Standard Mills Co. Ltd. vs M. Ramalingam And Anr. on 17 November, 1964

Equivalent citations: [1966]60ITR46(SC)

Bench: J.C. Shah, M. Hidayatullah, P.B. Gajendragadkar, R.S. Bachawat, S.M. Sikri

JUDGMENT

Shah, J.

1. The appellant is a public limited company incorporated under the Indian Companies Act, 1913, and has its registered office at Bombay. The company had, in the calendar year 1951, appropriated Rs. 11,68,000 in declaring dividend to the shareholders out of its total book profits of Rs. 55,69,669. For the assessment year 1952-53, Income-tax Officer, Companies Circle I(2), Bombay, estimated the undistributed profits at Rs. 18,24,525 and allowed a rebate thereon under part I of the First Schedule, Paragraph B, proviso 1, Finance Act, 1951, at the rate of one anna per rupee. For the assessment year 1953-54 the net profits of the company in the calendar year 1952 were determined at Rs. 31,03,760 and the taxable income was assessed at Rs. 12,94,872. In that year also the company declared Rs. 11,68,000 as dividend payable to the shareholders. As this amount exceeded the total income as reduced by seven annas in the rupee and a donation of Rs. 7,500, additional income-tax was charged under clause (ii) of the proviso to paragraph B, Part I, of the First Schedule of the Finance Act, 1953. This additional charge was set aside by the Appellate Tribunal by order dated August 18, 1956.

2. The Income-tax Officer then addressed a letter dated November 12, 1956, to the company intimating that he proposed to rectify the assessment of the year 1952-53 in exercise of the powers under section 35(10) of the Income-tax Act, and to withdraw the rebate, because in his view the company distributing Rs. 11,68,000 as dividend had utilised the undistributed profits of the previous year held admissible to rebate. The company contended, inter alia, that it was not true that the dividend or any part thereof came out of the undistributed profits of the assessment year 1952-53. By his letter dated February 21, 1958, the Income-tax Officer informed the company that "on a study of the figures of the assessment year 1953-54", it was disclosed that the net book profits amounted to Rs. 31,03,760 out of which Rs. 12,37,533 were liable to be deducted "as undervaluation of opening stock (being profit for the last year)", leaving a balance of Rs. 18,66,227. Out of that amount, Rs. 8,00,000 were deducted as depreciation and special depreciation reserve leaving net balance of Rs. 10,66,227, and deducting therefrom Rs. 7,50,000 as provision for taxation, Rs.

3,16,227 only remained as profit available for distribution. The Income-tax Officer therefore informed the company that in his opinion the dividends had "come out of the profits of the earlier year", represented by undervaluation of the opening stock which was the income of the previous year. The company asserted that the distribution of dividend was out of the current years profit which amounted to Rs. 11,70,889, and there was no ground for withdrawing the rebate.

3. The Income-tax Officer rejected the contention of the company and declared that as against the a mount of Rs. 3,16,227, which was the profit available for distribution, the dividend declared in the assessment year 1953-54 was Rs. 11,68,000 and the balance of Rs. 8,51,773 had come out of the undistributed profits of the year 1951 amounting to Rs. 18,24,525 on which rebate was allowed. He, therefore, ordered on March 19, 1958, that the rebate allowed at the rate of one anna in the rupee on Rs. 8,51,773 be withdrawn, and issued a demand notice for Rs. 53,235.13 nP.

4. The company then presented a petition under article 226 of the Constitution before the High Court of Judicature at Bombay praying for the issue of a writ in the nature of certiorari or other against the Income-tax Officer calling for the record of the case and for a direction quashing the order dated March 19, 1958, holding the company liable in the sum of Rs. 53,235.13 nP and the notice of demand consequent thereon. The company also prayed for the issue of a writ in the nature of mandamus ordering the Income-tax Officer to withdraw and cancel the order dated March 19, 1958, and the notice of demand consequent thereon. It was submitted by the company that the provisions of section 35(10) of the act were ultra vires the Central Legislature in that they infringed articles 14, 19(1),(f) and (g), 31 and 265 of the constitution, and in any event "traveled beyond the ambit of section 3 of the act " and imposed additional income-tax without reference to the total income or the rate applicable to the total income of the company, that the provisions of section 35(10) which had been added by section 19 of the Finance Act, 1956, had no application to the companys case, because the Act was not retrospective and orders which had become final and conclusive before the first April, 1956, were not covered by that provision and could not be rectified thereunder. The company also contended that the amount of Rs. 11,68,000 paid as dividend did not come out of the profits of the assessment year 1952-53 and that there were large profits available in other years out of which the dividend was in fact paid.

5. The petition was rejected by the High Court. Before the High Court the questions that the statute was ultra vires as infringing the constitutional provisions set out in the petition, that it travelled beyond the ambit of section 3 of the Income-tax Act and that section 35(10) was inapplicable to the order rectified because it had no retrospective operation were not pressed. The primary question argued before the High Court was that the order passed under section 35(10) withdrawing the rebate granted in the previous year was not liable to be withdrawn as Rs. 11,68,000 declared as dividend by the company had come out of the profits of the company for that year and not out of the profits of the previous year for which benefit of rebate had been obtained. In the view of the High Court the petition raised a "controversial question of fact", viz., whether any undistributed profits of the account year 1951 on which income-tax rebate had been allowed had been availed of by the company for declaring dividend in the account year 1952, and to resolve that question it would be necessary to record evidence, a step which the High Court was in the exercise of its direction not willing to adopt in a petition for a high prerogative writ. With special leave, the company has

appealed to this court against the order of the High Court.

6. In this appeal Mr. Setalvad on behalf of the company did not contend that section 35(10) is ultra vires because it infringes any constitutional provisions or is beyond the legislative power. Nor did counsel contend that section 35(10) had no retrospective operation. He concentrated his argument upon only one question, viz., that the order passed by the Income-tax officer disclosed an error apparent on the face of the record and it was liable to be rectified by the issue of a writ of certiorari, especially when the Income-tax Act did not provide an appeal against the order passed under section 35(10).

7. Section 35(10) provides :

> "Where, in any assessments for the years beginning on the 1st day of April, of the years 1948 to 1955 inclusive, a rebate of income-tax was allowed to a company on a part of its total income under clause (i) of the proviso to paragraph B of part I of the relevant schedules to the Finance Acts specifying the rates of tax for the relevant year, and subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year, the amount or that part of the amount availed of as aforesaid, as the case may be, shall, by reason of the rebate of income-tax allowed to the company and to the extent to which it has not actually been subjected to an additional income-tax in accordance with the provisions of clause (ii) of the proviso to paragraph B of part I of the Schedules to the Finance acts above referred to, be deemed to have been made the subject of incorrect relief under this Act, and the Income-tax Officer shall recomputed the tax payable by the company by reducing the rebate originally allowed, as if the recomputation is a rectification of a mistake apparent from the record within the meaning of this section and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the financial year in which the amount on which rebate of income-tax was allowed as aforesaid was availed of by the company wholly or partly for declaring dividends."

8. There is no dispute that in the assessment year 1952-53 the company obtained rebate on the amount of undistributed profits under clause (i) of the proviso to paragraph B of part I of the First Schedule to the Finance Act, 1951. The Income-tax Officer decided that the net available profits for distribution by the company in the account year 1952 were only Rs. 3,16,227 and without drawing upon the undistributed profits for which rebate was given in the account year 1951, the company could not distribute Rs. 11,68,000 as dividend. The assessment order made by the Income-tax Officer for the year 1953-54 (account year being 1952) was, it appears, not before the High Court, but copies of that order have been annexed to the petition for special leave filed in this court. That order discloses that the company had in its income-tax return disclosed Rs. 31,03,760 as book profits. Adjusting certain items which in the view of the Income-tax Officer were not allowable, the gross profit was Rs. 33,37,813. Out of this amount the Income-tax Officer deducted Rs. 12,37,533 under the head Undervaluation of opening stock," and Rs. 8,06,086 as depreciation leaving a

balance of Rs. 12,94,194. Adding to this amount certain gross dividends, the taxable profits of the company were computed at Rs. 12,94,872. But the taxable profits being subject to a first charge for liability to pay tax, the balance would in the view of the Income-tax Officer be insufficient to provide for Rs. 11,60,800 for distribution as dividend.

9. The entire dispute centers round the true nature of the deduction made by the Income-tax Officer in his order under section 35(10) in the computation made by him of Rs. 12,37,533. The Income-tax Officer was of the view that this amount represents the profits of the previous year, which must be deducted out of the book profits returned by the company, to show the true commercial profits. That there was undervaluation of the opening stock in the year of account 1952 was accepted by the company. From the order for the assessment year 1952- 53, it is apparent that the closing stock in 1951 had been enhanced by Rs. 12,37,533 and against that amount the enhanced value of the opening stock of Rs. 9,80,162 was debited. If to remove the discrepancy between the valuation of the closing stock of 1951, and the valuation of the opening stock in the year 1952, this amount of Rs. 12,37,533 is deducted from the book profits, the net balance at the close of the account year 1952 remaining in the hands of the company could not be sufficient to distribute dividend at the rate at which it was distributed.

10. Mr. Setalvad contended that in the assessment year 1951-52 relating to the account year 1950 adjustment was made in valuing the closing stock by adding to the hook profit Rs. 9,80,162 under the head "Addition to closing stock (without adjustment of the opening stock this year)" and his amount was taken into account in computing the income of the account year 1951. Counsel says that the amount of Rs. 9,80,162 was profit of the year 1950 kept out of the books by depreciating the value of the closing stock and was not in truth profit of the year 1951, for which on the undistributed profits rebate was given. The argument is that the company attempted in the year 1950 to reduce its profits by undervaluing its closing stock by Rs. 9,80,162 and that amount which was reflected in the account of 1951 must be regarded as profit, section 35(10) has no application. But from the assessment order relating to the account year 1950 it is clear that the amount of Rs. 9,80,162 was in fact added by the Income-tax Officer and total income was computed on that footing. In the assessment to tax of the income of the account year 1951, readjustment was made in the stock valuations, both opening and closing. The opening stock was valued as at the figure at which the closing stock was valued for the year 1950 and for that purpose an adjustment of Rs. 9,80,162 was made, and the closing stock was depreciated by Rs. 12,37,533, and the difference was taken into account in computing the profits of that year. In this state of accounts, it is difficult to accept without full examination of the accounts the argument that the amount of Rs. 9,80,162 had not received the benefit of rebate in the assessment year 1952-53.

11. We are at this stage not seeking to decide any questions of fact. It is sufficient for the purpose of this appeal to demonstrate that the petition field by the company in the High Court and the affidavit of the Income-tax Officer in reply raised disputed questions of fact. The company contended that it had on hand an amount exceeding Rs. 11,68,000 out of the profits of the account year 1952, from which dividend could be distributed. The Income-tax Officer was of the opinion that the company had not on hand that amount as profit, because it had attempted by manipulation of the value of stock on hand to show a larger figure of profits than the amount actually earned and therefore out of

the book profits the amount by which opening stock was undervalued was deducted.

12. On these respective pleas a dispute on a question of fact arose, in the investigation of which it would have been necessary for the High Court to scrutinize with the aid of auditors, the accounts of the company for at least three years to ascertain whether the dividend was paid out of the net profits on hand of the year 1952 or whether the profits of they year 1951 on which rebate was given were availed of for distributing dividend. The High Court having, in the exercise of its discretion, refused to embark upon that inquiry, we would not ordinarily be justified in an appeal under article 136 in reversing that decision.

13. But Mr. Setalvad contended that there were two special circumstances in this case, which should persuade us to remand this appeal to the High Court for investigation : (i) that in a case which had been decided only two days after the decision under appeal, against an order passed under section 35(10) by the same Bench which decided the case of the company, an order was passed by the High Court in a petition under article 226 of the Constitution and a writ of certiorari was issued discharging the order passed by the Income-tax Officer, and (ii) that the statute provides no appeal against the order passed by the Income-tax Officer, under section 35(10) to rectify what is fictionally deemed a mistake, and the company has no effective remedy against a patently unjust order. The first ground is, in our judgment, futile. If, in the circumstances of the particular case, the court was satisfied that before passing an order under section 35(10) no investigation into disputed questions of fact is necessary, it would b ticle 226 of the Constitution. There is again no ground for holding without full investigation that any injustice patent or otherwise has resulted. It is true that the Income-tax Act provides no appeal against the order passed under section 35(10). But that cannot by itself be a ground for ordering the High Court to entertain a petition which, in the exercise of its discretion, the High Court has declined to entertain. It may be noticed that a party aggrieved by an order under section 35(10) is not without a remedy. An application under section 33A(2) to the Commissioner of Income-tax for correcting the order undoubtedly lies against an order under section 35(10).

14. The appeal therefore fails and is dismissed with costs.

15. Appeal dismissed.