Hirday Narain vs Income-Tax Officer, Bareilly on 21 July, 1970

Equivalent citations: 1971 AIR 33, 1971 SCR (3) 683, AIR 1971 SUPREME COURT 33

Author: J.C. Shah

Bench: J.C. Shah, K.S. Hegde

PETITIONER:
HIRDAY NARAIN

Vs.

RESPONDENT:
INCOME-TAX OFFICER, BAREILLY

DATE OF JUDGMENT:
21/07/1970

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
HEGDE, K.S.

CITATION:
1971 AIR 33 1971 SCR (3) 683
1970 SCC (2) 530

ACT:
Income-tax Act 1922, Ss. 16(3) (a) (ii)-If applicable in case of assessment of H.U.F, income. S. 35-Nature of power of rectification If discretionary

HEADNOTE:
The appellant with his five sons constituted a Hindu undivided family and up to the assessment year 1950-51 the income received by the appellant was assessed to tax as the income of the H.U.F. The previous year of the Hindu Undivided Family for each assessment year was from October I to September 30 of the following year. The property of the Joint Family was partitioned on November 19, 1949. For the assessment year 1951-52 the income tax Officer assessed the appellant's income as that of the H.U.F. in appeal, the Appellate Assistant Commissioner directed that the income earned between October I and November 18, 1949 should be

treated as that of the H.U.F. and excluded from the assessment. The I.T.O. thereafter made two orders of assessment, assessing Rs. 18,52.00 earned upto November 18 as the income of the old H.U.F. and assessing the balance also as income of a Hindu undivided family and liable to tax in the hands of the appellant by the application of s. 16(3)(a)(ii), of the Income Tax Act, 1922. The appellant the* applied for rectification of an error in the second order of assessment under s. 35 of the Act claiming that his income assessed as that of an H.U.F.. Section 16(3) (a)(ii) did not apply. The I.T.O. accepted the plea that s. 16(3)(a)(ii) did not apply to an H.U.F. but declined to give relief holding that for the period between November 19 1949 and September 30, 1950, the appellant should have been assessed as an, individual.

A petition filed by the appellant in the High Court under Article 226 challenging the order of the I.T.O. was dismissed by a Single Judge holding, inter alia, that the appellant had not applied in revision to the Commissioner under section 33-A. A division Bench dismissed an appeal against the order of the single judge observing that the rectification under section 35 was "discretionary", and if the I.T.O. thought that the proceedings were "substantially fair" he was "not bound to rectify the assessment on technical grounds".

On appeal to this Court,

HELD : The income from November 19, 1949 onwards being assessed to tax as-the income of a Hindu undivided family consisting of the appellant, his wife and a new born minor son. s. 16(3)(a)(ii) plainly did not apply and writs must issue for the rectification of the appellant's assessments, Gowli Buddanna v. The Commissioner of Income-tax Mysore (1) 60 I.T.R. 293; N. V. Narendra Nath v. Commissioner of Wealth tax, (2) 74 I.T.R. 190, referred to. [686 E-F]

The High Court was wrong in assuming that exercise of the power under s. 35 to rectify an error apparent from the record was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power. If a statute invests

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a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the Courtswill readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen. [688 G, 689]

While accepting the appellant's plea that the income of his minor children was not liable to be included in his assessment in the status of an H.U.F. his right to obtain the benefit of rectification could not be refused by

changing the status on the basis of which the original assessment was made without investigating, after due notice, whether in assessing the income for the period November, 19, 1949 to September 30, 1950, a mistake in fact was committed. [688 B-C]
Because a revision application could have been moved for an order correcting the order of the Income Tax Officer under s. 35, but was not moved, the High Court was not justified in dismissing as not maintainable the writ petition, which was entertained and was heard on the merits. [688 El

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 193 and 448 of 1970.

Appeals by special leave from the judgment and order dated the September 19, 1968 of the Allahabad High Court in Second Appeals Nos. 12 and 13 of 1962.

J. P. Goyal, S. M. Jain and S. P. Singh, for the appellant (in both the appeals).

Jagadish Swarup, Solicitor-General, Gobind Das, R. N. Sach- they and B. D. Sharma, for the respondent (in both the appeals).

The Judgment of the Court was delivered by Shah, J.-These appeals arise out of orders passed in peti- tions praying for a writ of mandamus to rectify orders of assessment relating to income assessed to tax for the years 1951-52 and 1952-53. The corresponding previous years for the assessment years were October 1, 1949 to September 30, 1950 and October 1, 1950 to September 30, 1951. Hirday Narain and his five sons were members of a Hindu undivided family. Till the assessment year 1950-51 the income received by HirdayNarain -was assessed to tax as the income of a Hindu undividedfamily. On November 19, 1949 the property of the joint family was partitioned between Hirday Narain and his. sons. In assessing the income for the assessment year 195152 the Income-tax Officer recorded an order that the property was partitioned, but he still assessed the income received by Hirday Narain as income of a Hindu undivided family. In appeal the Appellate Assistant Commissioner treated Rs. 18,520 earned between October 1, 1949 and November 18, 1949 as income of the former Hindu undivided family and directed that it be "excluded from the assessment". Pursuant to that order, the Income-tax Officer made two orders of assessment-(I) assessing Rs. 18,520 as income of the Hindu undivided family of Hirday Narain and his five sons: and (2) assessing Rs. 1,06,156 also as income of a Hindu undivided family and liable to tax in the hands of Hirday Narain by the application of s. 16 (3) (a) (ii) of the Indian Income-tax Act, 1922.

Hirday Narain then applied for rectification of a mistake in the order of assessment which he claimed was apparent from the record. He submitted that "the assessment of * * * Hirday Narain has been made in the status of undivided family comprising of himself and his minor son Satendra Prakash. Section 16(3)(a)(ii) does not apply to cases of 'Hindu undivided family', but only to those of 'Individuals'. It is therefore requested that such of the income as has by mistake been included in

the, assessment of the Hindu undivided family for the said year under s. 16(3) (a) (ii) may kindly be excluded under s. 35 as the mistake is apparent from record." The Income-tax Officer accepted the plea that to income assessed to tax in the hands of Hirday Narain in the status of a Hindu undivided family s. 16 (3) (a) (ii) of the Income-tax Act, 1922, did not apply, but he declined to give relief holding that for the period November 19, 1949 to September 30, 1950 Hirday Narain should have been assessed as an individual.

Hirday Narain then moved a petition before the High Court of Allahabad under Art. 226 of the Constitution challenge in the order of the Income-tax Officer. A single Judge of the High ,Court rejected the petition holding that at the stage of the original assessment the question that the, income was not liable to be assessed under s. 16 (3) (a) (ii) of the Income-tax Act was not raised and that the assessee had not applied in revision to the Commissioner under s. 33-A of the Act. A Division Bench of the High Court confirmed that order in appeal, observing that the rectification under s. 35 of the Act was "discretionary", and if the Income-tax Officer thought that proceedings were "substantially fair"

> he was "not bound to rectify the assessment on technical grounds". The High Court also observed that "it was not clear that after November 19, 1949 there was a Hindu un- divided family which Hirday Narain represented and therefore it was possible to say with certainty that the Income-tax Officer was wrong in proceeding on the footing that the, assessment could be supported as assessment of an individual".

With special leave, Hirday Narain has appealed to this Court.

In respect of the period November 10, 1949 to September 30, 1950 the income was assessed in the hands of Hirday Narain in the status of a Hindu undivided family. Section 16 of the Indian Income-tax Act,1922, by sub-s. (3)(a)(ii) provides "In computing the total income of any individual for the purpose of assessment there shall be included-

> (a) so much of the income of a wife or minor child ofsuch individual as arises directly or 'indirectly-
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> (ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner".
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> * * * * *
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> (ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner."

Income for the period November 19, 1949 to September 30, 1950 being assessed to tax as the income of a Hindu undivided family and not of an individual, s. 16 (3) (a)

(ii) plainly did not apply and the income of the minor children of Hirday Narain could not be included in the income of Hirday Narain assessed as a Hindu undivided family.

Under the Income-tax Act it is not predicated of a Hindu undivided family as a taxable entity that it must consist of two or more male members : Gowli Buddanna v. The Commissioner of Income-tax, Mysore;(') see also N. V. Narendra Nath v. Commissioner of Wealth Tax(') (a case under the Wealth Tax Act). Hirday Narain received a share in the properties of the Hindu undivided family of which he and his wife were members. It may again be noticed that before the previous year expired, Hirday Narain's wife gave birth to a son on April 6, 1950. We are therefore unable to agree that the income accruing between November 19, 1949 and September 30, 1950 could be assessed in the hands of Hirday Narain as an individual.

(1) 60 I.T.R. 293. (2) 74 I.T.R. 190.

But the Solictor-General submitted that Hirdy Narain had filed his return in the status of an individual, and since the Appellate Assistant Commissioner had also passed an order when he directed separate assessment of the total receipts during the year October 1, 1949 to September 30, 1950 as the income of two distinct assessable entities, the Income-tax Officer was bound to assess the income for the period November 19, 1940 to September 30, 1950, as the income of Hirday Narain as -an individual, and to that income, the income of his minor children arising out of the partnership to which they were admitted was liable to be added under s. 16(3)(a)(ii) of the Income-tax Act, and the Tax Officer was entitled and indeed bound to rectify the assessment when his attention was invited to the error. There is no clear evidence on the record about the status in which Hirday Narain submitted the return of income. If the order of assessment made by the Income-tax Officer furnishes any indication, the return was probably filed in the status of a Hindu undivided family. By the order dated December 16, 1953 the total income of the relevant year was ordered to be assessed in the hands of Hirday Narain in the status of a Hindu undivided family. It is true that in the appeal before the Appellate Assistant Commissioner it was contended by Hirday Narain that the Income-tax Officer "had erred in including a sum of Rs. 18,520 to the income of the appellant (Hirday Narain)as an 'Individual' and in not assessing it separately as the income of the 'Hindu undivided family'." The Appellate Assistant Commissioner observed that the income of Rs. 18,520 related to the period when the family of the appellant was undivided, but by an order under s. 25-A the Income-tax Officer- had held that the appellant and his sons had partitioned the property of the family. He therefore directed that the amount of Rs. 18.520/which belonged to -the erstwhile Hindu undivided family be excluded from the assessment which accordingly stood reduced from Rs.. 1,24,676 to Rs. 1,06,156. The Appellate Assistant Commissioner did not direct that the status in which the income was sought to be assessed for the period November 19, 1949 to September 30, 1950 be altered. Pursuant to the order of the Appellate Assistant Commissioner the -Income-tax Officer assessed the income for that period as income of a Hindu undivided family represented by Hirday Narain. There was in fact an existing Hindu undivided family of which, for a part of the period Hirday Narain and his wife were members, and for the rest, besides the two, their infant son was a member. The order of the Income-tax Officer is subject to a proce- dural infirmity as well. In rejecting the application under s. 35 the Income-tax Officer apparently assumed that in an applica-

tion made by an assessee he could exercise his power suo motu and modify the status of the assessee even without giving an opportunity to the assessee to establish that the order assessing him in the status of a Hindu undivided family was in law correct. Hirday Narain had claimed that the income of his minor children was not liable to be included in his assessment in the status of a Hindu undivided family. There was no defence to the claim for rectification on the merits of that application. Right to obtain the benefit of rectification could not be refused by changing the status on the basis of which the original assessment was made without investigating, after due notice, whether in assessing the income for the period November 19, 1949 to September 30, 1950 a mistake in fact was committed. able. It is- true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by s. 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under s. 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on the merits The High Court observed that under s. 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is, discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, the view is in our judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are 'shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right -public or private-of a citizen. In Julius v. Bishop of Oxford(') it was observed by Cairns, L.C., at pp. 222-223 that the words "it shall be lawful"

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(1) (1880) 5 A.C. 214.

ferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be some- thing in the nature of the thing empowered to be done, some- thing in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is -reposed to exercise that power when called upon to do so." Lord Blackburn observed in the same case at pp. 244-245 that the enabling words give ,a power which prima facie might be exercised or not, but if the .object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Lord Penzance and Lord Selbone made similar observations at pp. 229 and 235. Exercise of power to rectify an error apparent from the re- cord is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an officer concerned with

assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him to ensure that injustice to the assessee or to the Revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that exercise of the power was discretionary and the Income-tax from the record is brought to his notice by a person concerned with or interested in the proceeding.

The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income- tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power. For the assessment year 1952-53 the assessee is also en- titled to relief claimed by him.

The appeals must therefore be allowed and the order passed by the High Court set aside. Writs will issue directing that the assessment of Hirday Narain for the years 1951-52 and 1952-53 be rectified by deleting the income of his minor sons included under s. 16(3(a)(ii) of the, Income-tax Act, 1922 from assessment. The appellant will be entitled to his costs in this Court and in the High Court. One hearing fee.

R.K.P.S. Appeals allowed.
13 Sup. CI/70-15