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on deliberate negligence and fraud and amounts to allowing a party to profit from its own wrong. We do not think that such a construction follows from the language used, which is more consistent with the view that the provision in s. 12A(6)(a) permits a review when through some oversight, mistake or error the necessary facts, basic or evidentiary, were not present before the Court when it passed the order sought to be reviewed. It is entirely wrong to think that the sub-section permits a party to play hide and seek with a judicial Tribunal; that is to say to raise a fact in issue or evidentiary fact as a plea in support of a claim and at the same time deliberately withhold the evidence in support thereof. Such a situation cannot be said to be one within the meaning of the expression "facts not present before the Tribunal".

In the appeals before us there was intentional withholding or suppression of evidence. In the case, the materials were not produced on the plea that they were written in Gujrati and nobody was available to instruct counsel in English or Telugu and in the other, on an equally specious plea that the correspondence was mixed up with other records for about two years. These two appeals can be disposed of on this short ground that the appellant was not entitled to ask for review under s. 12A(6)(a) by reason of his own deliberate negligence and intentional withholding of evidence.

We see no merit in these appeals and dismiss them with costs.

Appeals dismissed.

THE COTTON AGENTS LTD., BOMBAY
v.
COMMISSIONER OF INCOME-TAX, BOMBAY.

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May 3.

(S. K. DAS and M. HIDAYATULLAH, JJ.)

Income-tax—Managing Agency Agreement—Proper construction of—Commission on sale proceeds of the managed company—Time of accruing.

Messrs. Shivnarayan Surajmal Nomani were the managing agents of the New Swadeshi Mills of Ahmedabad Ltd. The Nemani group and the appellant-company which is the assessee

held a substantial number of shares of the said mills. Sometime in 1944 some difference arose between them and it was decided that the Nemani group should sell its block of shares to the appellant company at an agreed price and then the appellant company would become the managing agents of the mills company on payment of Rs. 5,00,000 to the Nemani group and would be entitled to the emoluments of the managing agents as from April 1, 1944. The relevant portion of the Managing Agency Agreement ran thus:—

"(2) The remuneration of the agents as such agents of the company as aforesaid shall be as follows:—

A commission at the rate of three and a half per cent. on the gross proceeds of all sales of the yarn, cloth, waste and other articles manufactured by the company earned in any year or other period for which the accounts of the company are made up and laid before the General Meeting."

"(3) The said commission shall become due to the Managing Agents at the end of each financial year or other period for which the accounts of the company are to be laid before the General Meeting and shall be payable and paid immediately after such accounts have been passed by the General Meeting."

The assessment year was 1946-47, and the year ending with Diwali, 1945 (October 18, 1944, to November 4, 1945) was the accounting year. The managing agency commission from April 1, 1944, to December 31, 1944, amounted to Rs. 2,20,433 and from January 1, 1945, to March 31, 1945, to Rs. 67,959. The case of the appellant-company was that for the assessment year 1946-47 it was liable to pay tax only on the commission of Rs. 67,959 which it had earned by working as managing agent of the Mills company and it was not liable to pay tax on the sum of Rs. 2,20,433. On a difference of opinion having arisen between the departmental taxing authorities and the Tribunal the following question was referred to the High Court for decision:—

> "Whether on the facts and circumstances of the case the managing agency commission of 3½% on sales made by the New Swadeshi Mills of Ahmedabad Ltd., between April 1, 1944, and December 31, 1944, accrued to Shivnarayan Surajmal Nemani or to the assessee?"

The High Court following the decision of the Supreme Court in *E. D. Sassoon and Company Ltd.* v. *Commissioner of Income-tax, Bombay City*, held that the appellant company was liable to pay tax on the whole of the commission as the commission accrued due on March 31, 1945, and they became entitled to receive it at the end of the year; it also held that no debt was created in favour of the agents when the goods were sold. On appeal by the assessee company on a certificate of the High Court:

Held, that the view of the High Court was correct. The commission of the managing agents accrued and became due at the end of the financial year and that neither any debt nor any right to receive payment arose in favour of the agents when each

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transaction of sale took place. No income arose or accrued on the sale proceeds at the time of each sale.

E. D. Sassoon and Company Ltd. v. *Commissioner of Income-tax, Bombay,* [1955] 1 S.C.R. 313, referred to.

Lakshminarayan Ram Gopal and Sons v. *The Government of Hyderabad,* [1955] 1 S.C.R. 393, followed.

Commissioners of Inland Revenue v. *Gardner Mountain & D'Ambrumenil Ltd.,* (1947) 29 T.C. 69 and *Turner Morrison & Co. Ltd.* v. *Commissioner of Income-tax, West Bengal,* [1953] 23 I.T.R. 152, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 100 of 1959.

Appeal from the judgment and order dated February 11, 1957, of the Bombay High Court in Income-tax Reference No. 53 of 1956.

R. J. Kolah, Dwarkadas, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra,* for the appellants.

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

1960. May 3. The Judgment of the Court was delivered by

S. K. Das. J.

S. K. DAS, J.—This is an appeal on a certificate granted by the High Court of Bombay, under s. 66A (2) of the Indian Income-tax Act, 1922. The short facts are these. The Cotton Agents Limited, Bombay, are a limited liability company registered under the Indian Companies Act and will be called the assessee Company in this judgment. It held a substantial number of shares of the New Swadeshi Mills of Ahmedabad, Ltd. (hereinafter called the Mills Company). Messrs. Shivnarayan Surajmal Nemani (called the Nemani group) also held a block of shares of the Mills Company along with its managing agency. The assessment year was 1946-47, and the year ending with Diwali, 1945 (October 18, 1944, to November 4, 1945) was the accounting year. Sometime in 1944 some differences arose between the assessee Company and the Nemani group; these differences were referred to one Govindram Seksaria, who decided that the Nemani group should sell its block of shares to the assessee Company at an agreed price. It was further decided

that a sum of Rs. 5,00,000 be paid by the assessee Company to the Nemani group as the price of the managing agency rights. This arrangement was approved by the share-holders of the Mills Company by a resolution dated January 4, 1945, and came into effect immediately. The agreement further was that the assessee Company would come in as managing agents of the Mills Company in place of the Nemani group and would be entitled to the emoluments of the managing agents as from April 1, 1944. The managing agency commission from April 1, 1944, to December 31, 1944, amounted to Rs. 2,20,433 and from January 1, 1945, to March 31, 1945, to Rs. 67,959. The case of the assessee Company was that for the assessment year 1946-47 it was liable to pay tax only on the commission of Rs. 67,959 which it had earned by working as managing agent of the Mills Company and it was not liable to pay tax on the sum of Rs. 2,20,433. This contention of the assessee Company was not accepted by the departmental taxing authorities; but the Tribunal decided in its favour. The assessee Company's case before the Tribunal was that as the managing agency commission was based on the sales, the commission accrued to the managing agents as and when the sales were made and furthermore the sum of Rs. 5,00,000 paid by the assessee Company to the retiring managing agents included the purchase price of the managing agency commission which had accrued in the hands of the retiring agents. The Tribunal expressed the view that on a true construction of the relevant managing agency agreement, the $3\frac{1}{2}$ per cent. commission on sales made when the Nemani group was the managing agent accrued to that group and not to the assessee Company and thus a debt was created in favour of the Nemani group on every sale during its period of managing agency and only the payment of the debt was deferred till the accounts of the Mills Company were passed at a general meeting; therefore, the commission prior to the close of the year 1944 was assessable in the hands of the Nemani group and thereafter in the hands of the assessee Company. The Department, however, contended that the whole

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of the managing agency commission accrued to the assessee. Thereupon, at the instance of the Department, the Tribunal referred the following question of law to the High Court for decision :—

"Whether on the facts and circumstances of the case the managing agency commission at 3½% on sales made by the New Swadeshi Mills of Ahmedabad Ltd., between April 1, 1944, and December 31, 1944, accrued to Shivnarayan Surajmal Nemani, or to the assessee ?"

The High Court held that the matter was concluded by the decision of this Court in *E. D. Sassoon and Company Ltd.* v. *Commissioner of Income-tax, Bombay City* (1). With reference to the argument of learned counsel for the assessee Company that the commission was payable on the sale proceeds and not on the profits as in *Sassoon's case* (1), it said :

"We would have given serious thought to this aspect of the matter but for the view we take that the decision of the Supreme Court with regard to the question of creation of the debt and with regard to the serving by the managing agents for a term of one year being a condition precedent for their being entitled to receive payment, is indistinguishable on the facts of this case. We may point out that here as in the *Sassoon's case* (1) the commission of 3½ per cent. is to be earned in any year, and also by clause 3 of the agreement the commission is to become due to the managing agents at the end of each financial year. Therefore, till the end of the financial year there is no debt whatsoever created in favour of the managing agents and also their right to receive payment depends upon their having served for a whole year. Under the circumstances we must hold, following the decision of the Supreme Court, that the assessees are liable to pay tax on the whole of the commission as the commission accrued due on March 31, 1945, and they became entitled to receive it at the end of the year. We do not agree with the view of the Tribunal that according to the agreement of the managing agents the debt was

(1) [1955] 1 S.C.R. 313.

created in favour of the agents when the goods were sold by the company and that the payment was deferred to a date after the accounts having been passed by the shareholders in the general meeting of the company. In no view of the case can it be said that the debt was created in favour of the agents when the goods were sold ".

The answer to the question really depends on a construction of the relevant terms of the managing agency agreement dated March 15, 1925, entered into between the Mills Company and the Nemani group. Before we proceed to a consideration of those terms it is necessary to state that the Department has assessed the Nemani group also to tax in respect of the commission for the period April 1, 1944, to December 31, 1944. That circumstance has, however, no bearing on the question of construction and learned counsel for the Department has stated before us that there is no intention to tax two parties for the same income and if the tax has been realised from both for the same income, it will have to be refunded to one of the two parties after the decision of this Court. We are not considering in this case the validity or otherwise of what are known as protective or precautionary assessments, and nothing said in this judgment has any bearing on that question.

We go at once to the Managing Agency Agreement dated March 15, 1925. Under that agreement the managing agents were appointed for a period of fifty-one years, but with liberty to them to resign the appointment and retire from the agency at any time by twelve calendar months' notice in writing, such notice to expire at the end of any financial year of the Mills Company. Then came cls. (2) and (3) of the agreement, which are material and must be quoted so far as they are necessary for our purpose :—

"(2) The remuneration of the Agents as such Agents of the Company as aforesaid shall be as follows :—

A commission at the rate of three and a half per cent. on the gross proceeds of all sales of the yarn, cloth, waste and other articles manufactured

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by the Company earned in any year or other period for which the accounts of the Company are made up and laid before the General Meeting."

Provided, etc., (it is unnecessary to quote the proviso).

"(3) The said commission shall become due to the Managing Agents at the end of each financial year or other period for which the accounts of the Company are to be laid before the General Meeting and shall be payable and paid immediately after such accounts have been passed by the General Meeting".

Clauses (6) to (11) recited the rights and duties of the managing agents, one of such rights being to retain, reimburse and pay themselves "all sums due to the agents for commission". Clauses (13) and (14) dealt with the right to assign the remuneration and the managing agency, and said inter alia that "it shall be lawful for the agents to assign this agreement and the benefit thereof and their rights and privileges, etc., to any person or firm or company having authority by its constitution to become bound by the obligations undertaken by the agents..... and the Company shall be bound to recognise the person, firm or company aforesaid as the agents of the Company". It is unnecessary to read the other clauses of the managing agency agreement.

The controversy before us hinges really on the scope and effect of clauses (2) and (3), read in the context of the agreement as a whole. On behalf of the assessee Company the argument is that under cl. (2) the managing agency remuneration accrued at the rate of 3½ per cent. on the gross proceeds of all sales; the word "all" is emphasised, and it is argued that the remuneration accrued as *each* sale took place, the totality of sales giving the gross sale proceeds. It is argued that embedded in each sale was the managing agency commission of the assessee Company. It is further suggested on behalf of the assessee Company that though cl. (3) uses the word "due", it merely indicated the time of payment and not that of accrual.

We do not think that this reading of the two clauses is correct. In our view, cl. (3) is the accrual clause; it shows that the commission became due at the end of each financial year or other period for which the accounts of the Mills Company were to be laid before the General Meeting. Significantly enough, the clause consists of two parts; one part says when the commission becomes due and the other says when it is to be payable and paid. In very clear terms, the clause says that the commission becomes due normally at the end of the financial year, but is payable after the accounts have been passed by the General Meeting. Let us contrast cl. (3) with cl. (2). Clause (2) states how the remuneration has to be calculated. It says in effect that the remuneration has to be calculated at the rate of $3\frac{1}{2}$ per cent. on the gross proceeds of all sales, etc., earned in any year or other period for which the accounts of the Mills Company are made up. Putting the two clauses side by side, the conclusion at which we have arrived is that in their true scope and effect cl. (3) determines the time of accrual of the managing agency remuneration and cl. (2) determines the rate at which the remuneration is to be calculated; and as to the time of payment, that is determined by the second part of cl. (3).

This view of the managing agency agreement of March 15, 1925, concludes the appeal. If the remuneration accrued at the end of the financial year, then undoubtedly it accrued in the hands of the assessee Company. It remains now to refer briefly to some of the decisions cited at the Bar.

As to the decision in *Sassoon's case*(1) it is pointed out that the commission there payable by way of remuneration was a percentage on the net profits and this, it is argued for the assessee Company, distinguishes that decision from the present case. Indeed, it is true that in *Sassoon's case* (1) the remuneration was fixed at a percentage on the net profits, but the real point of the decision was as to when the remuneration accrued. On this point the majority of learned Judges said:

(1) [1955] 1 S.C.R. 313.

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"It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro: see *W. S. Try Ltd.* v. *Johnson* (1) and *Webb* v. *Stenton* (2). Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he had acquired a right to receive the income or that income has accrued to him".

It has been argued before us that the decision requires reconsideration because it failed to make a further distinction, a distinction which it is stated arises in law, between the right to receive payment and the creation of a debt. We consider it unnecessary to consider such a distinction, if any such exists, in the present case. On our view of the managing agency agreement, the commission of the managing agents became due at the end of the financial year and that is when it accrued; and there were neither any debt created nor any right to receive payment when each transaction of sale took place. We were also addressed at some length on the further question whether managing agency is service and if so, whether it must be for one full year or whether apportionment is permissible. These questions do not fall for decision in the present case and we express no opinion thereon. We have proceeded in this case on the footing that the managing agency work of the assessee Company constituted business within the rule of the decision in *Lakshminarayan Ram Gopal and Sons Ltd.* v. *The Government of Hyderabad* (3) and on that footing we have decided the question of accrual. In *Commissioners of Inland Revenue* v. *Gardner Mountain & D'Ambrumenil Ltd.* (4), on which learned counsel for the appellant placed reliance, the facts were quite

(1) [1946] 1 All E.R. 532, 539.
(2) [1883] 11 Q.B D. 518, 522, 527.
(3) [1955] (1) S.C.R. 393.
(4) [1947] 29 T.C. 69.

different and on a true construction of the agreements there, it was held that the commission payable under certain under-writers' agreements arose in the year in which the policies were underwritten. That decision proceeded on a construction of the agreements there considered; and it is no authority for construing other agreements of a different character. Learned counsel for the appellant relied on *Turner Morrison & Co. Ltd.* v. *Commissioner of Income-tax, West Bengal*(1) for his contention that in the sale proceeds of each transaction of sale were embedded the income, profits or gains to be earned by the managing agents and, therefore, the accrual took place on each transaction, of sale. The observations at page 160 of the report on which reliance was placed were made in a different context, namely, in the context of the place of receipt of income in relation to the provisions of s. 4(1)(a) of the Income-tax Act.

Learned counsel for the respondent has pointed out to us that the observations of Lord Justice Fry in *Colquhoun* v. *Brooks* (2) were not very accurately reproduced in *Rogers Pyatt Shellac and Co.* v. *Secretary of State for India* (3). He submitted that Lord Justice Fry did not say that the words "accrual" or "arising" represented a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. He has argued that there is nothing inchoate about the income when it arises or accrues. We consider it unnecessary to embark on a discussion as to how far the aforesaid observations require consideration by us.

It is enough to say that on the view which we have taken of the relevant clauses of the managing agency agreement, no income arose or accrued on the sale proceeds at the time of each transaction of sale; the income accrued at the end of the financial year at the rate of $3\frac{1}{2}$ per cent. on the gross proceeds of all sales of yarn, cloth, waste, etc., earned in any one year. In that view of the matter, the High Court correctly answered the question.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1953] 23 I.T.R. 152. (2) (1888) 21 Q.B.D. 52, 59.
(3) (1924) 1 I.T.C. 363, 372.