

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRESENT:

The Hon'ble Justice Soumitra Pal.
The Hon'ble Justice Dr. Sambuddha Chakrabarti.

G.A No. 3149 of 2006
ITA No. 81 of 2005

Mohinder Singh Arora
Versus
The Commissioner of Income Tax, West Bengal.

For the Applicant	: Mr. Ranjit Kumar Murarka, Senior Advocate, Ms. Sutapa Roychoudhury, Advocate.
For the Respondent	: Md. Nizamuddin, Advocate.
Heard on	: 10.01.2014, 07.02.2014 and 04.08.2016
Judgment on	: 23 rd August, 2016

Dr. Sambuddha Chakrabarti, J.:-

The petitioner herein seeks review of the judgments and orders, dated November 8, 2005 and November 14, 2005 respectively passed by a Division Bench of this Court in ITA No.81 of 2004.

The circumstances leading to the filing of the appeal may be summed up briefly to appreciate the scope of the review. Certain watch movements were found in the possession of the assessee by the Customs Department which were

held to be of foreign origin. They were confiscated by the Customs authority. The assessee in turn claimed the same to be business loss in the return of income for the year 1989-90. The tax authority as well as the Commissioner of appeal assessed the same as an income from undisclosed source and added to the income of the assessee as income from business. The Income Tax Appellate Tribunal affirmed the order against which the assessee had filed an appeal under Section 260A of the Income Tax Act to this Court.

Before this Court the primary question that came up for consideration was whether the confiscation of goods from the appellant amounted to a loss in business carried on by the appellant and was allowable under the Income Tax Act. The Division Bench after considering the submissions of both the parties and after considering the various judgments had observed that confiscation is a liability personal to the smuggler. There was nothing to indicate that smuggling was a part of the business activity of the assessee and he also did not admit that it was so. Ultimately the Court held that the confiscation of this smuggled goods could not be treated to be a business expenditure or a business loss for the purpose of deduction of the said amount in course of compensation of the profits and gains from the business of the assessee. Accordingly the appeal was dismissed.

The Customs authorities also initiated a criminal case against the assessee under Section 135(1)(b)(i) of the Customs Act 1962 on the self-same allegation of seizure of a large number of wrist watch movements of foreign origin from the chamber of false ceiling and boxes on demand. The assessee failed to prove any

document in support of his legal possession of those watch movements. The raid was also conducted in the house of the accused wherefrom also a large number of watch moments were recovered.

In the trial had followed the learned Metropolitan Magistrate 7th Court Calcutta by a judgment and order dated January 8, 2002 held the accused to be not guilty and acquitted him to charges.

The Customs filed an appeal from the same before this Court and the learned Single Judge of this Court had dismissed the same.

The dismissal of the appeal is the occasion for filing the present review application. According to the petitioner/assessee this is a subsequent event which has a bearing on the right of the petitioner to the reliefs prayed for in the appeal filed him under Section 260A of the Income Tax Act. The case of the petitioner is that since it has been held in the criminal case that it could not be proved beyond reasonable doubt that the watch movements were of foreign origin and there was no satisfactory explanation whether the seized cash was the sale proceed of the smuggled goods, it could not be proved beyond all reasonable doubt that the watch movement fell within the purview of prohibitory orders.

Based on that the petitioner claims that he is entitled to have the reliefs as prayed by him before the Income Tax authorities, namely, allowance of loss caused by the seizure in view of the finding of facts relating to the fundamental basis of the decision of the Income Tax authorities as well as the Tribunal and this Court. According to him the very basis and reasoning cannot be sustained and, therefore, the judgment passed by this Court in the Income Tax appeal

requires a review. The primary foundation in seeking a review is the judgment in the criminal courts which had held the watch movements not to be of foreign origin which facts was not known to the petitioner earlier at the time of the hearing of the appeal. According to the petitioner this has entirely changed the basis of disallowing the business loss and the applicability of Section 37 of the Income Tax Act.

The other ground on which the petitioner has sought for a review is that the judgment and order of the Division Bench has not answered the second question formulated by the Bench. And, therefore, the appeal has remained undecided on a substantial question of law.

We have heard Mr. Murarka, learned Senior Advocate for the petitioner and Mr. Nizamuddin, learned Advocate for the Income Tax Department extensively and perused the relevant documents.

The second ground of review as mentioned above is taken first. The second ground formulated by the Division Bench related to the justification of the Appellate Tribunal in applying the explanation to Section 37 of the Act to the facts of the case. Even if the question had not been separately dealt with it cannot be said that the Division Bench was oblivious of the points so formulated by it. Section 37 of the Income Tax Act has been discussed in the body of the judgment in several paragraphs and Division Bench relied on the judgment reported in *Bimal Kumar Dimani versus Commissioner of Income Tax*, reported in 261 ITR 365. The said judgment has been extensively quoted by the Division

Bench where also Section 37 has been discussed. As such this ground cannot be allowed to be agitated by the petitioner as a ground of review.

However, Mr. Murarka has laid more stress on the judgment of the criminal court holding that the prosecution had failed to establish that the watch movements were of foreign origin. According to Murarka the finding has altered the entire basis of the reasoning of the High Court rendering it liable to be reviewed in view of subsequent finding by the criminal court.

We have given our anxious consideration to the contention of the petitioner and do not find that the finding of the criminal court can be applied to the facts of this court *de hors* the contextual aspects. Before the criminal court the prosecution was required to prove the case to its hilt which they failed. This Court while dismissing the appeal by the prosecution had had occasion to record that the case could not be proved probably due to the negligence of the officials of the Customs Department. That apart the proceeding under the Income Tax Act is very different from the prosecution in the criminal case. Before the Income Tax authority the main issue was whether return made by the assessee reflected the true state of income and he had any undisclosed source of income. Thus, the assessment to tax of the assessee was the issue before the tax authorities and that connected question of undisclosed income and business loss etc. came up for consideration. Since before the assessing official the assessee could not explain the source of acquisition of the watch movements the assessing official treated the income of the assessee under Section 69A of the Income Tax Act. On the contrary in the criminal case before the learned Metropolitan Magistrate the

issues that cropped up for consideration were basically three in number viz. 1) Whether the material exhibits nos. I to XII, i.e the wrist watch movements were really seized of possession of the accused. 2) Whether those seized wrist watch movements were of foreign make and 3) Whether the seized cash from the shop of the accused and the bank locker represented the sale proceeds of the smuggled goods as alleged.

In one case the failure of the assessee to explain acquisition of watch movements led to the assessment by the Income Tax Department and in another case the failure on the part of the prosecution to establish certain facts led to the acquittal of the petitioner. The respondents were different and the subject matter of enquires in two different proceedings were miles apart. The finding of the criminal court cannot be imported into the decision of the tax matter and to review the entire thing on the basis of the decision given by criminal court.

The law on the point is well settled that a decision of a criminal court cannot be relied on as binding in a civil action. The judgment in the criminal court would not be relevant for disposal of an appeal under Section 260A of the Income Tax Act. It can be used only to establish the fact that an acquittal has taken place as a fact in issue in the subsequent civil proceeding. In a civil proceeding the grounds on which the acquittal was based cannot be taken into consideration. The standard of proof for imposing liability is widely different between the two proceedings. In *Vishnu Dutta Sharma versus Daya Sapre*, reported in (2009) 13 SCC 729 the Supreme Court had held that a finding in a criminal proceeding by no stretch of imagination would be binding in a civil

proceeding. A decision of the criminal court does not affect the binding nature of the civil proceedings since the proof required in two cases are different. It has been decided in the case of *Anil versus Latika*, reported in AIR. 1955 SC. 566, that the judgment of the criminal court is relevant only to show that there was a trial resulting in the conviction and sentence of the son. The judgment of the criminal court convicting the son of the crime of murdering the testator is no proof of the fact in a proceeding to revoke the probate.

And it is well settled that the appeal under Section 260A of the Income Tax Act is a civil proceeding as the proceeding before appellate Tribunal from whose order the appeal has been filed is of a civil nature under Section 255(6) of the said Act. That apart, the petitioner's application for review is also in terms of the Civil Procedure Code.

Apart from that to allow the petitioner to take advantage of the finding of the criminal courts in the tax matter would be giving him an undue premium resulting from shifting of his stand. In the income tax matter he had proceeded on the basis of that the watch movements found from him had been smuggled. The Division Bench itself had held that the appellant had been trying to change his stand. The assessee had denied initially that these goods belonged to him having himself admitted that it was not an income out of his business but from an undisclosed source. The Court had held that confiscation of these smuggled goods which was only a solitary adventure had not been a part of the series of the activities undertaken by the assessee and such solitary adventure not having been claimed to be a business adventure of the assessee, it cannot be treated a

business loss or a business expenditure and on that basis the Court held that the smuggled goods cannot be treated be a business expenditure based on the stand taken by the petitioner and his failure to furnish names and address of the persons who were alleged to have kept the said movements. Now that the judgment in the criminal court had been delivered the petitioner cannot come forward and seek a review on the ground of the finding on a learned Single Judge in criminal appeal.

Mr. Murarka has relied on the judgment of *Pasupuleti Venkateswarlu versus The Motor & General Traders reported in (1975) 1 SCC 770* for a proposition that at the stage of revision High Court can take cognizance on subsequent events. That the High Court has the power to take cognizance of subsequent events cannot be any longer doubted. However, the question is whether the petitioner is entitled to the same on the basis of the facts such as these.

Mr. Murarka had also relied on the judgment in the case of *OM Prakash Gupta versus Ranbir B. Goyal reported in (2002) 2 SCC 256* for a proposition that the Court has power to take note of and mould relief as appropriate if three conditions are satisfied.

The petitioner has also relied on the judgment in the case of *Ram Gopal Garodia versus Income Tax Officer and others reported in 1976 Tax. L.R. 884* where a learned Single Judge of this Court had held that subsequent facts cannot and should not be permitted to defeat or affect the assessment if properly made at the time of assessment. But the proposition is different in the case not of

subsequent facts but subsequently discovered or awareness of preexisting facts. If it is subsequently discovered that at the relevant material time the authorities concerned had no jurisdiction to pass the impugned order in appropriate cases the High Court retains the discretion to interfere with such order. The subject matter of the decision was an assessment order directing a sum of Rs.1,50,000/- to be added as undisclosed income. During the course of assessment it was found that fixed deposit was opened on September 12, 1963 in the name of the wife of the assessee and an amount of Rs.1,50,000/- was deposited into the said account. On that date the Income Tax officer had taken evidence and concluded that the said sum of rupees was undisclosed income of the assessee. The appeal was rejected upto the stage of the Tribunal on consideration of that evidence. Subsequently the assessee came to know that the deposit in question by the wife of the petitioner was not made on September 12, 1963, but on September 12, 1962. On this evidence the assessee moved the Tribunal for rectification of the order on the ground of mistake apparent from the record. Needless to mention, the judgment in this case has no application to the facts of the present one. In the reported judgment the date of opening the bank was very vital for deciding the validity of addition of a sum of rupees as undisclosed income. Since the assessee subsequently came to learn that the deposit in question by his wife was made a year ago, the assessment become relevant as on the basis of the same the assessing officer had passed the impugned assessment order.

On the contrary, in the present case the petitioner wants to take advantage of a finding of fact that the prosecution had failed to prove watch movements as of foreign origin.

Mr. Murarka tried to justify the review on the ground that if the watch movements are not of foreign origin the entire basis of the tax would be changed. His justification for the stand before the taxing authority as well as before the High Court is that the petitioner had no alternative but to take plea of business loss in respect of the goods confiscated from his custody. This is hardly any answer as on that basis the High Court had delivered the judgment. Otherwise, there would not have been any occasion for the assessee to deny that smuggling was not part of his business. Therefore, the Court entered into the discussion that the confiscation of the smuggled goods which was only a solitary adventure was not part of the series of the activities undertaken by the assessee and this not having been claimed to be a business adventure by the assessee could not be treated as business loss or business expenditure.

For the reasons aforesaid we find no merit in the present review and the same is dismissed.

No order as to costs.

(Dr. Sambuddha Chakrabarti, J)

I agree.

(Soumitra Pal, J.)

Later:-

After delivery of judgment Mr. Murarka, the learned senior advocate for the petitioner prays for stay of the operation of the order. Since the review petition has been dismissed by this Court, there is no question of granting any stay, the prayer is heard, considered and refused.

(Dr. Sambuddha Chakrabarti, J)

I agree.

(Soumitra Pal, J.)