were folders doing cut-looking. If the said finding amounts to *res judicata* it is in favour of the two respondents and not in favour of the appellant; that is why the learned Attorney-General did not seriously dispute the correctness of the decision of the High Court on the question of *res judicata*.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

1960

December 13.

THE INCOME-TAX OFFICER, ALWAYE

v.

THE ASOK TEXTILES LTD., ALWAYE

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Rectification, scope of—If can be equated with review under the Code—Advance payment of tax—Penal interest due to additional tax on rectification, if could be imposed—Code of Civil Procedure (V of 1908), O. 47, r. 1—Indian Income-tax Act, 1922 (11 of 1922), ss. 18A (8), 35.

After the respondents net assessable income for the years 1952-53 was determined, it declared dividends which attracted provisions of the Finance Act, 1952, and became liable to the

payment of additional income-tax, which fact was overlooked by the Income-tax Officer, who, after giving notice under s. 35 of the Income-tax Act, rectified the error and imposed an additional tax at the rate of one anna in the rupee. He later discovered that this was also erroneous and the rate should have been five annas in a rupee and rectified the error; by the same order the omission to impose penal interest under s. 18A(8) was rectified and penal interest was imposed. The respondent's case before the High Court was that s. 35 of the Act did not apply and that on the merits the additional tax could not be imposed. The High Court held that the necessary foundation for the exercise of the powers under s. 35 had not been laid and therefore the Income-tax Officer had no jurisdiction to make the order; and also that the penal interest under s. 18A(8) of the Act for failure to make advance deposit was also without jurisdiction.

Held, that the language and scope of s. 35 of the Indian Income-tax Act, 1922, could not be equated with that of O. 47, r. 1 of the Code of Civil Procedure. The Income-tax Officer could under s. 35 of the Act examine the record and if he discovered that a mistake had been made, could rectify the error both of law and fact. The restrictive operation of the powers of review under O. 47, r. 1 of the Code of Civil Procedure was not applicable in the case of s. 35 of the Income-tax Act.

Held, further, that the s. 18A(8) was a mandatory one and the Income-tax Officer was required to calculate the interest in the manner provided under the provisions of that sub-section and had to add it to the assessment.

Maharana Mills (P.) Ltd. v. *Income-tax Officer*, [1959] 36 I.T.R. 350 and *M. K. Venkatachalam* v. *Bombay Dyeing & Manufacturing Co. Ltd.*, [1958] 34 I.T.R. 143, discussed.

Commissioner of Income-tax v. *Elphinstone Spinning & Weaving Mills Co. Ltd.* [1960] 40 I.T.R. 142, *Commissioner of Income-tax, Bombay City* v. *Jalgaon Electric Supply Co. Ltd.*, [1960] 40 I.T.R. 184 and *Commissioner of Income-tax, Bombay City* v. *Khatau Makanji Spng. & Weavg Co. Ltd.*, [1960] 40 I.T.R. 189, not applicable.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 311 of 1959.

Appeal from the judgment and order dated October 31, 1955, of the Travancore Cochin High Court, Ernakulam, in Original Petition No. 75 of 1955.

A. N. Kripal and *D. Gupta*, for the appellant.

Sardar Bahadur, for the respondent.

1960. December 13. The Judgment of the Court was delivered by

1960

The Income-tax Officer, Alwaye
v.
The Asok Textiles Ltd., Alwaye

Kapur J.

KAPUR, J.—This is an appeal pursuant to a certificate of the High Court of Kerala against the judgment and order of that court and the question for decision is the applicability of s. 35 of the Indian Income-tax Act (hereinafter termed the 'Act').

The facts which have given rise to the appeal are these: The respondent is a limited company which owns a spinning mills at Alwaye. It commenced business in January, 1951, and its first accounting year ended on December 31, 1951, and the relevant assessment year is 1952-53. It filed its return showing an income Rs. 3,21,284 without taking into account the amount allowable under s. 15C of the Act. On February 2, 1953, the net assessable income of the respondent was determined at Rs. 1,47,083 after deducting Rs. 1,79,081 under s. 15C. The respondent however declared a dividend of Rs. 4,72,415 which attracted the application of s. 2 of the Finance Act, 1952, read with Part B, proviso (ii) of First Schedule and thus it became liable to the payment of additional income tax and this fact was overlooked by the Income-tax Officer. After giving notice under s. 35 of the Act, the Income-tax Officer by an order dated January 25, 1954, rectified this error and imposed an additional tax at the rate of one anna in the rupee. He later discovered that this was also erroneous and the rate should have been 5 annas in a rupee. By an order dated August 12, 1954, he rectified the error. Under s. 18A, advance income tax had to be paid and the respondent company had deposited only Rs. 5,000 and therefore became liable to penal interest under s. 18A(8) of the Act. By the same order this omission to impose penal interest was corrected and this error was thus rectified.

Against this order the respondent company went in revision under s. 33A(2) to the Commissioner of Income-tax but the revision was dismissed. Thereupon the respondent company filed a petition in the High Court of Kerala under Art. 226 of the Constitution on the ground that s. 35 of the Act did not apply and that on the merits additional tax could not be imposed. The High Court by its judgment dated October 31,

1955, held that the orders made were without jurisdiction and therefore granted a writ of certiorari quashing the orders and the Income-tax Officer has brought this appeal pursuant to a certificate of that High Court.

According to the High Court, s. 35 of the Act was a provision for rectification of "mistakes apparent on the record" and in the opinion of the High Court it was a mistake analogous to O. 47, r. 1 of the Code of Civil Procedure for grant of review on the ground of mistake or error apparent on the face of the record and it construed it in the following words:—

> "i.e. an evident error which does not require any extraneous matter to show its incorrectness. The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face of the record. See Chitaley's C.P.C. Col. III pp. 3549-50, 5th edition."

On the ground that the applicability of proviso (ii) of Part B of the First Schedule of the Finance Act was a complex question which could not be said to be "apparent on the face of the record", the High Court held that the necessary foundation for the exercise of the powers under s. 35 had not been laid and therefore the Income-tax Officer had no jurisdiction to make the order that he did. The High Court also held that the levy of penal interest under s. 18A(8) of the Act for failure to make advance deposit under s. 18A(3) was also without jurisdiction.

The learned Judges of the High Court seem to have fallen into an error in equating the language and scope of s. 35 of the Act with that of O. 47, r. 1, Civil Procedure Code. The language of the two is different because according to s. 35 of the Act which provides for rectification of mistakes the power is given to the various income-tax authorities within four years from the date of any assessment passed by them to rectify

1960

The Income-tax Officer, Alwaye v. The Asok Textiles Ltd., Alwaye

Kapur J.

any mistake "apparent from the record" and in the Civil Procedure Code the words are "an error apparent on the face of the record" and the two provisions do not mean the same thing. This court in *Maharana Mills (Private) Ltd.* v. *Income-tax Officer, Porbandar* (1) has laid down the scope of s. 35 at p. 358 in the following words:—

> "The power under section 35 is no doubt limited to rectification of mistakes which are apparent from the record. A mistake contemplated by this section is not one which is to be discovered as a result of an argument but it is open to the Income-tax Officer to examine the record including the evidence and if he discovers any mistake he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard."

In that case the error arose because of an initial mistake in determining the written down value which was subsequently rectified. In an earlier case *M. K. Venkatachalam* v. *Bombay Dyeing & Manufacturing Co. Ltd.* (2) where as a consequence of a subsequent amendment of the law having retrospective effect, the Income-tax Officer reduced the amount of interest under s. 18A(5) of the Act and the assessee obtained from the High Court a writ of prohibition against the Income-tax Officer on the ground that the mistake contemplated had to be apparent on the face of the order and not a mistake resulting from an amendment of the law even though it was retrospective in its effect, it was held that it was a case of error apparent from the record. Gajendragadkar, J. in his judgment said:—

> "At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952."

Thus this court has held that discovery of an error on

(1) [1959] 36 I.T.R. 350. (2) [1958] 34 I.T.R. 143.

the basis of assessment due to an initial mistake in determining the written down value is a mistake from the record and so is a misapplication of the law even though the law came into operation retrospectively. The Income-tax Officer, can, under s. 35 of the Act, examine the record and if he discovers that he has made a mistake he can rectify the error and the error which can be corrected may be an error of fact or of law. The restrictive operation of the power of review under O. 47 R.1, Civil Procedure Code is not applicable in the case of s. 35 of the Act and in our opinion it cannot be said that the order of the Income-tax Officer in regard to assessment in dispute was without jurisdiction.

In regard to s. 18A (8) also the learned Judges have misdirected themselves because that section is mandatory. It provides:—

> S. 18A(8) "Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment."

Therefore the Income-tax Officer was required to calculate the interest in the manner provided under the provisions of that sub-section and had to add it to the assessment.

Counsel for the respondent sought to raise the question as to the applicability of proviso (ii) of Part B of First Schedule of the Finance Act 1952 and relied upon the judgments of this Court in *Commissioner of Income-tax* v. *Elphinstone Spinning & Weaving Mills Co. Ltd.* (1) and similar cases reported as *Commissioner of Income-tax, Bombay City* v. *Jalgaon Electric Supply Co. Ltd.* (2) and *Commissioner of Income-tax, Bombay City* v. *Khatau Makanji Spinning and Weaving Co. Ltd.* (3); but the facts of those cases were different. In the first case there was no total income and the

(1) [1960] 40 I.T.R. 142. (2) [1960] 40 I.T.R. 184.
(3) [1960] 40 I.T.R. 189.

1960

The Income-tax Officer, Alwaye v. he Asok Textiles Ltd., Alwaye

Kapur J.

Finance Act was not applicable in that case. In the second there was no profit in any preceding year and therefore the fiction failed because it postulates that there should be undistributed profits of one or more years immediately preceding the previous year. In the third case also the Finance Act was inapplicable because the additional tax was not properly laid upon the total income and what was actually taxed was never a part of the total income of the previous year.

In our opinion the order of the High Court was erroneous. We therefore allow this appeal and set aside the judgment and order of the High Court with costs in this court and in the High Court.

Appeal allowed.

1960

December 13.

DIAMOND SUGAR MILLS LTD., AND ANOTHER

v.

THE STATE OF UTTAR PRADESH AND ANOTHER

(JAFER IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL and N. RAJAGOPALA AYYANGAR, JJ.)

Sugar Cane—Imposition of cess—Enactment taxing entry of cane into factory—Constitutionality of—"Local area", Connotation of—Constitution of India, Sch. VII, List II, Entry 52—U. P. Sugarcane Cess Act, 1956 (U. P. XXII of 1956), s. 3.

Entry 52 of List II of the Seventh Schedule to the Constitution empowered State Legislatures to make a law relating to "taxes on the entry of goods into a local area for consumption, use or sale therein". The U. P. Legislature passed the U. P. Sugarcane Cess Act, 1956, which authorised the State Government to impose a cess on the entry of cane into the premises of a factory for use, consumption or sale therein. The appellant contended that the premises of a factory was not a 'local area' within the meaning of Entry 52 and the Act was beyond the competence of the legislature.