
(1957) 02 P&H CK 0007
In the Punjab And Haryana At Chandigarh
Case No : Civil Reference No. 6 of 1952

BALBHADHAR MAL KUTHIALA

APPELLANT

Vs

COMMISSIONER OF Income Tax, PUNJAB.

RESPONDENT

Date of Decision : 06-02-1957

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 114, 16
General Clauses Act, 1897 — Section 27
Transfer of Property Act, 1882 — Section 106

Citation : (1957) 31 ITR 930

Judgement

This is a reference by the Appellate Tribunal u/s 66 (1) of the Income Tax Act for determination of the following questions :

"(i) Where a property addressed registered letter, postage prepaid, is returned by the post office with an endorsement by a postman Inkariwala hai (in the category of refusal), does a presumption arise of due service of the letter on the addressee ?

and, following as a corollary,

(ii) If the answer to the above question is in the negative, whether the order of the Tribunal, dismissing the appeal for default, is not liable to be recalled on the ground that it is null, as the appellant had not been given an opportunity of being heard in support of his appeal ?"

The facts giving rise to the reference are :

The petitioner, Balbhadhar Mal Kuthiala, preferred an appeal before the Income Tax Appellate Tribunal against an assessment of the year 1945-46. The appeal was submitted by post and it reached the Tribunal on 6th June, 1949. The appeal was fixed for hearing for 6th December, 1949, and a notice thereof was issued to the petitioner at his Simla address, as given in the memorandum of appeal, by registered post pre-paid and acknowledgment due. The registered letter was delivered to the post office on 28th October, 1949. The addressee being not

available in Simla, the post office there redirected the letter to Kuthiala House, Hoshiarpur. The postal authorities at Hoshiarpur returned the cover to the office of posting with an endorsement in pencil Inkariwala hai (refuses to accept), presumably made by the postal peon. On 6th December, 1949, when the appeal was called for hearing, no one was present on behalf of the appellant. On 13th December, 1949, the Tribunal dismissed the appeal with the following order :

"A notice fixing the hearing of assessee's appeal for 6th December, 1949, was issued by the office on 27th October, 1949. The notice was issued to the assessee under registered post acknowledgment due, it was returned by the post office with the remarks that the addressee refused to receive the service of the notice. This refusal is tantamount to a service. Nobody was present on the date of the hearing. The appeal is, therefore, dismissed for default of appellants appearance."

Information of this order reached the assessee on 7th February, 1950, On 13th February, he submitted an application to the Tribunal for restoration of his appeal and for its decision after affording an opportunity to him of being heard in support of the contentions raised in the appeal. This application was accompanied by an affidavit of the petitioner stating that no registered letter purporting to be from the Income Tax Appellate Tribunal was ever presented to him by the postal authorities and that he had never refused to accept the same. The Tribunal rejected the application, vide their order dated 27th October, 1950, mainly on the ground that the Tribunal had no inherent power of reviewing or setting aside their own order.

Simultaneously, the petitioner had presented another application to the Tribunal u/s 66 (1) of the Income Tax Act praying that a statement of the case be drawn up and the following questions referred for determination of the High Court :

(i) Whether, in the circumstances of the case, the order of dismissal of the case, preferred by the appellant, in limine is an order valid in law ?

(ii) Whether, in the circumstances of the case, the Tribunal was in law justified to draw the conclusive inference that the notice of hearing was in fact served upon the assessee ?

(iii) Whether, in the circumstances of the case, the Tribunal did give in law a real opportunity to the appellant of being heard ?

The Appellate Tribunal accepted this application, but confined the reference to the questions reproduced above. The assessee wanted that the draft statement should also include a reference to his having made a miscellaneous application for setting aside the Tribunal's order dated 6th December, 1949, to his filing an affidavit denying that the notice was tendered to or refused by him and to the order of the Tribunal rejecting the application. This prayer of the assessee was refused on the ground that these were events which happened subsequent to the Tribunal's order, and no question relating to them could be said to arise out of

that order.

These subsequent events and the facts relating thereto were stated by the assessee in a petition u/s 66 (4) of the Income Tax Act read with articles 226 and 227 of the Constitution, presented to this Court on 12th May, 1952.

Mr. Mahajan, learned counsel for the assessee, contends that this Court while answering the questions should take regard of the events that subsequently happened and take into consideration the documents relating thereto. It is further submitted that the Appellate Tribunal May be required to state the case including the subsequent events and refer it under sub-section (2) or (4) of section 66. Now, it is a well-settled principle of law that the jurisdiction of the High Court, which is only advisory and a limited one, is confined to the determination of the questions raised and referred by the Appellate Tribunal. The High Court cannot raise and start determining any question which has not been referred either under sub-section (1) or (2) of section 66. The section makes it further clear that reference can only be made with respect to a question of law which arises out of an order of the Appellate Tribunal under sub-section (4) of section 33 of the Act. No reference would, therefore, be permissible from an order of the Tribunal made under any other provision of law or in exercise of its inherent jurisdiction. In *Commissioner of Income Tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar*, it was held that the jurisdiction of the Tribunal and of the High Court, under sub-sections (1) and (2) of section 66, is conditional on there being an order by the Appellate Tribunal which May be said to be one u/s 33 (4) and a question of law arising out of such an order. It was further observed that if the question of law arises out of an order made by the Tribunal on any miscellaneous application, which does not clearly fall within the four corners of section 33 (4) but purports to have been made in exercise of what it regarded as its inherent powers, then the Appellate Tribunal would have no jurisdiction under sub-section (1) of section 66 of to refer a case, nor would the High Court have jurisdiction under sub-section (2) of that section to direct the Tribunal to do so.

Under sub-section (4) to section 66, the High Court May refer the case back to the Appellate Tribunal to make additions thereto or alternations therein, if the Court is satisfied that the statements in the case referred are not sufficient to enable it to determine the question raised by the Tribunal. Here again, no new questions can be raised or required to be raised. The case can be sent back for clarification of the statement or filling up any lacuna that May be found therein, but this ought to be with a view to enable the High Court to determine the questions that have actually been raised. No such flaw is shown to exist in the present case. The statement does not appear to be in any way incomplete or wanting in the narration of material facts necessary for the determination of the questions raised therein.

Section 66 (4) has no application to a case where the Appellate Tribunal states a case with regard to certain questions of law but refuses to state a case with regard to some other questions which the assessee or the Commissioner, as the

case May be, wants to raise. For this purpose the assessee or the Commissioner can only make an application to the High Court under sub-section (2) to section 66. No such application has been presented by the assessee in this case. Moreover, as already observed, the questions of law which can be raised u/s 66 are those and those alone which arise out of an order of the Appellate Tribunal u/s 33 (4).

Evidently, therefore, I am here to answer only those questions which have actually been referred and not to raise and determine any new or additional questions. The events that took place after the order of the Tribunal dismissing the appeal u/s 33 (4) cannot be gone into or taken into consideration. As a matter of fact, the documents relating thereto should not have been included in the paper book. The Tribunal had refused to include in the statement any reference to the assessee's application for restoration of the appeal, his affidavit in support of the facts stated in the application and the order of the Tribunal dismissing that application. In *Purshottam Laxmidas v. Commissioner of Income Tax, Bombay City*, it was held that the paper book in a case referred to the High Court u/s 66 (1) of the Income Tax Act can only consist of the statement of the case and the documents which the Tribunal considers should be included in the paper book and that the assessee has no right to incorporate in the paper book a document with regard to which the Tribunal refuses to give its permission for being so included. The subsequent events or the documents relating thereto cannot, therefore, be taken into consideration, nor can any decision be based thereon.

Let me now proceed to consider the questions referred by the Tribunal.

Section 27 of the General Clauses Act lays down :

"27. Meaning of service by post. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions, give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Section 63 of the Indian Income Tax Act provides that a notice or requisition under the Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908. It means that where the Income Tax authorities choose to serve the requisition by post, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post the letter containing the requisition.

Under section 16 of the Evidence Act, to prove that an act has been done it is admissible to prove any general course of business or office according to which it would normally have been done, there being a probability that the general course

was followed in the particular case. Thus, where the question is whether a particular letter reached A, the facts that it was posted in due course and was not returned through the dead-letter office are relevant (Illustration (b) to section 16).

According to section 114, the Court May presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The Court May thus presume that the common course of business or of any office has been followed in the particular case. The presumption of the course of business having been followed is specially strong in the case of public offices, e.g., the post office.

Mr. Mahajan contends that the presumption of service arises only in cases where the letter sent by post is not returned by the postal authorities as undelivered, but where it is so returned, for whatsoever reason, there is a direct and self-evident proof of the fact that the letter was not delivered. According to him, the report of the postman that the addressee had refused to accept the letter cannot be taken notice of or admitted into evidence without formal proof, and there would be no presumption of service in such a case. Reliance is being placed upon *Gobinda Chandra Shaha and Another v. Dwaraka Nath Pattita, Jaganath Brakbhau v. J. E. Sassoon and Others, Butto Kristo Roy and Others v. Gobindram Marwari and Others*. I do not see any force in the contention.

The presumption equally attaches to the postal peons report "refused" because the report is made in the usual course of business and it is open to the Court to presume that the usual course was followed in the particular case. When a letter is duly addressed and posted, particularly when it is also registered, the presumption is that the postman did tender the letter to the addressee. The fact that the letter came back does not in itself rebut the presumption that it was tendered. The writing of the endorsement "refused" falls within the ambit of "common course of business" of the postman and, therefore, even with out any formal proof, involves the presumption in support of this view.

Mohan Lal Kajriwal v. Sundar Lal Nand Saraf and Others is a decision of my Lord the Chief Justice in which it held that when a registered letter addressed to a person is received back with the remark "refused" a presumption arises that the letter was refused by such person himself even though the word "refused" is not proved to be in his handwriting. A similar view was taken by Zafar Ali, J., in *Sher Afzal Mohan Lal* and by Addison, J., in *Raunaq Ram and Others v. Prabh Dayal and Others* and it was observed that where a notice sent by post in a registered cover is returned by the postman with a note that the addressee refused to receive it and the posting of the notice has been proved, there arises, a presumption u/s 114, Evidence Act, that the addressee did refuse to receive it.

In *Shri Bhagwan Radha Kishen v. Commissioner of Income Tax, U. P.*, a notice fixing the date of hearing of the appeal was sent to the appellant by the

Appellate Tribunal by registered post at the address given by him for service. The notice came back with the endorsement by the postal authorities as "refused". The Tribunal thereupon dismissed the appeal for default. On an application by the assessee u/s 66 (1) of the Income Tax Act, one of the questions referred to the High Court was :

"Whether the mere endorsement of refusal to accept the service of the notice of hearing of the appeal made by the postal authorities was sufficient in the eye of law to justify the presumption of service of the notice on the applicant ?"

The question was answered in the affirmative and it was held that the mere endorsement of "refusal" made by the postal authorities was sufficient in the eye of law to justify the presumption of service of the notice on the appellant.

Certain obiter remarks made in the course of the decision in Gobinda Chandra Shaha and Another v. Dwarka Nath Pattita no doubt support, Mr. Mahajans contention that the endorsement of "refusal" is required to be proved and that a letter returned by the postal authorities as having been refused does not justify the presumption that the refusal was made by the addressee. The dispute in the case was confined to the particular date on which the notice to quit u/s 106 of the Transfer of Property Act was served upon the defendant, and the ultimate decision was that the endorsement of refusal made by the postal authorities on the cover was not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the date of the endorsement. The case thus contains no final decision that the endorsement, such as it was, could not be taken onto consideration, unless the postman was examined.

Directly the matter came up for decision of the same Court in Nirmalabai Debi v. Provat Kumar Basu Reliance on Gobinda Chandra Shaha and Another v. Dwaraka Nath Pattita was placed in support of the contention that since the registered letter had come back, the presumption that it had been delivered in due course to the addressee was rebutted and since the postman had not been examined to prove the endorsement of refusal, there was no evidence that the letter had been tendered to the addressee. The argument was not accepted by Chakravatti, J., and it was held that where a notice addressed to a person and sent by registered post is returned to the sender with an endorsement "refused" made by the postman, the notice would be presumed to have been duly served upon the addressee without the examination of the postman or other evidence regarding tender and refusal.

The next decision relied upon by Mr. Mahajan, Jagannath Brakbhau v. J. E. Sassoon & Others was given before section 27 of the General Clauses Act was enacted and is, therefore, not of much assistance. A contrary view was, however taken by the same Court in Aga Gulam Husain v. Sir Albert David Sassoon and again in Baluram Ramkissen and Others v. Bai Pannabai and Another. In this last case a summons was sent by registered post addressed to the defendant in accordance with the provisions of Order V, rule 25, of the CPC and the cover was

returned with the endorsement "refused to take". It was held that as it appeared that the cover was properly addressed to the defendant and had been registered, duly stamped and posted, the Court was entitled to draw the inference indicated in section 27 of the General Clauses Act and to hold that there was sufficient service.

The decision in *Butto Kristo Roy v. Gobindaram Marwari* cannot be regarded as an authority for the contrary view, because it simply follows the above quoted remarks in *Gobinda Chandra Shaha and Another v. Dwaraka Nath Pattita* and contains no independent discussion. Moreover, in this case also, the point was not material for final decision of the case. This is apparent from the following observation of Chatterji, J., at page 547 :

"But even assuming that this notice was served on the plaintiffs it does not improve the defendants position at all."

For the reasons already stated, I am of the view that where a properly addressed registered letter is received back with the endorsement "refused" made by the postman, the letter may be presumed to have been refused by the addressee, even without examination of the postman or other evidence regarding tender and refusal. Undoubtedly, the presumption is one of fact and rebuttable; it can never be regarded as conclusive. I would, therefore, answer the first question in the affirmative. The second question could arise only if the answer to the first had been in the negative. Mr. Mahajan lastly submits that the orders of the Tribunal dated 27th October, 1950, refusing to restore the appeal dismissed for default be quashed in exercise of the powers of this Court under article 227 of the Constitution. It is argued that the order was based on the wrong notion that the Appellate Tribunal the appeal dismissed for default and that the Tribunal had, therefore, refused to exercise jurisdiction vested in them by law. The matter, in my opinion, cannot be gone into because of there being no proper petition before us in this connection. In the application dated 12th December, 1952, with the heading "Petition u/s 66 (4) of India", the relief claimed is stated as follows :

"..... that the statement of case submitted by the Appellate Tribunal be referred back to them with the direction that a reference to the miscellaneous application aforesaid and the Tribunal's order thereon be included in the statement of case which should be returned to this Hon'ble Court with those additions thereto and the documents referred to in para. 11 above."

The respondents, therefore, have had no notice of the fresh case sought to be made out by the assessee during arguments. The assessee may, if so advised, present a fresh application for the purpose. This application of his stands dismissed. In view of the peculiar circumstances of the case no order is made as to costs.

Reference answered accordingly.