Jaipur Mineral Development Syndicate, ... vs The Commissioner Of Income Tax, New ... on 16 December, 1976

Equivalent citations: AIR1977SC1348, [1977]106ITR653(SC), (1977)1SCC508, [1977]2SCR460, AIR 1977 SUPREME COURT 1348, 1977 (1) SCC 508, 1977 TAX. L. R. 685, 1977 2 SCR 460, (1977) 106 ITR 653, 1977 SCC (TAX) 208, 106 ITR 653, (1977) 48 TAXATION 129, 1977 U P T C 491, 48 TAXATION 129

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Bench: H.R. Khanna, V.R. Krishna Iyer

JUDGMENT

H.R. Khanna, J.

1. This appeal by special leave is against the order of Rajasthan High Court whereby the High Court held that it was functus officio to entertain an application for re-hearing the reference made under Section 66(1) of the Indian I.-T. Act, 1922 (hereinafter referred to as the Act).

2. The assessee-appellant is carrying on business in soap stones. At the instance of the appellant, the following two questions were referred to the High Court by the Tribunal under Section 66(1) of the Act:

> 1. Whether on the facts and in the circumstances of the case the I-T. Appellate Tribunal was justified in holding that the property in the goods passed in the customers in erstwhile part 'A' and 'C' States, because the railway receipts in respect of the sale of goods of the vale (sic) of Rs. 94,037/- were made out in the name of 'Self and were sent to the purchasers in erstwhile part 'A' arid 'C States, after endorsing the same in their favour?
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> 2. Whether on the facts and in the circumstances of the case, the entire profits and gains amounting to Rs. 93,019/- arisen to the assessee firm in part 'A' and part 'C' States should be taken into account for the purpose of applying the test laid down under Section 4A(C)(h) (sic) or only that profit of the profits (sic) which can be determined after the application of Section 42(3) of the Act as reasonably be attributable to that part of the operations carried on in British India?

It appears that a notice was sent by the High Court to the appellant to file paper books within three months of the receipt of the notice. The notice was received by a clerk of the appellant firm on May

9, 1970. According to the affidavit filed on behalf of the appellant, the aforesaid clerk misplaced that notice. The necessary paper books were consequently not filed in the High Court. The reference came up for hearing on August 26, 1970. On that date, counsel for the department was present. No one appeared on behalf of the appellant, apparently because the notice sent by the High Court had been misplaced. The High Court in a brief order observed that the assessee at whose instance the reference had been made had not put in appearance and had also hot filed the paper books in spite of the service of notice. The High Court accordingly declined to answer the reference.

3. The affidavit filed on behalf of the appellant shows that the clerk, who had misplaced the notice received from the High Court, while proceeding on leave and handing over the charge to another clerk, discovered on September 21, 1970 that the above mentioned notice had been received from the High Court. Counsel was then engaged on behalf of the assessee-appellant. On enquiry it was found that the matter had been disposed of on August 26, 1970. On September 24, 1970 an application was filed on behalf of the appellant stating that the paper books had not been filed because of bona fide mistake. Prayer was made for permitting the appellant to file the paper books and for re-hearing the reference. The High Court, as per order dated february 22, 1971, dismissed the aforesaid application after observing that it had become functus officio to entertain the application because of its earlier order declining to answer the reference. It is this order which is the subject-matter of the appeal.

4. We have heard Mr. Desai on behalf of the appellant and Mr. Manchanda on behalf of the revenue. Mr. Manchanda has brought to our notice a derision of the Calcutta High Court in M.M. Ispahani Ltd., Calcutta v. Commr. of Excess Profits Tax, West Bengal wherein the High Court held that when a party at whose instance the reference had been made under Section 66(1) of the Indian Income-tax Act, 1922 does not appear aft the hearing of the reference the High Court is not bound to answer the question referred to it and should not do so. It is urged by Mr. Manchanda that the above decision has been followed by some of the other High Courts. As against that, Mr. Desai on behalf of the appellant has urged that the correctness of those decisions is open to question in view at the decisions of this Court in the case of Commr. of L-T., Madras v. S. Chenniappa Mudaliar . It was held by this Court in that case that an appeal filed by the assessee before the Tribunal under Section 33 of the Act should be disposed of on merits and should not be dismissed in default because of non-appearance of the appellant. The Court in this context referred to Section 33(4) of the Act and particularly the word "therein" used in that sub-section It is urged by Mr. Desai that as the Tribunal is bound to dispose of the appeal on merits even though a party is not present, likewise the High Court when a question of law is referred to it, should dispose of the reference on merits and answer the question referred to it. In our opinion, it is not essential to express an opinion about this aspect of the matter, because we are of the opinion That the High Court was not functus officio in entertaining the application which had been Sled on behalf of the appellant for re-hearing the reference and disposing of the matter on merits.

5. A party or its counsel may be prevented from appearing at the hearing of a reference for a variety of reasons. In case such a party shows, subsequent to the order made by the High Court, declining to answer the reference, that there was sufficient reason for its non-appearance, the High Court, in our opinion, has the inherent power to recall its earlier order and dispose of the reference on merits. We

find it difficult to subscribe to the view that whatever might be the ground for non-appearance of a party, the High Court having once passed an order declining to answer the question referred to it because of the non-appearance of that party, is functus officio or helpless and cannot pass an order for disposing of the reference on merits. The High Court in suitable cases has, as already mentioned, inherent power to recall the order made in the absence of the party and to dispose of the reference on merits. There is nothing in any of the provisions of the Act which, either expressly or by necessary implication, stands in the way of the High Court from passing an order for disposal of the reference on merits. The courts have power, in the absence of any express or implied prohibition, to pass an order as may be necessary for the ends of justice or to prevent the abuse of the process of the court. To hold otherwise would result in quite a number of cases in gross miscarriage of justice. Suppose, for instance, a party proceeds towards the High Court to be present at the time the reference is to be taken up for hearing and on the way meets with an accident. Suppose, further, in such an event the High Court passes an order declining to answer the question referred to it because of the absence of the person who meets with an accident. To hold that in such a case the High Court cannot recall the said order and pass an order for the disposal of the reference on merits, even though full facts are brought to the notice of the High Court, would result in obvious miscarriage of justice. It is to meet such situations that courts can exercise in appropriate cases inherent power. In exercising inherent power, the courts cannot, override the express provisions of law. Where however, as in the present case. there is no express or implied prohibition to recalling an earlier order made because of the absence of the party and to directing the disposal of the reference on merits, the courts, in our opinion, should not be loath to exercise such power provided the party concerned approaches the court with due diligence and shows sufficient cause for its non-appearance on the date of hearing.

6. Our attention has been invited to the decision of the Allahabad High Court in Roop Narain Ramchandra (P) Ltd. v. Commr. of I.-T., U.P. (All) wherein the High Court held that it has no power to recall an order returning a reference unanswered. For the reasons stated above, we are unable to agree with the view taken by the Allahabad High Court in that decision. The facts brought out in the application filed on behalf of the appellant show, in our opinion, that there was sufficient cause for the non-appearance on behalf of the appellant on the date of hearing as well as for the nonfiling of the paper books within time. It also cannot be said that there was lack of diligence on the part of the appellant in approaching the High Court for recalling its earlier order and for disposing of the reference on merits. We accordingly accept the appeal, set aside the order of the High Court and remand the case to it for answering the questions referred to it on merits. Looking to all the circumstances, we make no order as to costs.