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(2) after refusal by the company to register the transfer of shares, the transferor ceased to be trustees either express or constructive.

In support of the first plea, the learned counsel says that against the refusal to transfer shares, the plaintiffs went up in appeal to the Central Government under section 111 of the Companies Act, 1956, and the Central Government decided against the plaintiffs. That judgment, according to the learned counsel, operates as *res judicata.* There is no merit in this contention. The relief sought under section 111 was against the refusal by the company to transfer shares. That subject matter and cause of action had nothing to do with the subject matter and cause of action in the present suit. The judgment, apart from other matters, cannot on this ground alone operate as *res judicata.*

The learned counsel then contended that in terms of the letter, exhibit P. 7, the defendants had undertaken to be trustees till the shares were registered. Once registration was refused, they ceased to be so. I am afraid I cannot agree. The relationship as trustee and *cestui que* trust continues between the parties even after the registration has been refused. The act of the company in declining to register the transfer cannot, in my opinion, vitiate that relationship.

In the result, I must hold that the judgment of the learned Additional District Judge was correct and the appeals and the cross-objections fail. They are, therefore, dismissed, but the parties will bear their own costs.

B.R.T.

FULL BENCH

Before S. B. Capoor, Inder Dev Dua, and D. K. Mahajan, JJ.

RAM BHAGAT,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB AND ANOTHER,—*Respondents*

Civil Writ No. 1085 of 1962

1965

December, 15th.

Income-tax Act (XI of 1922)—S. 35(5)—Whether retrospective —Assessment of a partner completed before 1st April, 1952, and that of the firm after that date—Mistake in the assessment of the partner becoming apparent only from the record of the firm—Whether can be rectified—Income-tax officer—Whether can re-open the assessment of the partner as a consequence of the assessment of the firm in which he is a partner.

Held, that sub-section (5) of section 35 of the Indian Income-tax Act, 1922, is not retrospective and does not apply to the assessment of partners completed before the 1st of April, 1952. Although this sub-section empowers the Income-tax authorities to rectify mistakes apparent from the record within four years, yet a mistake discovered from the record of another case cannot be said to be a mistake apparent from the record of the assessment already finalised in the assessee's own case. Thus the section is not applicable to cases where the assessment of a partner is completed before the 1st of April, 1952, even though the assessment of his firm is completed after that date and the mistake sought to be rectified becomes apparent only from the record of the firm. Hence the Income-tax Officer has no jurisdiction to re-open the assessment of the partner which has already been finalised before 1st April, 1952, after the expiry of four years on the ground that the assessment of the firm has revealed larger income of the partner from the firm than already included in his assessment.

Case referred by the Hon'ble Mr. Justice D. K Mahajan on 25th March, 1964 to a Full Bench for decision owing to the important question of law involved in the case. The case was finally decided by a Full Bench consisting of the Hon'ble Mr. Justice S. B. Capoor, the Hon'ble Mr. Justice Inder Dev Dua and the Hon'ble Mr. Justice D. K. Mahajan, on 15th December, 1965.

Petition under Article 226 of the Constitution of India, praying that an appropriate writ, order or direction be issued quashing the orders, dated 7th May, 1962 and 16th October, 1958, passed by respondents Nos. 1 and 2, respectively.

D. C. GUPTA AND M. R. AGGARWAL, ADVOCATES, for the Petitioner.

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the Respondents.

ORDER OF THE FULL BENCH

The Judgment of the Court was delivered by—

Capoor, J.

CAPOOR, J.—This case has been referred to the Full Bench at the instance of my learned brother D. K. Mahajan, J., the reason being certain conflict of authorities bearing on the point involved in the case.

Briefly the facts are that Messrs Fateh Chand-Jai Ram Das of Kaithal, a joint Hindu family firm (to be referred to as the Kaithal firm) was a partner in the firm Messrs. Ambala Flour Mills, Ambala City, the former's share being four annas in the rupee. For the assessment year 1948-49, the aforesaid share of the Kaithal firm was assessed at Rs. 7,499 and this assessment was finalised on the 15th September, 1950.

However, the assessment of Messrs. Ambala Flour Mills was re-opened under section 34 of the Indian Income-tax Act, 1922 (Act No. XI of 1922), hereinafter to be

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referred to as the Act, by an order, dated the 31st March, 1958, and for the aforesaid assessment year the income of the share of the Kaithal firm was determined at Rs. 53,843. Thereafter, on the 6th August, 1958, the Income Tax Officer issued a notice under sub-section (5) of section 35 of the Act to the Kaithal firm why its assessment should not be re-opened. The assessee objected that sub-section (5) of section 35 was not applicable as the assessment for the year 1948-49 was completed on the 15th September, 1950, but this objection was overruled by the Income Tax Officer by his order, dated the 16th October, 1958, and he further issued demand notice against the assessee for the assessment year 1948-49 for Rs. 46,345, the difference in the share income (copy of order being Annexure 'D' to the petition). The assessee's revision petition to the Commissioner of Income Tax, Punjab, was dismissed by the order dated the 7th May, 1962 (copy Annexure F) without giving hearing to him. The assessee then filed a writ petition under Article 226 of the Constitution to which the Commissioner, Income Tax, Punjab, as well as the Income Tax Officer, B-Ward, Karnal, were parties and in essence the submissions made are that in the order of assessment of the Kaithal firm made on the 15th September, 1950, there is no such error apparent on the face of the record which would attract the provisions of sub-section (1) of section 35 of the Act and inasmuch as the notice for rectification, dated the 6th August, 1958, issued by the Income Tax Officer, was beyond the period of four years from the date of the finalisation of the assessment, the order could not be touched under sub-section (1) of section 35. As regards the deeming clause in sub-section (5) of section 35 of the Act, it is pointed out that it was enacted in the year 1953 and not being retrospective in its effect, it cannot be applicable to the assessment of a partner completed before the 1st April, 1952.

Sub-section (1) of section 35 of the Act, so far as material, is as follows:—

> "The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33-A and the Income Tax Officer may, at any time within four years from

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> the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee".

The only other provision which needs notice is sub-section (5), which is as follows:—

> "Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm".

In support of the contentions advanced on behalf of the petitioner, there is a direct authority of the Supreme Court which is on all fours with the facts of the instant case—*Second Additional Income Tax Officer, Guntur* v. *Atmala Nagaraj and others* (1). In that case the assessment of the assessee was completed on the 22nd January, 1952. As the assessment of a firm in which the assessee had a share was not completed at that time, a certain amount was included as his share in the firm and the assessment orders were passed with a note that action under section 35 of the Act would be taken when the correct share income was known. It was in the year 1954 that the assessment of the firm was completed and it was then discovered that the income of the share of the

(1) 46 I.T.R. 609.

assessee in the firm was much higher than the figure previously included and then the revised assessment orders were made under sub-section (5) of section 35. It was held by Hidayatullah, J., speaking for himself and for the other Judges constituting the bench, that sub-section (5) of section 35 was not applicable to cases where the assessment of the partner was completed before the 1st April, 1952, even though the assessment of the firm was completed after the 1st April, 1952. The ratio was that though section 35(1) empowered the Income Tax authorities to rectify mistakes apparent from the record within four years from the date of the assessment order sought to be rectified, a mistake which becomes apparent only from the record of the firm was not a mistake apparent from the record so far as the assessment of the partner was concerned.

The learned Judges reiterated what had been held by them in a previous case in *Income Tax Officer,* V. *Circle, Madras, and another* v. *S. K. Habibullah* (2), at pages 811 and 812, that a mistake discovered from the record of the disposal of another case could not be said to be a mistake apparent from the record of the assessment already finalised in the assessee's own case. It should, however, be noted that the facts in *Habibullah's case* (*supra*) were somewhat different because the assessments of the assessee himself as well as of the two firms in which he was the partner had all been completed before the 1st April, 1952. From the records of the firm it transpired that the proportionate share of the assessee in the losses of the firm was less than that which had been computed in his assessment. The Income-Tax Officer on the 27th March, 1954, revised the assessment of the assessee in respect of the two years in question after taking into account the share of the losses as computed in the assessments of the two firms. The Commissioner of Income Tax, to whom the assessee went in revision, held that section 35 was properly invoked for rectification of the assessments and rejected the applications. The Madras High Court allowed the writ petitions under Article 226 of the Constitution filed by the assessee and quashed the order of the Income Tax Officer. The appeal by the Commissioner of Income Tax, Madras, to the Supreme Court failed.

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(2) 44 I.T.R. 809.

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In a Bench decision of this Court in *Kundan Lal v. Income Tax Officer, B. Ward, Amritsar* (3), it was held that the Income Tax Officer had jurisdiction under section 35(5) of the Act to rectify an assessment of a partner of a firm completed in 1946, on a re-assessment of the firm under section 34 made in March, 1956, which necessitated the inclusion of the partner's correct share of the profits in his assessment. Though it is correct that in *Habibullah's case,* the learned Judges referred with approval to certain observations in *Kundan Lal's case,* yet that approval was not to the decision of the case on the facts but to the principle enunciated, which was that clause (5) of section 35 of the Indian Income Tax Act, which was enacted by the Income Tax (Amendment) Act, 1953, was not declaratory of pre-existing law, and as it clearly affected vested rights which had accrued to the assessee, must be deemed to have come into force from the 1st April, 1952. It had no greater retrospective effect than was expressly granted to it.

It has, however, been pointed out by Mr. D. N. Awasthy, learned counsel for the respondents, that in the decision of the Supreme Court in *Ahmedabad Manufacturing and Calico Printing Co. Limited* v. *S. G. Mehta, Income Tax Officer and another* (4), some of the learned Judges have cast doubts on the correctness of the previous decision of that Court in *Habibullah's case* (*supra*) and *Atmala Nagaraj's case* (*supra*). But it must be remembered that in *Ahmedabad Manufacturing and Calico Printing Co. Limited's case*, the learned Judges were dealing not with sub-section (5) of section 35 but with sub-section (10) of section 35 of the Act, which deals with recomputation of the tax payable by a company on account of rebate of income-tax being availed of by it wholly or in part for declaring dividend in any year, which amount would be deemed to have been made subject of incorrect relief under the Act. The counsel for the appellant in that case relied on *Habibullah's case* and *Atmala Nagaraj's case.* Out of the five Judges constituting the Court two (S. K. Das, J., who spoke for himself as well as for Kapur, J.) held that so far as the case before them was concerned, there was no reason why the principle laid down in *Habibullah's case*

(3) 37 I.T.R. 337.
(4) 48 I.T.R. 154.

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(*supra*) should not be applied, the principle being simply this : "A statute which is not declaratory of a pre-existing law nor a matter relating to procedure but affects vested rights cannot be given a greater retrospective effect than its language renders necessary, and even in construing a section which is to a certain extent retrospective, the line is reached at which the words of the section cease to be plain". He observed, however, that the decision in *Atmala Nagaraj's case* may perhaps require reconsideration but about that the Judges did not express any final opinion then. Two other of the learned Judges (Hidayatullah, J. and Raghubar Dayal, J.) considered the same arguments and were of the view that both *Habibullah's case* and *Atmala Nagaraj's case* may have to be reconsidered on some future occasion but they also emphasised that they did not express a final opinion on sub-section (5) of section 35 but would leave that to a future case. Sarkar, J., who agreed with Hidayatullah, J., and Raghubar Dayal, J., in holding that the appeal be dismissed, was of the view that *Habibullah's case* as well as *Atmala Nagaraj's case* were entirely different from the case before the Court as the language used in sub-sections (5) and (10) of section 35 seems to be wholly different.

Mr. Puran Chand, learned counsel for the petitioner, has also emphasised that despite the doubts which some of the Judges constituting that Bench in *Ahmedabad Manufacturing and Calico Printing Company's case* (*supra*) expressed to the correctness of the decision in *Habibullah's case* and *Atmala Nagaraj's case,* they were cautious to say that they were not expressing any final view on the scope of sub-section (5) of section 35 and that would have to be done at some future date when the appropriate occasion arose. So, Mr. Puran Chand argued that this court cannot assume to itself the functions of the Supreme Court, and so far as it is concerned the authority of the Supreme Court in *Atmala Nagaraj's case* holds the field, and as it is fully applicable to the facts of the present case, it must be held that the Income Tax Officer had no jurisdiction on the facts as mentioned above to reopen on the basis of his notice under section 35(5) of the Act the assessment on the assessee, which had already been finalised before the 1st April, 1952. This argument, in our view, is unanswerable and it must, therefore, be held that the enhanced assessment in the order, dated the 16th October, 1958, of the

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Income Tax Officer in pursuance of the notice issued under sub-section (5) of section 35 of the Act is without jurisdiction and of no effect. This order and in consequence the order of the Commissioner of Income Tax, dated the 7th May, 1962, are quashed by a writ of *certiorari*. As the legal question involved in this case is not free from difficulty, the parties are left to bear their own costs.

K. S. K.

FULL BENCH

Before Mehar Singh, S. B. Capoor and P. C. Pandit, JJ.

UDE BHAN AND OTHERS,—*Appellants*

versus

KAPOOR CHAND AND OTHERS,—*Respondents*

Execution Second Appeal No. 450 of 1963

1965

December, 15th.

Code of Civil Procedure (Act V of 1908)—S. 60(1) (ccc)—Non-agriculturist judgment-debtor letting out a portion of, or a building attached to, his main residential house to a tenant or tenants—Whether can be deemed to be in occupation of that portion or building—Letting out of the portion not voluntary—Whether makes any difference.

Held, per Full Bench—That when the judgment-debtor has himself let out a portion of the house, he cannot under clause (ccc) of section 60(1) of the Code of Civil Procedure be deemed to be in occupation thereof, even if the remaining part of it is occupied by him and the let-out portion will not be exempt from attachment or sale. A fortiori if a building attached to the main residential house, belonging to and occupied by a non-agriculturist judgment-debtor, is let out to a tenant, that portion cannot be considered to be in his occupation within the meaning of section 60(1) (ccc) of the Code of Civil Procedure.

Held, by majority (Mehar Singh and Capoor, JJ.; Pandit J. *Contra*)—That having regard to the plain terms of section 60(1) (ccc) of the Code of Civil Procedure, no distinction can on legal grounds be made between a case where part of the house is let by the judgment-debtor himself and a case in which the tenant had been inducted by a competent authority such as the Requisitioning or the Rehabilitation authorities. In each of these cases the inescapable fact is that on the relevant date, that is, at the time of attachment, the portion of the house, which is sought to be attached, is not in the occupation of the judgment-debtor.