
(1975) 07 CAL CK 0037
In the Calcutta High Court

Bhagwan Devi Saraogi and Others

APPELLANT

Vs

Income Tax Officer, "E" Ward and Others

RESPONDENT

Date of Decision : 14-07-1975

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 148

Citation : (1979) 118 ITR 906

Hon'ble Judges : A.N. Sen, J

Bench : Single Bench

Advocate : Advocate General, for the Appellant; B.L. Pal and Ajit Sengupta, for the Respondent

Judgement

A.N. Sen, J.—On the 22nd of February, 1973, the ITO, "E" Ward, Dist. 1(2), Calcutta, issued the following notice u/s. 148 of the IT. Act, 1961.

"Notice u/s 148 of the Income Tax Act, 1961.

Income Tax Officer, Dist, 1(2)/K-Ward, 18, Rabindra Sarani, Calcutta-1. Dated the 22-2-1973.

To, Smt. B. D. Saraogi and others, 2A, Girish Avenue, Calcutta.

Whereas I have . reason to believe that your income chargeable to tax for the assessment year 1965-66 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

I therefore propose to assess the income for the said assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your income in respect of which you are assessable for the said assessment year.

This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, West Bengal IV.

(Sd/). income tax Officer, "E" Ward, Dist. 1(2), Cal."

2. The validity of the said notice has been questioned in this writ proceeding.

3. Various grounds have been taken in para. 10 of the petition.

4. Learned Advocate-General appearing in support of this application has stated before me that although various grounds have been taken in the petition, he will attack the validity of the notice only on two grounds, namely, (1) the notice is invalid as the notice does not indicate or mention whether B.D. Saraogi and others is a firm or HUF or association of persons, and (2) the sanction of the Commissioner is mechanical and in giving the sanction the Commissioner has not applied his mind. The learned Advocate-General has further stated that although he is not pressing the other grounds in this petition, it should not be considered that the other grounds are abandoned or are being given up by the petitioner. According to the learned Advocate-General, these two grounds are sufficient for the purpose of the disposal of this application and in that view of the matter he has confined his arguments only to these two grounds. The learned Advocate-General has fairly stated that ground No. 1, namely, that the notice is invalid has not been specifically taken in the petition. It is, however, his contention that although the said ground has not been taken specifically in the petition, he is entitled to urge that ground as the said question is a pure question of law and does not require any investigation of facts and the said question goes to the very root of the matter. In support of his submission that he is entitled to raise this ground without taking the ground specifically in the petition, the learned Advocate-General has relied on a number of decisions of the Supreme Court and also of this court.

5. The learned Advocate-General has drawn my attention to Section 2(31) of the Act which defines person. He has also drawn my attention to Section 2(35) of the Act which defines principal officer. He has referred to Section 282 and to the provisions contained in Sub-section (2)(c) of that section and also to Section 148 of the Act. The learned Advocate-General has argued that the notice is a statutory requirement and in the absence of a valid notice the ITO does not acquire any jurisdiction to start reassessment proceeding. It is the argument of the learned Advocate-General that a valid notice goes to the very root of the matter and is the basic requirement under the statute and the service of a valid notice is essential for assumption of the jurisdiction and power of re-opening an assessment. The learned Advocate-General has argued that in the instant case the notice must be considered to be invalid for the following reasons,

(a) The notice is addressed to Smt. B.D. Saraogi & Ors. It is not stated in the notice apart from B.D. Saraogi which other persons are being addressed in this notice.

(b) It is also not stated in what capacity Smt. B. D. Saraogi and others were being served with the notice. It is not stated whether Smt. B. D. Saraogi and others were being served as an association of persons or otherwise and it is also

not stated whether Smt. B. D. Saraogi was being served as principal officer of the said association of persons or whether she was being served only as a member thereof or in any other capacity.

(c) It is nowhere stated as to which persons constituted the said association.

(d) The notice does not at all indicate that the notice was being, addressed to an association of persons.

6. The learned Advocate-General contends that because of the aforesaid defects in the notice, the notice in the instant case must be considered to be invalid and illegal. In support of his contention the learned Advocate-General has relied on the following decisions (1) Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others, , (2) SEWLAL DAGA Vs. COMMISSIONER OF Income Tax, CALCUTTA., , (3) Shyam Sundar Bajaj Vs. Income Tax Officer, "A" Ward and Others, , (4) Unreported decision of the Division Bench of this Court in Income Tax Ref. No. 217 of 1973 Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, .

7. The learned Advocate-General has submitted that the decision of the Division Bench in the case of Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, indeed concludes the question involved in the present proceeding. The learned Advocate-General has further argued that as the question relates to lack of jurisdiction on the part of ITO, there cannot be any question of waiver on the part of the petitioners and even consent by the petitioner would not confer any jurisdiction on the part of the ITO. The learned Advocate-General has next contended that the facts and circumstances of the case will clearly go to show that the sanction by the Commissioner has been purely mechanical and the Commissioner has not applied his mind to this aspect at all. The learned Advocate-General has commented that the Commissioner has merely acted as a rubber stamping authority and it is the comment of the learned Advocate-General that if the Commissioner had properly applied his mind, the Commissioner would undoubtedly have detected these defects. The learned Advocate-General further comments that the records would undoubtedly have shown that the Commissioner had carefully applied his mind to the question, if the Commissioner had in fact applied his mind. The learned Advocate-General has argued that it is well settled that if the Commissioner does not apply his mind and grants the sanction mechanically, there is no valid sanction by the Commissioner in the eye of law and the notice under such circumstances must be considered to be bad. In support of this submission the learned Advocate-General has referred to the decision of the Supreme Court in the case of Chhugamal Rajpal Vs. S.P. Chaliha and Others, and also to the decision of the Supreme Court in the case of Union of India and Others Vs. Rai Singh Deb Singh Bist and Another, .

8. Mr. B.L. Pal, learned counsel appearing on behalf of the revenue, has contended that the notice is valid and in any event it is not open to the

petitioners to raise the contention that the notice is not valid. He has drawn my attention to the reply sent to the said notice which is dated 24th March, 1973, and is annex. "G" to the petition. Referring to the said reply, Mr. Pal has argued that the said reply clearly goes to indicate that the petitioners knew to whom the notice was addressed and that it was addressed to an association of persons and the petitioners did not raise any objection to the validity of the notice on that ground. Mr. Pal argues that the only objection of the petitioner was that there was no jurisdiction for reopening the assessment as the conditions precedent to the assumption of jurisdiction by issuing the notice were not satisfied, but the petitioners made no grievance with regard to any defect in the notice. Mr. Pal has contended that the decision of the Supreme Court and also of this court relied on by the learned Advocate-General turned on the peculiar facts and circumstances of those cases. Mr. Pal has referred to the decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I, Ahmedabad Vs. Bhanji Kanji's Shop, . Mr. Pal has also relied on the decision of the Supreme Court in the case of PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF INDIA AND OTHERS. (AND OTHER CASES)., in support of his submission that the petitioners cannot invoke this jurisdiction and he has placed particular reliance on the following observations at page 593 :

"It was only after our decision in Bidi Supply Co. Vs. The Union of India (UOI) and Others, was pronounced on March 20, 1956, that these petitioners woke up and asserted their alleged rights, the Amritsar group on April 20, 1956, and the Raichur Group on November 5, 1956. If they acquiesced in the jurisdiction of the Income Tax Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of this court under article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of this court."

9. In my opinion, the notice in the instant case must be considered to be invalid. In the case of Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others, , the Supreme Court observed at p. 392 ;

"The argument is that the service of the requisite notice on the assessee is a condition precedent to the validity of any reassessment made u/s 34 ; and if a valid notice is not issued as required, the proceedings taken by the Income Tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. In our opinion, this contention is well-founded. The notice prescribed by Section 34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid, then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void."

10. These observations of the Supreme Court were quoted in the judgment of S.P. Mitra J. (as his Lordship then was) in the case of SEWLAL DAGA Vs.

COMMISSIONER OF Income Tax, CALCUTTA., . After quoting the above observations of the Supreme Court at p. 409, the learned judge held:

"In view of these clear observations by the Supreme Court, I do not think there is any scope for any further argument in this matter. The notice which was issued and served in the instant case was obviously invalid and the proceedings before the Income Tax Officer were, consequently, illegal and void. The service of notice on the assessee was a condition precedent to the assumption of jurisdiction by the Income Tax Officer u/s 34. No consent can confer jurisdiction upon a court if the court has no jurisdiction. The failure to give the requisite notice deprives the Income Tax Officer of his jurisdiction to assess u/s 34. "

11. In the case of Shyam Sundar Bajaj Vs. Income Tax Officer, "A" Ward and Others, , the validity of a notice more or less on similar grounds came to be questioned in a writ petition filed in this court. Sabyasachi Mukhar Ji J. in his judgment referred to the decision of SEWLAL DAGA Vs. COMMISSIONER OF Income Tax, CALCUTTA., , and held at p. 320 :

"In the instant case as in the aforesaid decision the notices did not state that they were being served on the petitioner in any particular capacity. From that point of view the notices are liable to be quashed ."

12. This aspect of the matter, to my mind, appears to be concluded by the decision of the Division Bench in the case of Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, . The notice which came up for consideration before the Division Bench in Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, , was more or less similar and it is necessary to set out the said notice.

"Notice u/s 148 of the Income Tax Act, 1961, III(2)/762-a/A Income Tax Officer, III(2) Dated the 8th January, 1963.

To,

Smt. Rama Devi Agarwalla & others, 3, Tarachand Dutt Street, Calcutta.

your income

Whereas I have reason to believe that ----- in the income of the A.O.P.

respect of which you are chargeable/assessable to tax for the assessment year 1947-48, has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961 :

1. therefore, propose to assess/reassess/recompute the income/less depreciation allowance for the said assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice,

your income a return in the prescribed form of-----in respect, of

the income of the A.O.P. which you are assessable for the said assessment year.

2. This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax......./the Central Board of Revenue.

Income Tax Officer, A-Ward Dist. III(2), Cal. "

13. It will appear from the said notice that the notice was addressed to Smt. Rama Devi Agarwalla and others without mentioning in what capacity the said notice was issued to them, though in the body of the notice, it appears, the words "A.O.P" were in the notice. Challenging the validity of the notice before the Division Bench similar arguments were advanced on behalf of the assessee.

14. The Division Bench held (p. 264) :

"In the facts and circumstances of the case and in the light of the law as cited above, the contentions of Mr. Pranab Pal cannot be stated to be without substance. From the notice in this case it cannot be ascertained who is the assessee. Further, it cannot be ascertained whether the service is being effected as prescribed by Section 282 of the Act on the persons addressed in their capacity as principal officers or members of an association. No doubt, the words A.O.P. appear in the body of the notice but there is nothing in the notice by which the assessee can be connected with this association. Lastly, from the language of the notice it is also not clear whether the association is sought to be assessed or the addressees. If it is presumed that it is the association which was sought to be assessed, there is no indication in the notice as to the particular item of business or activity regarding which the fresh assessment was sought to be made."

15. As I have already observed in the instant case the notice does not even mention A.O.P. On the basis of the aforesaid decisions I must, therefore, hold that the notice in the instant case is invalid and on the basis of the invalid notice the ITO does not acquire any jurisdiction to reopen the assessment and to proceed with the reassessment proceeding. The failure to issue a valid notice deprives the ITO of the jurisdiction conferred on him under the Act and the proceedings taken by the ITO in pursuance of an invalid notice must necessarily be illegal and void. In this view of the matter, I do not consider it necessary to decide the further question whether the sanction given by the Commissioner in the instant case was mechanical or not.

16. It is undoubtedly true that this point of invalidity of the notice has not been specifically taken in the petition. This question, however, is a pure question of law and the question turns on the interpretation of the notice itself and does not require any investigation into any question of fact. The question of law clearly goes to the very root as the point relates to the question of jurisdiction of the authority concerned. As the question is one of pure law and raises the vital question of jurisdiction of the authority concerned to reopen the assessment, I am clearly of the opinion that the petitioner is entitled to urge this question at

the hearing of the petition. If the authority concerned does not acquire jurisdiction in the absence of a valid notice being served, the entire proceeding will be without jurisdiction and void, and even consent on the part of the petitioner would confer no jurisdiction on the ITO. There cannot, therefore, be any question of any waiver.

17. The decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I, Ahmedabad Vs. Bhanji Kanji's Shop, is of no assistance in the facts and circumstances of this case. In the said case the question of validity of the notice did not come up for consideration at all. The said case was concerned with the question of service of an otherwise valid notice. The decision of the Supreme Court in the case of PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF INDIA AND OTHERS. (AND OTHER CASES)., , relied on by Mr. Pal, to my mind, has no application to the facts and circumstances of this case. The facts and circumstances of this case clearly go to indicate that there has been no acquiescence on the part of the petitioner in the jurisdiction of the ITO. The exercise of the power conferred on the court under Article 226 rests undoubtedly in the discretion of the court and in exercising the discretion the court in appropriate cases takes into consideration the conduct of the parties. Apart from the question that there has been no acquiescence in the jurisdiction of the ITO, I am further of the opinion that any amount of acquiescence on the part of the petitioner would not have conferred any jurisdiction on the ITO, if the ITO lacked jurisdiction for failure to serve a valid notice in accordance with law. The validity of a notice cannot be tested or judged in the light of the conduct of the parties concerned. If the notice itself is otherwise invalid or bad in law, the invalidity or illegality of the notice cannot be cured by any act of the assessee to whom the said notice is issued. The legal effect remains that if no valid notice has been issued and the notice issued is illegal and invalid, the entire reassessment proceeding is without jurisdiction and is void and illegal. In the case of Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, , it appears that a similar argument was advanced on behalf of the revenue. The Division Bench repelled the said contention and held (p. 264):

"It does not appear to us that this decision of the Supreme Court is an authority for the proposition that if a statutory notice u/s 34 of the Indian I.T. Act, 1922, and/or u/s 148 of I.T. Act, 1961, is ambiguous or defective or otherwise invalid, the same can be cured by taking into account and/or looking into other documents whereby such defects can be rectified and/or omissions can be filled in. Mr. B.L. Pal did not cite any other authority on this point.

In this view of the matter, we do not accept the contentions of Mr. B. L. Pal and we hold that in the instant case the notice was invalid and that there was an illegality in the issue of the notice. We also hold that the issue of this notice being illegal and the notice being invalid, the ITO had no jurisdiction to proceed thereunder and the assessment which has followed therefrom is also necessarily illegal."

18. The act of reopening sought to be done without jurisdiction can be properly challenged in a writ petition.

19. This rule is, therefore, made absolute. The impugned notice is quashed and the respondents are restrained from taking any action on the basis of the said notice. Assessment, if any, made on the basis of the said notice is also clearly illegal and void and without jurisdiction and the same is also quashed. There will be no order as to costs. Operation of the order will remain stayed for a period of six weeks.