Supreme Court of India
Second Additional Income-Tax ... vs Atmala Nagaraj And Ors. on 24 April, 1962
Equivalent citations: 1962 46 ITR 609 SC
Author: Hidayatullah
Bench: J Shah, M Hidayatullah, S Dass
JUDGMENT Hidayatullah, J.

1. These are two appeals on certificates under article 133(1)(c) of the Constitution, by the Second Additional Income-tax Officer, Guntur, against the common decision of the high Court of Andhra Pradesh in two appeals under the Letters Patent, confirming two decisions of a learned single judge of the High Court by which the Income-tax Officer was ordered by a writ of mandamus not to give effect to the revised assessments made under section 35 of the Income- tax Act against the respondents. The respondents did not appear at the hearing in the court.

2. The proceedings in the two cases related to the assessment of the respondents for the assessment year 1950-51. The respondent in Civil Appeal No. 410 of 1961 was assessed as an individual and the respondent in Civil Appeal No. 411 of 1961, as a Hindu undivided family. In both cases, the original assessment was completed on January 22, 1952. The two assessees held shares in two registered firms and the shares of profits from these firms were taken to be certain amounts and were included in the total assessable incomes of the two respondents. The assessments of the two firms were not completed by that date. In the assessment orders that were passed, a note was added that action under section 35 of the Income-tax Act would be taken when the correct share income would be known.

3. The assessments of two firms were completed by an order dated October 16, 1954, and then it was known that the aggregate shares of income from the two firms in the case of each of the respondents were more. After notice under section 35 of the Income-tax Act, the revised assessment orders were made under section 35 and an additional demand was made. A penalty of Rs. 300 was also imposed under section 46(1) of the Income-tax Act on the respondent in Civil Appeal No. 411 of 1961.

4. The respondents moved the High Court of Andhra Pradesh under article 226 of the Constitution. Before the High Court, the department justified the revised assessment under sub-section (5) of section 35 of the Income-tax Act. That sub-section was added by section 19 of the Indian Income-tax (Amendment) Act, 1953 (25 of 1953), but was to be in force from April 1, 1952. The resulting position thus was that the original assessment was before the operation of sub-section (5), but the assessment of the firms and the revised assessments were after that date. The learned single judge made an error in thinking that the assessments of the firms were made before April 1, 1952. Perhaps, he meant the original assessments of the respondents in the following sentence :

"The assessments on the firm were admittedly made before April 1, 1952, and they were sought to be reopened under section 35(5) of the Act and this it has been held by the bench in Lakshminarayana Chetty v. Income-tax Officer, Nellore is without jurisdiction."

5. The error, therefore, was easily explainable and the meaning quite clear, though learned counsel for the appellant before us relied on such an obviously explainable error. The decision of the learned single judge that to an assessment completed before April 1, 1952, the provisions of section 35(5) could not be made applicable was upheld by the divisional bench. The divisional bench stated the real point raised as follows :

"The Income-tax Officer reopened the assessments made on the partners and, therefore, the only question that arises is whether those assessments made before April 1, 1952, can be reopened under section 35(5) of the Act."

6. The learned judges did not permit the department to contend for the first time before them that inasmuch as the assessments of the firm were made subsequent to April 1, 1952, section 35(5) would apply.

7. The question how far section 35(5) is retrospective and whether it would apply to original assessments completed before April 1, 1952, is no longer res integra. In S.K. Habibullah's case, it was pointed out by us that section 35(1) empowered the income-tax authorities to rectify mistakes apparent from the record of assessees within four years from the date of the assessment order sought to be rectified, but a mistake not apparent from such record could not be said to be made apparent from another record, which the record of the firm would be. The decision of Subba Rao C.J. (as he then was) in Kanumarlapudi Lakshminarayana Chetty v. First Additional Income-tax Officer, Nellore was approved, where the learned Chief Justice observed that such a mistake was "not a mistake apparent from the record but a mistake discovered from the disposal of another case". Speaking then of sub- section (5), this court observed that the fiction enacted in that sub-section was not out of abundant caution but to provide for a lacuna. The sub-section thus enacted that a certain mistake not apparent from the record of an asses see was to be deemed to be so apparent, providing at the same time a different period of limitation; but the power could not be exercised in those cases where the assessment of a firm was completed before April I, 1952, even though the rectification of the assessment 0 a partner was made after that date.

8. The learned counsel for the department contends that the assessment of the partners was made on January 22, 1952, and could be rectified under sub-section (1) within four years, and it was so done in this case after sub-section (5) came into force. Unfortunately, the case has never been stated under sub-section (1) at any time in the High Court, and this new point cannot be permitted to be taken for the first time here. The case was rested on the application of sub-section (5) in the High Court. In S.K. Habibullah's case, the assessment of the partners as well as of the firms were completed before April 1, 1952, and the amended provision was not held applicable. Here, the original assessment was made before the amendment, and to that assessment the amended provision cannot still be made applicable for the reasons to be given by us, even though the assessment of the firms were after April 1, 1952. The assessment of the respondents was a final assessment before April 1, 1952, and sub-section (5) has not been made applicable to such assessment, either expressly or by implication. It has been given a limited retrospectively from April i, 1952, and it was held by this court in the cited case that it I Was not open to courts to give more retrospectively to it Resort in this case could only be taken to the: law as it stood: before the

introduction of sub section (5), and as determined already by this court; the record of the firm's assessment could not then be called in aid to demonstrate an errors on the record of a partners assessment. It was further. Held in S..K. Habibullah's case that the provision enacted by sub-section (5) is not procedural in character and that it affects vested rights of an assessee. In our opinion, sub-section (5) could not be used in this case, and the decision the High Court was right.

9. It was contended lastly that the assessment of the partners was provisional, and reference was made to the note that action under section 35 would be taken when the assessments of the firms were completed. The assessment was final, notwithstanding the remark in the order of assessment. It was not a provisional assessment under section 23B of the Act, and was not stated to be so. Being a final assessment, it could be rectified only under the law, as it stood then. That law did not include the fiction enacted by sub-section (5), which, when enacted, could not be used in those cases which has been finally closed before April 1, 1952. The only other remedy was rectification under sub-section (1), which was inapplicable, as there was not error apparent from the record of the partners' assessments. Further, sub- section (1) was not relied upon the High Court, and cannot be allowed to be invoked in this court.

10. The appeals thus fail and are dismissed.

11. Appeals dismissed.