

SHRI KANHAIYALAL LOHIA

1961

v.

July, 17.

THE COMMISSIONER OF INCOME-TAX,
WEST BENGAL

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

*Income-Tax – Appeal from High Court's order—Procedure—
Appeal from order of the Tribunal by-passing High Court's order—
Appeal if competent—Income-tax Act, 1922(11 of 1922),
ss. 66(1), 66(2) and 66(a).*

The appellant supported his brother and his nephew for a number of years as they were doing no work. In the year 1943 he made a gift of Rs. 7,60,000 odd to them though he had to overdraw his account with the Bank and to pay interest or the amount borrowed to raise the money. He also made a transfer of some of his businesses to them. His explanation was that these gifts were made to set these two persons up in business. The Income-tax Officer held that the gifts were not bonafide and he assessed the income of all the businesses in the hands of the appellant. The appellant had produced letters from some businessmen in support of his case. One such person was one M. who was examined by the Income-tax Officer without notice to the appellant. Later, however, a copy of the statement of M. was taken by the appellant's counsel and at his request M. was summoned for cross-examination but on the date fixed none appeared for the appellant who was also absent.

The appellant made a petition under s. 66(1) of the Income-tax Act to the Tribunal asking that a number of questions of law be referred to the High Court. Only one question was referred by the Tribunal which declined to refer the other questions. In the High Court the question referred by the Tribunal was answered against the appellant on the admission of his counsel. The High Court was moved also under s. 66(2) to order a reference of the remaining questions but the High Court rejected the application. The appellant did not appeal against these two orders of the High Court and instead filed appeals against the orders of the Tribunal. The appellant relied upon two cases of this Court viz. *Dhakeshwari Cotton Mills' Case* and *Baldev Singh's case* and contended that the appeal to this court was competent.

Held, that the appeals were incompetent in view of the decisions of this Court in *Chandi Prasad Chokhani v. State of Bihar* and *The Indian Aluminium Co., Ltd.*

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Held, further, that an appeal against an order of the High Court deciding a question referred or against a refusal to call for a statement can only be brought before the Supreme Court under s. 66(A) of the Income-tax Act, if the High Court decides the question referred, and under Art. 136 of the Constitution if the High Court refuses to call for a statement. There can be no direct appeal to the Supreme Court by passing the decisions of the High Court.

Held, also, that there was neither any breach of the principles of natural justice in this case nor the existence of circumstances as existed in *Baldev Singh's case* to justify the appeal.

Held, that where a witness has been examined by the Income-tax Officer behind the back of the assessee but a copy of the statement of the witness is made available, to the assessee and an opportunity is given to him to cross-examine the witness, there is no breach of the principle of natural justice.

Chundi Prasad Chokhani v. State of Bihar. (1962) 2 S.C.R. 276 and *Indian Aluminium Co., Ltd., v. Commissioner of Income-tax*. (Civil Appeal No. 176 of 1959, decided on April 24, 1961) followed.

Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income-tax (1955) 1 S.C.R. 941 and *Sardar Baldev Singh v. Commissioner of Income-tax, Delhi and Ajmer*. (1961) 1 S.C.R. 482, explained.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 347 to 350 of 1960.

Appeals by special leave from the judgment and order dated January 18, 1953, of the Income-tax Appellate Tribunal, Calcutta Bench, in Income-tax Appeals Nos. 7062-7064 and C.P.T.A. No. 548 of 1951-52.

N. C. Chatterjee, A. F. Viswanatha Sastri and D.N. Mukherjee, for the appellants.

K. N. Rajagopal Sastri and D. Gupta, for respondent.

1961. July 17. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—These appeals with special leave were filed by one Kanhaiyalal Lohia, who died during the pendency of the appeals, and who

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is now represented by the executors appointed under his will. By these appeals, which are consolidated, the appellants question an order dated January 8, 1953, of the Income-tax Appellate Tribunal (Calcutta Bench) in appeals filed by the Department against the order of the Appellate Assistant Commissioner. The Tribunal reversed the order of the Appellate Assistant Commissioner and restored that of the Income-tax Officer. Kanhaiyalal Lohia made petitions under s. 66 (1) to the Tribunal, setting out a number of questions of which the following was referred to the High Court :

“Whether in the circumstances of this case where the Income-tax Officer, District III (2), separately assessed the business run in the name of Brijlal Nandkishore as belonging to a partnership firm consisting of Brijlal and Nandkishore, the Income-tax Officer, Non-Companies E. P. T., District can assess the income from the same business in the hands of the assessee ?”

This question was answered against him. Kanhaiyalal Lohia also applied under s. 66 (2) to the High Court of Calcutta for reference of the other questions, but failed. No appeal has been filed by him against the order of the High Court refusing to direct the Tribunal to state a case or against the decision on the question referred, and the present appeals have been filed against the decision of the Tribunal.

At the hearing of these appeals, we asked counsel for the appellants how, in view of the recent decisions of this Court in *Chandi Prasad Chokhani v. State of Bihar* (1) and *Indian Aluminium Co. Ltd. v. Commissioner of Income-tax* (2), these appeals were maintainable, if the two decisions of the High Court had become final. Mr. A. V. Viswanatha Sastri relied upon the decisions in

(1) (1962) 2 S.C.R. 276.

(2) Civil Appeal No. 176 of 1959 decided on April 24, 1961.

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Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax, West Bengal (1) and *Sardar Baldev Singh v. Commissioner of Income-tax Delhi and Ajmer* (2), and pointed out that in those cases, appeals were entertained from the Tribunal's order, though he conceded with his usual frankness that special circumstances must exist. He contended that this was a case in which such circumstances existed. We shall deal with the appeals from that point of view, because unless special circumstances exist, the appeals must be regarded as not competent, in view of our recent rulings above mentioned.

Kanhaiyalal Lohia, who was a prosperous dealer in jute, had his head office in Calcutta. He had no issue, and his family consisted of his wife, his brother, Brijlal Lohia and Brijlal's son, Nandkishore Lohia. The properties of Kanhaiyalal Lohia were self-acquired, and he was always assessed as an individual. He maintained accounts according to the *Ramnavami* year. In his return for the account year, April 14, 1943 to April 1, 1944 (corresponding to the assesment year, 1944-45), he indicated that he had closed down in the middle of 1943 his purchasing centres in East Bengal, which stood in the name of Nandkishore, and that, he had gifted to his brother Rs. 5,11,101 on July 12, 1943, and to his nephew, Rs. 2,50,000 on September 30, 1943. He showed income of his East Bengal business only up to the closure of that business.

Brijlal and Nandkishore entered into partnership between themselves, and started a business under the name and style of "Brijlal Nandkishore." They took over the purchasing centres in East Bengal. They opened accounts in banks in the name of "Brijlal Nandkishore", and became members of the Baled Jute Association, and the Jute Balers Association, and traded in their own names. A deed of partnership between them was also executed on August 5, 1953. The business of Kanhaiyalal Lohia and of "Brijlal Nandkishore"

(1) (1955) 1 S.C.R. 941.

(2) (1961) 1 S.C.R. 482.

was within the jurisdiction of the same Income-tax Officer. In the assessment of the partnership firm, notices were issued to the partnership both under s. 22(2) and s. 34, and the partnership also applied for registration under s. 26A of the Income-tax Act, which was granted. The partnership was also assessed for the years, 1945-46 and 1946-47. The assessment of Kanhaiyalal Lohia was completed by the Income-tax Officer, Non-Companies Income-Tax *cum* Excess Profits Tax District, and during the assessment for the year, 1945-46 a notice was issued under s. 22(4) of the Income-Tax Act on August 24, 1949, calling for accounts of the head office at Calcutta and also the branches including the business being carried on as "Brijlal Nandkishore", Kanhaiyalal Lohia proved the above facts, producing the books of account, bank statements, registration certificate of "Brijlal Nandkishore" and evidence showing the membership of "Brijlal Nandkishore" of the two Associations. He also produced letters from four persons including one Sri A.L. Mazumdar who was questioned by the Income-tax Officer without notice to Kanhaiyalal Lohia and whose statement was also recorded. Kanhaiyalal Lohia objected to this procedure, but the Income-tax Officer, it is alleged, paid no heed to his protests, and on March 31, 1950 the assessment was completed, and the income of the branches under the direct control of "Brijlal Nandkishore" was pooled with the income of Kanhaiyalal Lohia. The Income-tax Officer held that the gifts were not *bona fide*, and were colourable transactions. He relied upon the statement of Sri A. L. Mazumdar, which was recorded when Kanhaiyalal Lohia was not present.

Against the assessment, Kanhaiyalal Lohia, appealed to the Appellate Assistant Commissioner before whom two more letters from leading businessmen were filed. The Appellate Assistant Commissioner accepted the letters which were filed, and held that the gifts were proved and were *bona fide* and directed the exclusion

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of the income of "Brijlal Nand kishore" from the assessment of Kanhaiyalal Lohia. The order of the Appellate Assistant Commissioner was pronounced on December 27, 1951. The Department appealed to the Appellate Income-tax Tribunal, Calcutta Bench. The Tribunal disagreed with the Appellate Assistant Commissioner, and held on January 8, 1953, that the gifts were not proved by the assessee by unimpeachable evidence, and that the income of "Brijlal Nandkishore" was rightly included in the assessment. As stated already, applications under s. 66 (1) and s. 66 (2) were made to the Tribunal and the High Court respectively. The Tribunal referred one question, but declined to refer the other questions. The High Court was then moved under s. 66 (2) but without success. The High Court agreed with the Tribunal and answered the question which was referred, against Kanhaiyalal Lohia. Before the High Court, Kanhaiyalal's counsel, Dr. Pal, admitted that he could not persuade the Court to answer the referred question against the Department, and it appears that it was conceded by the Department before the High Court that the assessment of "Brijlal Nandkishore" would be cancelled. Kanhaiyalal Lohia then filed the present appeals against the order of the Tribunal dated January 8, 1953.

This Court has pointed out in *Chandi Prasad Chokhani v. State of Bihar*⁽¹⁾ and *Indian Aluminium Co., Ltd. v. Commissioner of Income-tax*⁽²⁾ that the two cases in which this Court interfered with appellate orders of a Tribunal and relied upon before us, were of a special kind. In *Dhakheshwari Cotton Mills case*⁽³⁾ there was a breach of the principle of natural justice, and that was held sufficient to entitle an aggrieved party to come to this Court against the appellate order of the Tribunal under Art. 136. In

(1) (1962) 2 S.C.R. 276.

(2) Civil Appeal No. 176 of 1959 decided on April 24, 1961.

(3) (1955) 1 S.C.R. 941.

Baldev Singh's case (1) this Court entertained an appeal against the appellate order of the Tribunal, because limitation to take other remedies was barred without any fault of the assessee concerned. The ratio in each of these cases is that a circumstance which cannot be corrected by the procedure of a stated question of law on a statement of the case may afford a ground for invoking the jurisdiction of Court under Art. 136. That ratio does not apply, where a question of law can be raised, and is capable of being answered by the High Court or on appeal, by this Court. An appeal against an order of the High Court deciding a question referred or against a refusal to call for a statement can be brought before this Court under s. 66A, if the High Court decides the question referred and under Art. 136, if the High Court refuses to call for a statement.

In the present case, the order of the High Court on the question referred was not brought before this Court by the ordinary mode indicated in the Indian Income-tax Act, presumably because of the concession of counsel that he could not claim that the question be answered in favour of the assessee and the attitude of the Department that the assessment of "Brijlal Nandkishore" would be cancelled. The order refusing to call for a statement on questions other than the one referred is also not questioned before us. The attempt is to bring this case within the ratio of *Dhakeshwari Cotton Mills'* case (2), and in support, it has been pointed out mainly that the examination of Sri A. L. Mazumdar in the absence of Kanhaiyalal Lohia was against the principles of natural justice. The statement of Sri A. L. Mazumdar was taken on March 28, 1950, and it is recorded as follows :

"Mr. Mazumdar is questioned by me as to what he knows regarding the alleged gift as recorded in the books of Kanhaiyalal Lohia in favour of Brijlal and Nand Kishore. He says

(1) (1961) 1 S.C.R. 482.

(2) (1955) 1 S.C.R. 941.

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that I don't remember things very distinctly but I can say that the gifts to Brij Lal or Nand Kishore were not made in my presence as alleged. Mr. Kanhaiyalal Lohia used to tell me that his brother and nephew are idling away their time hence I shall give them a gift and make them work by that money.

The partnership deed was most probably drawn up by me. The gift was reported to have been made to Brij Lal and Nand Kishore before I should have taken up the drafting of the deed. Kanhaiyalal told me several times that he wanted to separate his brother and nephew. When the firm was started then Brijlal came to me and asked me if father and son's partnership deed could be drawn up.

I don't know anything else than this in the matter."

The lie given by Sri Mazumdar to the statement of Kanhaiyalal Lohia has affected his credibility. The order sheet shows that Mr. B. Sen Gupta took a copy of Sri Mazumdar's statement and expressed a desire to cross-examine him; but when the opportunity was given, he failed to appear. It is impossible to think in these circumstances that there has been any breach of the principles of natural justice. The order sheets of March 29 and 30, 1950 clearly record the absence of Mr. B. Sen Gupta. In our opinion, there is no breach of the principles of natural justice in this case to entitle the appellants to invoke the ruling in *Dhakeshwari Cotton Mills* case (1).

It was contended before us that the finding of the Tribunal was perverse, and that, on an examination of the total circumstances, it is quite clear that the gifts were not only real, but were acted upon. This was a matter within the jurisdiction of

(1) (1955) 1 S.C.R. 941.

the Appellate Tribunal as the final fact-finding authority. The Tribunal acted within its powers in refusing to accept the evidence tendered, and looking at the circumstances of the case, we cannot say that the finding has been perversely reached. For a number of years, the brother and the nephew were supported by Kanhaiyalal Lohia, and it does not appear that a gift of even a small sum was made to them to put them on their legs. Suddenly in the year 1943, Kanhaiyalal Lohia made up his mind to put them in business with a gift of the order of Rs. 7,60,000 odd. For this purpose, he had to overdraw his accounts with the Bank and to pay interest to the Bank. It does not appear why he felt that the establishment of his brother and nephew in business should be made on such a grand scale, which involved him in debt. This circumstance, taken with the fact that Mr. Mazumdar stated that he had always complained that they were good for nothing and were idlers, makes the transactions suspicious. It was presumably done with a view to reduce the assessable profits in the hands of Kanhaiyalal Lohia, and on the evidence, the Tribunal was entitled to hold, as it did, that this was a sham transaction. In our opinion, no special circumstances exist, on which the appellants can claim to come to this Court against the decision of the Tribunal, by passing the decision of the High Court on the question referred and there fusal the High Court to call for a statement of the case from the Tribunal on questions which the Tribunal refused to refer to the High Court. The appeals are, therefore, within the rulings of this Court in *Chandi Prasad Chokhani v. State of Bihar* (1) and *Indian Aluminium Co., Ltd. v. Commissioner of Income-tax*(2), and must be regarded as incompetent.

The appeals are dismissed with costs, one set.

Appeal dismissed.

(1) (1962) 2 S.C.R. 276.

(2) Civil Appeal No. 176 of 1959 decided on April 24, 1961

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