

PETITIONER:
STAR COMPANY LIMITED

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX (CENTRAL) CALCUTTA

DATE OF JUDGMENT:
07/08/1969

BENCH:
GROVER, A.N.
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GROVER, A.N.
SHAH, J.C. (CJ)
RAMASWAMI, V.

CITATION:
1970 AIR 394 1970 SCR (1) 772
1969 SCC (2) 518

ACT:

Income-Tax--Loss arising in the ordinary course of business---Assessee carrying on business of buying and selling shares--Buying certain shares of a company at well above market price as nominee of associate who acquired management of company--Selling shares later to associate at market price--Loss on transaction if in normal course of business.

HEADNOTE:

The K company, who. were the managing agents of the F Company, entered into an agreement on May 21, 1952, with the M Company, whereby the entire share-holding of the K Company consisting of certain preference and ordinary shares were to be sold to the M Company or their nominees. The appellant was a public limited company carrying on the business of dealing in shares and securities. Some of the preference shares were purchased, amongst others by the appellant at Rs. 185 per share and for this purpose the appellant had to overdraw on its bank account. The market price of the preference shares at the time was about Rs. 119. After the agreement was implemented, the M Company became the managing agents, of the F Company.

On December 23, 1953, the appellant sold the preference shares to the M Company thereby incurring a loss of Rs. 1,11,816. In its assessment to income-tax the appellant claimed this loss as arising in the ordinary course of its business. The Income-tax Officer and Appellate Assistant Commissioner rejected the appellant's claim on the ground that the shares were purchased as a contribution to the scheme of acquisition of the managing agency of the F Company by the M Company. The Appellate Tribunal found however that there was no evidence that the appellant had been made a pawn in the scheme of acquisition of the managing agency; but in view of the treatment of the loss by the appellant as a loss in investment and not a loss on its stock in trade in its own profit and loss account, the tribunal held that the shares were not acquired in the course of the appellant's share dealing business and therefore rejected its claim. The High Court, upon a

'reference, also held against the appellant, 'but expressed the opinion that the tribunal had not properly considered the primary facts found by the Income-tax Officer and the Appellate Assistant Commissioner which clearly showed that the appellant, an associate of the M Company, had entered into the transaction relating to preference shares at the bidding of the M Company and for the purpose of helping them.

In appeal to this Court it was contended (i) that the High Court was not entitled to reverse the findings of fact of the tribunal which were in favour of the appellant since the department had not challenged these by means of appropriate proceedings; and (ii) that where a question is one of mixed 'facts and law, the facts as found by the tribunal must be accepted as correct; the tribunal had negatived the finding that the preference shares were acquired by the appellant as a pawn in the scheme of transfer of the managing agency of the F Company and it was not open to the High Court to come to the same conclusion by not treating the findings of the Tribunal as final.

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HELD: Dismissing the appeal:

(i) The question which was referred to the High Court was couched in general terms and was not limited to or circumscribed by the reasons which had been given by the Tribunal against the appellant. The question of law on which reference can be made must arise out of the order of the Tribunal. Although certain reasons which had appealed to the Income-tax Officer and the Appellate Assistant Commissioner were not accepted by the Tribunal, it had come to the conclusion which was material for the disposal of the appeal, namely, that the loss in question was not a loss that arose in the course of the appellant's business in share dealing. The question which was referred to the High Court was framed in the light of this final conclusion and it was not necessary for the department to apply for and obtain a reference on a question arising from the reasons given by the Tribunal in support of its conclusion in favour of the department. [777 D-G]

(ii) Even if the conclusion of the High Court on the facts relating to the appellant's role in the scheme for transfer of the managing agency to the M Company was not taken into consideration, the question which was referred to it had to be answered against the appellant. This was clear on admitted and proved facts which had some extraordinary features and led to the irresistible conclusion that whatever the motives which entered into the appellant's acquisition of the shares, they were not bought and sold in the ordinary course of the business of the appellant as a dealer in shares. [778 F]

Commissioner of Income-tax, Bombay City IV. Greaves Cotton & Co. Ltd., 68 I.T.R. 200; and Oriental Investment Co. P. Ltd. v. Commissioner of Income-tax, 72 I.T.R. 408; referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1635 of 1968.

Appeal from the judgment and order dated May 7, 1965 of the Calcutta High Court in Income-tax Reference No. 205 of 1961.

S. Ray, R.K. Choudhury and B.P. Maheshwari, for the appellant.

Jagdish Swarup, Solicitor-General, S.C. Manchanda, R.N. Sachthey and B.D. Sharma, for the respondent.

The Judgment of the Court was delivered by

Grover, J. This is an appeal by certificate from a judgment of the Calcutta High Court answering the following question referred to it in the negative and against the assessee:

"Whether on the facts and in the circumstances of the case, the loss of Rs. 1,11,816/- suffered by the assessee on the sale of shares of Fort William Jute Company Limited was a loss that arose in its share dealing business."

The assessee is a public limited company. It carries on, inter alia, business of dealing in shares and securities. The profits

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and losses arising from transactions in shares in the ordinary course of the assessee's business have always been treated as profits or losses of the share dealing business. During the assessment year 1954-55, relevant accounting period being the financial year 1953-54 the assessee suffered a loss of Rs. 1,11,816 on the sale of 1,575 preference shares of Fort William Jute Company Ltd. These shares were purchased on May 22, 1952 at the rate of Rs. 186 per share from Mugneeram Bangur & Co. and were sold on December 23, 1953 at the rate of Rs. 115/- per share to the same company.

The background in which these transactions took place may be noticed. Kettlewell Bullen & Co. were the managing agents of Fort William Jute Co. Ltd. On May 21, 1952 an agreement was entered into between Kettlewell Bullen & Co. and Mugneeram Bungur & Co. according to which the entire holdings of Kettlewell Bullen & Co. in the managed company (Fort William Jute Co. Ltd.) consisting of 6,920 tax-free cumulative preference shares and 600 ordinary shares were to be sold to Mugneeram Bangur & Co. or their nominees at the agreed price of Rs. 185/- per preference share and Rs. 400/- per ordinary share. Pursuant to this agreement Kettlewell Bullen & Co. issued a circular letter to all shareholders of Fort William Jute Co. Ltd informing them of the terms of the agreement and pointing out that Kettlewell Bullen & Co. would tender resignation from the office of the managing agents with effect from July 1, 1952. It was stated in this letter "the purchase price of each ordinary share was Rs. 400/- and of each preference share Rs. 185/-. It was further condition of the agreement that M/s. Mugneeram Bangur & Co. would offer to all shareholders of the company (ordinary and preference) to purchase their shares at the same price on the terms hereinafter referred to". It was intended that M/s. Bangur Brothers Ltd. would be appointed managing agents.

At the time of the agreement, namely, May 21, 1952 the market price of the preference shares ranged between Rs. 119/- and Rs. 122 per share but the shares were purchased by the assessee on May 22, 1952 at the rate of Rs. 186/- per share. A large part of the preference shares of Fort William Jute Co. Ltd. were transferred to three Companies by Mugneeram Bangur & Co. who had to take over 8,617 preference shares in terms of the agreement. The Companies to which these shares were transferred were (1) Manwar Textile Agency Ltd; (2) Union Co. Ltd., and (3) Star Co. Ltd.--the assessee. M/s. Bangut Bros., were appointed as the managing agents of Fort William Jute Company for a period of ten years with effect from July 1, 1952. The total number

of preference shares of Fort William Jute Company Ltd. which were acquired by the assessee from Mugnee-

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ram Bangur & Co. was 1,670. One lot of 1,620 shares was purchased on May 22, 1952 at Rs. 186/- per share and the second lot of 50 shares was purchased at Rs. 184/- on May 27, 1952. For the acquisition of these shares the assessee had to overdraw on its Bank account. On December 23, 1953, 1,575 shares were sold to Mugneeram Bangur & Co. at Rs. 115/- per share resulting in a loss of Rs. 1,11,816 which was included in the loss of Rs. 1,30,152/- debited to the profit and loss account under the head "loss on sale of investment". The assessee claimed this as a loss arising in the ordinary course of its business.

The Income-tax Officer and the Appellate Assistant Commissioner rejected the assessee's claim on the ground that the shares were purchased as a contribution to the scheme of acquisition of the managing agency of the Fort William Jute Co. Ltd. by Mugneeram Bangur & Co. or its nominee. The loss, therefore, did not arise in the course of the assessee's normal business of dealing in shares. The Appellate Tribunal found that there was no evidence that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co. Ltd. by Mugneeram Bangur & Co. or that the shares were acquired by the assessee to relieve the latter of the load of their shares in pursuance of that scheme. The Tribunal was further of the view that even if Mugneeram Bangur & Co. had a controlling interest in the assessee firm by having a majority of the shares in it no such inference could necessarily be raised that the assessee did not purchase the shares of Fort William Jute Co. Ltd. as a measure of its own activity as a dealer in shares. The Tribunal, however, held that the shares were not acquired in the course of the assessee's share dealing business for the reason that in the profit and loss account for the year ending March 31, 1954 the assessee had made a distinction between its transactions as a dealer and as an investor in shares. The Tribunal found that while the profit on sale of shares out of its stock in trade had been shown and described as such in the profit and loss account, the loss on sale of investment had been shown in the profit and loss account as a loss in investment. From the treatment of the loss given by the assessee in its own profit and loss account the Tribunal came to the conclusion that the shares of Fort William Jute Co. Ltd., were acquired by the assessee as a measure of investment and not as stock in trade of the assessee's share dealing business.

The High Court, while dealing with the question which had been referred at the instance of the assessee, was of the opinion that the Tribunal had not properly considered the primary facts which had been found by the Income-tax Officer and the Appellate

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Assistant Commissioner. It proceeded to refer to some of the proved and admitted facts which were:

(1) The profits and loss account relating to the sale of shares showed that the transactions in Fort William Jute Co. shares stood apart from the other transactions. While the other transactions were of a few thousand rupees only rising to nearly 30,000 in one case the transaction in Fort William Jute Co. shares involved the payment of nearly Rs. 3,00,000.

(2) These shares were acquired in one lot from Mugneeram Bangur & Co. and sold back to the same concern in one lot which was altogether unusual.

(3) The shares in question were purchased by the assessee one day after the agreement was entered into between Kettlewell Bullen & Co. and Mugneeram Bangur & Co.

(4) The preference shares of the face value of Rs. 100/- were purchased at Rs. 186/- per share on May 22, 1952 when on the previous day the quotation in the market was Rs. 119/- per share only. Taking the overall picture the High Court felt that there could be only one inference that the assessee--an associate of Mugneeram Bangur & Co.--had entred into the transaction relating to preference shares at the bidding of the Bangurs, for the purpose of helping them. It was observed that the Tribunal was wrong in holding that there was no evidence that these associates had been made pawns in the transaction. The conclusion of the High Court was "on the facts and circumstances of the case it is impossible to hold that the assessee bought shares in the ordinary course of business or would have bought them but to help Mugneeram Bangur & Co. in their scheme of acquisition of the managing agency rights". It appears that the High Court was not impressed with the view of the Tribunal that on the basis of entries in the profit and loss account it could be held that the share transactions in question related to the capital account, the shares having been acquired as a measure of investment.

The first contention raised on behalf of the assessee, which is the appellant before us, is that the High Court was not entitled to reverse the findings of fact of the Appellate Tribunal since

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the department had not challenged the same by means of appropriate proceedings for reference of a question challenging those findings. It is pointed that the Tribunal had come to the conclusion that there was no evidence to show that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co. by Mugneeram Bangur & Co. or that the preference shares had been acquired by the assessee pursuant to that scheme. It is submitted that the Tribunal had thus reversed the view which had commended itself to the Income-tax Officer and the Appellate Assistant Commissioner and to that extent the Tribunal's decision was in favour of the assessee and could not be reversed or set aside by the High Court in the absence of any reference at the instance of the department. It is noteworthy that the question which was referred is couched in general terms and was not limited to, or circumscribed by the reasons which had been given by the Tribunal against the assessee. The question of law on which reference can be made must arise out of the order of the Tribunal. The order which was made in the present case was in favour of the department and against the assessee. It is true that certain reasons which had appealed to the Income tax Officer and the Appellate Assistant Commissioner were, not accepted by the Appellate

Tribunal but it had come to the following conclusion which was material for the disposal of the appeal :--

"We accordingly uphold the view taken by the authorities below that the loss of Rs. 1,11,818/- incurred on the sale of 1,575 preference shares of Fort William Jute Co. Ltd. was not a loss that arose in course of the appellant's business in share dealing though for different reasons".

The question which was referred was framed in the light of the final conclusion and in our judgment it was not necessary for the department to apply for and obtain a reference on a question arising from the reasons given by the Tribunal in support of its conclusion in favour of the department.

It has next been contended on behalf of the appellant that where a question is one of mixed facts and law the facts as found by the Tribunal must be accepted as correct. The Tribunal had negatived the finding of the Income-tax Officer and the Appellate Assistant Commissioner that the preference shares had been acquired by the assessee as a pawn in the scheme of transfer of the managing agency of Fort William Jute Co. Ltd. It

was, therefore, not open to the High Court to come to the same conclusion by not treating the finding of the Appellate Tribunal

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as final. Our attention has been invited to the observations in Commissioner of Income-tax, Bombay City Iv. Greaves Cotton & Co. Ltd. (1) that it is not open to the High Court in a reference under s. 66(1) of the Income-tax Act, 1922 to embark upon a re-appraisal of the evidence and to arrive at findings of fact contrary to those of the Tribunal. The finding of fact will be defective in law if there is no vidence to support it or if the finding is unreasonable or perverse, but it is not open to a party to challenge such a finding unless reference has been made of a specific question concerning that finding. In Oriental Investment Ca. P. Ltd. v. Commissioner of Income-tax(2) it has been reiterated that in dealing with findings on questions of mixed law and fact, the High Court must accept the findings of the Tribunal on the primary question of fact as final although it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly. It is argued that the High Court has not characterised the aforesaid finding of the Appellate Tribunal as perverse or arbitrary and once that finding is accepted there would be no justification for holding that the assessee had been made a pawn in the matter of the scheme of transfer of the managing agency of Fort William Jute Co. Ltd. by Mugneetare Bangut & Co. or Bangut Brothers Ltd. In any case there were several facts which showed that the assessee was not privy or party to the aforesaid scheme. It did not acquire any interest in the managing agency nor was it a subsidiary or associate of Mugneeram Bangut group of concerns. The assessee was connected with the Bangurs only to the extent that out of its four Directors two of the Directors were Bangurs.

In our opinion even if the conclusion of the High Court on the point mentioned above is not taken into consideration the question which was referred had to be answered against the assessee. On admitted and proved facts there can be no manner of doubt that the assessee did not acquire the preference shares in the ordinary course of business. These facts may be restated as follows :--

(1) The market rate of the preference shares remained constant at the figure of Rs. 119/- between April 16, 1952 and May 21, 1952.

(2) On May 21, 1952 the agreement between Mugneeram Bangur & Co. and Kettlewell Bullen & Co. was entered into for purchasing the entire holding of the managing agency company in the managed company.

(1) 68 I.T.R. 200. (2) 72 I.T.R. 408.
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(3) On May 22, 1952, 1,620 shares were acquired by the assessee from Mugneeram Bangur & Co. at the rate of Rs. 186/- per share. 50 more shares were acquired on May 27, 1952 at Rs. 184/- per share. The shares were obviously acquired at a price which was very much higher than the market price which prevailed only a day before they were purchased by the assessee.

(4) Out of 1,670 shares taken over by the assessee from Mugneeram Bangur & Co. 1,575 were sold back to the same company at the rate of Rs. 115/- per share.

(5) The profit and loss account for the assessment year 1954-55 showed that the dealings in other shares of comparatively much lesser value than the shares in question. The profits and losses which had been made and incurred on account of the other shares were also comparatively of minimal nature.

(6) The shares of Fort William Jute Co. Ltd., were purchased by the assessee by obtaining an overdraft from a Bank.

All the above facts and circumstances which have some extraordinary features lead to the irresistible conclusion that whatever the motives which entered into the acquisition of the shares, they were certainly not bought and sold in the ordinary course of business of the assessee as a dealer in shares. The answer to the question must, therefore, be in the negative and against the assessee and it was rightly so returned by the High Court. The appeal fails and it is dismissed with costs.

R.K.P.S.
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Appeal dismissed.