(1965) 02 CAL CK 0013

In the Calcutta High Court

Case No : Income Tax Ref. No. 80 of 1956

B.K. Gooyee APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 05-02-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 10
Income Tax Act, 1922 — Section 22, 22(2), 34, 34(1), 5

Citation : AIR 1966 Cal 438

Hon'ble Judges : S. Datta, J;C.N. Laik, J

Bench : Division Bench

Judgement

Datta, J.—The facts of this Reference lie in a very narrow compass.

2. On the 6th flay of March 1951 a notice by registered post was issued by the Income Tax Officer u/s 34 of the Income Tax Act on the ground that certain incomes had escaped assessment. The said notice was served on the lawyer for the assessee. On receipt of the said notice by the lawyer, the assessee filed his Return, and thereafter an assessment was made by the Income Tax Officer upon the basis of the said notice u/s 34. Thereafter, the assessee being dissatisfied with the order, took the matter to the Appellate Assistant Commissioner where for the first time the assessee took the point that the notice u/s 34 was bad in law inasmuch as it did not bear the signature of the Income Tax Officer, for a proper notice u/s 34 is a condition precedent in the exercise of jurisdiction by the Income Tax Officer

3. It transpired before the Appellate Assistant Commissioner that the Income Tax Officer had taken permission of the Commissioner of Income Tax before issuing notice u/s 34 in compliance with the mandatory provisions of one of the sub-sections of the same section. It further transpired that the office copy of the same notice was not signed by the Income Tax Officer. In these circumstances the Appellate Assistant Commissioner negatived the contention of the assessee. This matter, however, did not rest there. The assessee look the matter to the

Tribunal The Tribunal, again, affirmed the order of the Appellate Assistant Commissioner on this point.

4. Thereafter, an application u/s 66 (1) was made, and this question was referred to us.

5. The relevant provisions of the Income Tax Act are as follows:--

Section 34 (1) (a) If the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profit or gains chargeable to Income Tax have escaped assessment for that year, or have under-assessed, or assessed at too low a rate, or have been made the subject of excessive reliefs under Act or excessive loss or depreciations, allowance has been computed, or

(b) Notwithstanding there has been no omission or failure as mentioned in Clause (a) on the part of the assessee the Income Tax Officer has in consequence of information in his possession reason to believe that income profits or gains chargeable to Income Tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed. He may in cases falling under Clause (a) at any time within 8 years and in cases falling under Clause (b) at any time within 4 years of the end of that year, serve on the assessee, or if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section 2 of Section 22 and may proceed to assess, re-assess such income, profits or gains or re-compute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notices were a notice issued under that sub section."

Section 22(1). The Income Tax Officer, shall, on or before the first day of May in each year, give notice, by publication in the prescribed manner requiring every person whose total income during the previous year exceeded, the maximum amount which is not chargeable to Income Tax to furnish within such period not being less than 60 days as may be specified in the notice, a return, in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year provided that the Income Tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons.

(2) In the case of any person whose total income is, in the Income Tax Officer''s opinion, of such an amount as to render such person liable to Income Tax, the Income Tax Officer may serve a notice upon him requiring him to furnish, within such period, not being less than 30 days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth

(along with such other particulars as may be provided for in the notice) his total income and total world income during the previous year provided that the Income Tax Officer may in his discretion extend the date for the delivery of the return.

Section 65(1)--A notice or requisition under this Act may be served on the person therein named either by post or, if it were summons issued by a Court, under the CPC 1908 (V of 1908).

(2)--Such notice or requisition may, in the case of a firm of Hindu undivided family, be addressed to any member of the firm or to the manager or any adult male member of the family, and, in the case of any other association of persons, be addressed to the principal officer thereof."

The relevant provisions of the CPC are as follows:

"Order 5, Rule 3--Every such summons shall be signed by the Judge or such other person as ne appoints and shall be sealed with the seal of the Court.

Order 5 Rule 10--Mode of Service: Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court."

6. The word ''notice'' carries according to Oxford Concise Dictionary meaning "intimation, intelligence, warning", the words ''give notice'', ''have notice'' mean "formal intimation of something or instructions to do some thing". Hence, according to its ordinary English meaning a notice need not be in writing. In the case of Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar, the Supreme Court held inter-alia, that a verbal notice was sufficient to fulfil the requirement of the proviso to Section 35(1). In the case of Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, , His Lordship Dayal, J. who delivered the judgment after contrasting the pro vision of Sub-section (1) and Sub-section (2) of Section 14 of the Arbitration Act of 1940 observed, inter alia, that "The difference in the provisions of the two sub-sections with respect to the giving of notice is significant and indicates clearly that the notice which the Court is to give to the parties of the filing of the award need not be a notice in writing. The notice can be given orally."

7. It follows from these considerations and decisions that if there is no express provision or provision by necessary implication, that the notice must be in writing and writing only, it is sufficient if a verbal notice is given.

8. It is for this reason that the legislature when it thinks in its wisdom that a written notice should be given makes provision in or one or more of the sections of the Act itself Section 7 of the Public Demands Recovery Act Section 14(1) of the Arbitration Act. Section 6 of the Parsee Marriage and Divorce Act. Section 4(l) of the Revenue Recovery Act, Section 106 of the Transfer of Property Act. Section 37(1) of the Gift Act, Section 41 of the Expenditure Tax Act, Section 82 of the Estate Duty Act are illustrations of this class. The Legislature may again

provide for written notice in the Rules. Rule 20 of the Public Demands Recovery Act is an illustration of the class. The legislature may again leave the matter to the discretion of the executive authorities, who may by framing rules require a written notice. Rule 18 of the Income Tax Act is an illustration of this class. The Legislature may again do it by prescribing a form.

9. Hence, it is necessary to consider firstly whether Section 34 requires a notice in writing. It was at one stage conceded on behalf of the Revenue that a notice u/s 34 must be in writing. It is however difficult to say in view of the subsequent arguments whether the revenue had stuck to the same concession. Be that as it may, it is clear that the words "has reason to believe" in Section 34 (1) suggest the requirement of a written notice, though by itself, it is not decisive. The words "serve on the assessee" in Section 34 indicates the necessity of a written notice. The paragraph after clause (b) in Section 34 incorporates by reference the requirements of a notice u/s 22 Clause (2). Section 22 provides inter alia "may serve a notice" and "not being less than thirty days as may be specified in the notice". This again lends support to the view that a notice u/s 22 must be in writing. Therefore, in my view, Section 34 (1) makes it incumbent upon the Income Tax Officer to give a notice in writing.

10. The Legislature may again not only require that notices should be in writing but further stipulate that such notices in writing must be under the signature of the person or officer issuing it or sending it out of his agent. This is sometimes provided in one or more sections of the Act itself. Section 106 of the Transfer of Property Act is an illustration of this class. This may again be done under the rules made under the Act. Rule 2 of the Public Demands Recovery Act is an illustration of this class. This may again be done by forms prescribed under an Act or the rules made thereunder.

11. It is now necessary to consider whether the Legislature or the rules made under the Act require that the notice u/s 34 (1) must not only be in writing but also bear the signature of the Income Tax Officer.

12. Section 34 provides inter alia that ''"He (the Income Tax Officer) .....serve on the assessee a notice ....."

13. The word ''serve'' in Section 34 at once attracts Section 63 (1) and consequently in cases "where it is served as if it were a summons" the provisions of Order 5 Rule 10 of the CPC are attracted.

14. It is a matter of common knowledge that the Judge does not serve the summons or notice. Therefore, he cannot sign on the summons when it is delivered or lendered. It is signed by the Judge or an officer so authorised, when the summons is prepared in the office under Order 6 Rule 6 (3) of the Civil Procedure Code. Therefore in a way it was redundant for the legislature to specifically mention that the summons shall bear the signature of the Judge in Order 5 Rule 10 when it had already commanded that the Judge shall put the signature on the summons in Order 5 Rule 1 Clause 3. In my opinion it has been

mentioned both in Order 5 Rule 1 and Order 5 Rule 10 with the object of emphasising that the signature must not only exist before the sending out of the summons but also at the time when it reaches the hands of the defendant or the respondent, as the case may be, for the signature of the officer together with the seal of the Court or may be without it is the hall mark of genuineness or proof or guarantee that it was issued by the Judge from the Court. If it is originally put but is effaced before it is served, it would not be a guarantee of its genuineness.

15. A notice u/s 34 cannot be issued mechanically or as a matter of routine, for it seeks inter alia to disturb the assessment already made and finalised. Hence, it imposes upon the Income-lax Officer to apply his mind to the matter before seeking to unsettle the matter to the detriment of the assessee. The Income Tax Officer must satisfy that he has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary for this assessment for that year, that income, profits or gain chargeable to Income Tax have escaped assessment for that year or have been under assessed or assessed at a too low a rate or have been made the subject of excessive relief under the Act or excessive loss or depreciation allowance has been computed. The foundation of the jurisdiction of the Income Tax Officer to disturb the earlier assessment is not circumscribed only to the grounds related above. The Income Tax Officer in the alternative must satisfy that in consequence of information in his possession, he has reason to believe that income, profits or gains chargeable to Income Tax has escaped assessment for any year or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act or that excessive loss or depreciation has been computed. These again do not give him jurisdiction to issue a notice. He must satisfy himself that it is within a period of eight years in the first class of case and within a period of four years under the second class of case. It is only when these two conditions are satisfied that the Income Tax Officer is competent to issue a notice u/s 34. The signature along with the seal below the notice or may be without it would be a guarantee beyond doubt that the Income Tax Officer had exercised his mind over the points mentioned in Section 34 (1). If the notice does not bear his signature it may be that it was issued from his office by mistake or it may be that he had not applied his mind to the points involved u/s 34. Therefore, in my opinion on a consideration on the second part of Section 63 (1) read with Order 5 Rules 1 and 10, the signature on a notice is not only necessary but an integral part of the notice.

16. If the designation Income Tax Officer is without the signature it cannot be said that the notice was by "the Income Tax Officer." The designation by itself means nothing. It may refer to any Income Tax Officer. If the District is mentioned it may not be possible to identify the Income Tax Officer. If the District is mentioned along with the date it may be possible to identify the Income Tax Officer. Even then, there is however the possibility that the Income Tax Officer may disown the responsibility of having given the notice or issued the

notice or served the notice on the assessee. Hence, in my opinion, again on this reasoning it is incumbent upon the Income Tax Officer to place his signature on the notice.

17. Section 84 requires that it must contain all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22.

18. Section 22 clause (1) expressly pro-vides for a written notice. The words "notice by publication in the press and by publication in the prescribed manner" make it abundantly clear.

19. It does not however expressly or explicitly require the signature of the Income Tax Officer on the notice. The relative form made under Rule 18 of the Income Tax Rules specify the following things after the body of the notice:

income tax Officer Address Date of publication of the notice.

20. The Income tax Officers are appointed u/s 6 of the Income Tax Act. Section 2 Clause (7) defines Income tax Officer which "means" a person appointed to be an Income Tax Officer u/s 5." The words "Income tax Officer" in the form is vague and does not indicate the person. It becomes definite and points out the person when the Income Tax officer puts his signature. Hence, the words "income tax Officer" in the notice u/s 22 (1) require the signature of the Income Tax Officer.

21. Section 22 (2) provides that the In-come tax Officer "may serve a notice." The word "serve" in Section 22 (2) brings in the necessary element of a signature by the Income tax Officer on the notice. Hence, the signature becomes a part of the notice.

22. A notice u/s 22 (2) which initiates the assessment proceeding requires a signature.

23. A notice u/s 34 inter alia unsettles the assessment already made, a matter having more far reaching effect on the assessee than Section 22 (2). It stands to reason that Section 34 should equally require the signature of the Income Tax Officer.

24. In my opinion, there is another approach to the problem which was not referred to at the time of arguments.

25. Section 34 provides that "He (meaning the Income Tax Officer) .... serve on assessee. ..... a notice". The word "income tax Officer", means the person appointed to be an Income Tax Officer u/s 5. If the words "income tax Officer" refer to the person appointed to be an Income Tax Officer it must inevitably lead to the conclusion that the notice must bear the signature of that person otherwise the notice will not be by the person who was appointed as the Income Tax Officer

26. In this connection reference was made to the form of a notice given u/s 34 in

the Income Tax Manual at p. 496. The form ends with the words ''income tax Officer'' on the right hand side and on the left hand side there is a circle with the word ''Seal''. This form appears in the chapter or part which begins with the word ''Notes'' on the Indian Income Tax Act, 1922. The rules made under that Act and statutory provisions and orders concerned with the imposition of Income Tax as compiled upto 30th September, 1947. The form of the notice u/s 34 is preceded by the following words. "The notice u/s 84, i.e., (I. T. 90) is not a prescribed form but may be in the following form." Section 5 (8) provides that all officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue. Therefore, it is necessary to consider whether this form is in the nature of an order, instructions or directions. In my opinion though it appears in a part which is headed notes, it is clear that it is an order or instruction or direction made by the Central Board of Re-venue which is expected to be followed by the Income Tax Officer. The notice in the present case is also on the same terms and in the same form.

27. The next question for consideration is whether the breach of the order instruction or direction makes it invalid or it is only a matter between the Central Board of Revenue and the Officer concerned so that the Central Board of Revenue may only take such disciplinary action or otherwise as they may think fit against such officer without in any way affecting the assessment or re-assessment. In my view having regard to the word of Clause 5 of Section 5, it is a matter as between the Central Board and the delinquent officer. The Central Board may or may not take steps for the omission of the Income Tax Officer. The assessee cannot take advantage of its breach by the Income Tax Officer.

28. Therefore the form in the Income Tax Manual does not make it obligatory upon the Income Tax Officer to place his signature in the notice so that its breach may be taken advantage of by the assessee.

29. Hence even though the form in the Income Tax Manual is not helpful to an assessee, the reasons mentioned before make the signature of the Income Tax Officer on the notice u/s 34 an essential and/or integral and/or inseparable vital part or requirement of such a notice and consequently the notice u/s 34 must be signed by the Income Tax Officer and it must bear the signature of the Income Tax Officer when it is served as if it were a summons. In my opinion if this conclusion is correct, as it is, it necessarily follows that the notice sent by post must likewise be signed and hear the signature of the Income Tax Officer.

30. It is now necessary to consider the effect of the omission on the part the Income Tax Officer concerned to put his signature in a notice issued by Mm u/s 34 or the Income Tax Act.

31. The language of Section 34 prime facie suggests that no Income Tax Officer can proceed to re-assess on the grounds mentioned in Section 34 without issuing a notice to the assessee in terms of the provisions of Section34.

32. In the case of Commr. of Agri. Income Tax v. Sultan Ali, reported in (1951) 20 ITR 482, Calcutta High Court had occasion to consider Section 34 of the Bengal Agricultural Income Tax Act. 1944 which substantially corresponds with Section 34 of the Indian Income Tax Act. In that case, a notice was given to the assessee u/s 22 (2) and in compliance with that notice the assessee made a return and the Income tax Officer assessed the assessee u/s 34. In those circumstances, the question arose whether the assessment was a valid assessment u/s 34 or not. The Privy Council (Sic) held that the assessment was bad for want of a notice u/s 34.

33. In a Bombay case, Commissioner of Income Tax, Bombay City I Vs. Ramsukh Motilal, Bombay, the notice u/s 34 (sic) though the Section required that 30 days time should he given. Nonetheless the assessee appeared, filed his return and was assessed. In these circumstances, a bench of the High Court presided over by Chagla C. J. held that it was not a mere procedural irregularity but a defect going to the root of the jurisdiction for a valid notice u/s 34 is a condition precedent to the assumption of the jurisdiction by the Income Tax Officer.

34. In case of Narayana Chetty v. Income Tax Officer AIR 1969 SC 218 at p. 215, Gajendragadkar, J. as he then was, who delivered the judgment of the court laid down the general law on the subject in these words:

"The notice prescribed by Section 34 cannot be recorded as a mere procedural requirement; if the same 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 proceeding taken by Income Tax Officer without a notice or in pursuance to the notice would be illegal and void."

Consequently, the service of valid notice u/s 34 is a mandatory requisite of assessment on reassessment u/s 34 of the Income Taxi Act going to the root of the jurisdiction

35. Hence, it is now necessary to determine whether the notice in the instant case without the signature of the Income Tax Officer is an invalid notice affecting jurisdiction or is a mere imperfect notice tantamounting to an irregularity.

36. There is no direct case on the point u/s 34 and in fact none was cited before us. In course of arguments however both parties referred to us several decisions, some of which require examination for they may throw light on the precise point before us. In the case of The Commissioner of Income Tax Vs. K.M.N.N. Swaminathan Chettiar, it was held by a bench of the Madras High Court that the omission to state in the notice that it was directed against him as Karta of the family was mere irregularity when the assessee proceeded on the basis that the notice called upon him as karta and filed the return as such and did not agitate the point as to defective notice before the matter reached the Income Tax Tribunal. In the case of COMMISSIONER OF Income Tax, BIHAR AND ORISSA Vs. BANARSILAL RAJGARHIA., the assessment year 1948-49 was clearly specified in

one part of the notice but in another part beginning with the words "Whereas I have reason to believe that your income assessable to Income Tax for the year ending 31st March, 1948 has escaped assessment" a different assessment year was indicated. It was held by the Patna High Court on the facts that as the Income Tax Officer with all intents and purpose issued a notice to re-assess the assessee''s income for the assessment year 1948-49, and it was understood by the assessee and as there was no violation of any condition precedent for the assumption of jurisdiction u/s 34 the obvious clerical mistake in the notice in mentioning the year of assessment did not invalidate the notice or the reassessment proceeding taken in pursuance thereof or the order of reassessment.

37. In the case of Commissioner of Income Tax, Bombay City Vs. Ramsukh Motilal, already referred to. the notice was held invalid for the requisite period of 30 days to file the notice was not correctly stated in the notice. In the case of MESSRS. TANSUKHRAI BODULAL Vs. Income Tax OFFICER, NOWGONG, AND OTHERS., it was held that if the notice u/s 34 does not give prescribed period of 30 days, the notice is invalid. In the case of Sewlal Daga v. Commr. of Income Tax (Central), 68 CWN 715 (Cal) the assessee was liable to be assessed as legal representative of his father who was the Karta of the family but he was described in the notice u/s 34 as M/s. Chandrabhan Johurmull (Karta Sewlal Daga). In these circumstances, their Lordships Mr. Justice Mitter and K. Sen held that the notice u/s 34 was illegal and void.

38. In the case of COMMISSIONER OF Income Tax, KERALA Vs. THAYABALLI MULLA JEEVAJI KAPASI., it was held that if a notice u/s 34 is not properly served, it is also an invalid notice.

39. In my opinion, the cases of Madras High Court, and Patna High Court can be distinguished on facts found there on the ground that there was mere irregularity or clerical mistake.

40. In the present case here was more than a mere irregularity or a clerical mistake For, in my view, a notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice u/s 34, a notice in terms of which is a condition precedent to the assumption of jurisdiction by the Income Tax Officer. It is notice with a body but without a soul. Hence it is an invalid notice and consequently equivalent to no notice.

41. It is now necessary to turn to the cases under the Public Demands Recovery Act which were referred to before us.

42. Rule 2 of Sch. II of the Act dealing with

"Mode of Service provides inter alia that the service of a notice ..... shall be made by delivering or tendering a copy thereof signed by the Certificate Officer or such Ministerial Officer as he authorises in this behalf ....."

43. In the case of Abanindra Kumar Maity Vs. A.K. Biswas, the Certificate Officer

did not put his signature on the notice in his own hand. The notice however bore a rubber stamp signature of the Certificate Officer. It was urged before their Lordships in these circumstances that the notice was invalid and consequentially the proceedings thereunder were void. Their Lordships held that a signature by a rubber stamp does not fulfil the requirements of the Act and was consequently void. In a later case reported in 65 Cal WN 324 a Bench of this High Court had to consider whether a signature by a rubber stamp was sufficient to fulfil the requirements of the Public Demands Recovery Act. Their Lordships held that since there was explicit mention of a a signature in the prescribed form, the provision of Section 220 which provides that a signature includes a "stamp" does not apply to such a case. Hence, their Lordships held that the notice was invalid. In a later case, the case of SETHANI CHHOTI DEBI Vs. UNION OF INDIA AND OTHERS, which was heard by a Bench consisting of Bachawat J. and Chatterjee, J. their Lordships had to consider whether a facsimile signature was sufficient to fulfil the requirements of the Public Demands Recovery Act. Their Lordships after referring to the relative provisions of the General Clauses Act and cases on will, came to the conclusion that a signature can be made by a rubber stamp and need not be in the handwriting of the Officer issuing the notice. In this view of the matter their Lordships dissented from the view expressed in the case of Abanindra Kumar Maity Vs. A.K. Biswas, and preferred to follow the earlier case of Hara Prasad Gain and Others Vs. Gopal Chandra Gain and Others, .

44. It will however, be noticed that all those three cases proceeded on the basis that the requirement of the signature was mandatory and accordingly a condition precedent. The only question which they decided was whether a signature in the handwriting of the Officer issuing the notice or any other authorised person is a sine qua non or whether a signature in a rubber stamp put on the notice complies with the requirements of the prescribed form. Hence, in reality these cases did not directly deal with the point before us but they clearly suggest that where a statute or rule requires that the notice in writing must bear the signature of the officer its absence makes it invalid. Hence these cases lend support to the view expressed by me.

45. It is next necessary to consider whether the omission to place the signature in a notice u/s 34 can be waived by the assessee after filing a return pursuant to the invalid notice and obtaining an order of assessment on the basis of the invalid notice, without challenging the same at any earlier stage of the proceedings before the Income Tax Officer.

46. In the case of Dhirendra Nath Ghorai v. Sudhir Ch. Ghose, a case which raised the question of waiving in relation to Order 21 Order 90 Of the CPC and Section 35 of the Bengal Money Lenders Act. In that case, the general principles regarding waiver in relation to statutory provisions were discussed at some length. It was observed there that this raises the question whether such a sale is a nullity.

"If a provision of statute is only directory and (sic) act in contravention of the provision is manifest and not a nullity. Section 35 of the Act is couched to a mandatory form and it casts a duty on the Court to apply a provision before the same is held. Prima facie the provision is mandatory, at any rate which (sic) has assumed it to be so for the purpose of the appeal."

47. Their Lordships after referring to several decisions and relative observations finally summarised the matter in these words:

"Whether the Court acts without inherent jurisdiction a party affected cannot by waiver confer jurisdiction on it, which does not, whether such jurisdiction is not wanting (sic) a directory provision can obviously be waived. But a mandatory provision can only be waived If It is not conceived with the public interest, but in the interest of the party that waives ft. In the present case, the executing Court has inherent jurisdiction to sell the property ....."

48. In my opinion, it can be said that u/s 34 (sic) conceived in mandatory form In public interest. Hence, in my opinion, there cannot be any question of waiver in respect of a breach of a provision u/s 34.

49. In the case of Commissioner of Income Tax, Bombay City Vs. Ramsukh Motilal, it was suggested that the omission cannot be waived and the point can be taken at any stage of the proceeding. The case of Narayana Chetty, AIR 1959 SC 213 makes it abundantly clear that the notice cannot be waived

50. In this connection greater reliance was placed by the Revenue on the case of Central Potteries Ltd. Vs. State of Maharashtra and Others, , a case under C. P. Berar Sales Tax Act, 1947. In that case it was held that

"..... the proceedings for assessment taken against non-registered dealer without the issue of notice u/s 10 (1) that would be a mere irregularity in the assumption of jurisdiction and the order of assessment cannot be held to be without jurisdiction."

51. Hence, these cases do not militate against the principle that there can be no waiver where the condition precedent for assumption of jurisdiction is not fulfilled.

52. There is a further point for consideration. It was suggested that the point must have been known to the lawyer from the beginning and it was not taken deliberately and fraudulently until the expiry of 8 years and thereby has prejudiced the department. Hence, the asses-see should not be allowed to take advantage of his lawyer''s fraud.

53. There is no evidence that the point was raised fraudulently and deliberately at this belated stage. The facts at the most raise a suspicion.

54. Even assuming that the point was kept in the sleeves deliberately and taken at a time when it will prejudice the department, it cannot confer jurisdiction when there is none.

55. There is a further point for consideration on the assumption that there could

be a waiver of such an invalid notice.

56. The findings are that the advocate received the notice, appreciated the defect in the notice, deliberately did not take the point of invalidity of the notice u/s 34 till the prescribed period of limitation to wit. eight years had expired and that he in fact took it 11 days after the prescribed period of eight years had expired. In these circumstances it was said that the assessee''s lawyer waived the assessee''s right to challenge the irregularity of the notice. In other words, the question for consideration is whether the knowledge of the lawyer and his intentional relinquishment of the right on behalf of his client is sufficient to fasten it on the client himself when he is not aware of the position in law and does not in fact relinquish his right voluntarily with knowledge of the same. In my opinion, no warrant of attorney is worded in such a wide term as to enable a counsel or a lawyer to waive the rights of the client without referring the matter to him. There is no evidence that the matter was referred to the assessee or that he had knowledge of the same. Hence, in my opinion, in law again Mr. Banerjee was not competent to waive the right which his client had.

57. In the result, the answers must be in favour of the assessee. The assessee will get the costs of this application.

Laik, J.

58. In this Reference, the assessment was originally completed on September 23, 1946 u/s 23 (3) of the Income Tax Act, 1922 on a total income of Rs. 10,000 and odd. On February 3, 1951 a notice u/s 34 of the Act was served on the assessee on 8-2-1951, for the encashment of High Denomination Notes, worth Rs. 14,000, in the year of account, calling upon the assessee to file a return, which was done on March 20, 1951.

59. It is contended broadly, on behalf of the assessee, that the notice u/s 34 is not signed by the Income Tax Officer and therefore, the same is altogether bad and the proceedings are void ab initio. The Appellate Assistant Commissioner gave effect to the said contention. As the Appellate Tribunal took the other view the instant reference, at the instance of the assessee, is the result.

60. With these short facts for its foundation, an interesting argument was addressed before us. It is resolutely challenged by Mr. Meyer appearing for the Revenue that there is nothing in Section 84 of the Income Tax Act that the notice is to be signed and that there is nothing specific therein that the notice under the said Section must be in writing. But in my view on the language of the section it cannot be disputed, and in fact, it is rightly conceded by Mr. Meyer, at the end that an oral notice under the said section is insufficient

61. Coming to the Rules under Act and the Forms etc. it is stated that the Income Tax Manual, 10th Edition, was issued by the Central Government and not by the Central Board of Revenue and that also after the amendment of 1948. It contains certain notes on the Act, which include the instructions. Part III of the

said Manual contains instructions (Pages 447 and 449). In my opinion the Notes in respect of Section 34, do not come under the category of instructions or directions within the mean ing of Section 5 (8) of the Act. though they are indeed popularly used and commonly called the instructions. I. T. Form No. 90, which is strongly relied on, is not prescribed by the Rules. If the other Forms (save immaterial exceptions) are scrutinized, it would also appear that in most of the cases, where there occurs the expression "assessee" there is a provision for the signature, but where there occurs the expression "income tax officer", no signature is provided for. Further scrutiny reveals that there is no provision for the Seal in the Act. Even an Order u/s 18-A of the Act, it is argued, does not require to be signed by the Income Tax Officer. On the other hand, it appears that the notice u/s 34 (1B) of the Act is prescribed by Rule 49 but not so, the notice u/s 34. Still one must ask oneself as to whether any principle could be deduced from all these, as there is no logical consistency as to the provisions of signing and non signing, in the Act, Rules, Instruction, Notes, Forms etc., though the Revenue authorities are presumed to act conformably to them.

62. It lias been contended that it is difficult to follow the reasoning of Chakravarti C. J. in the case of R.K. Das and Co. Vs. Commissioner of Income Tax, West Bengal, particularly the place at the top of page 449. But it should be remembered that the general principles in the said case as well as in the case of Commissioner of Income Tax, Bombay City I Vs. Ramsukh Motilal, Bombay, are approved by the Supreme Court in Narayana Chetty''s case (1959) 36 ITR 388: (AIR 1959 SC 213) which also speaks of prescribed notice. Mr. Meyer strongly relies on a Bench decision of this Court, where Bachawat J. (as his Lordship then was) sitting with Chatterjee J. held, in the case of (1964) 61 ITR 473 (Cal) referred to by my learned brother to the effect that even rubber stamp signature was sufficient. The principal reason, which weighed with their Lordships for the said decision, was that the person issuing the notice was identified. It should be stated that the said Division Bench, contrary to the principles of judicial decorum, laid down by the Supreme Court in the case of Mahadeolal Kanodia v. Administrator General of West Bengal, (1960) 8 SCR 678. AIR 1960 SC 938 did not follow another earlier Division Bench decision of this Court in the case of Abanindra Kumar Maity Vs. A.K. Biswas, (also a case of rubber stamp signature) which held that the signature was essential and the rubber stamp signature was not sufficient. Another Bench decision of this Court in the case of Satish Chandra Bhowmior Vs. Union of India, was also cited. No opinion need be expressed on the said decisions, as they do not directly touch the present issue.

63. Mr. Meyer refers to the provisions of signature in many other Statutes referred tp by my learned brother. In my view such reference, in most of the other enactments, would not be of much help. For example, the Public Demands Recovery Act relies on its own rules, whereas the Income Tax Act refers to the Code of Civil Procedure. Similarly, according to Section 94 of the Negotiable Instruments Act, the notice might be oral, which is not so in Section 84. In the Revenue, Recovery Act, the Seal is treated as signature. There is difference again

in some of the Statutes between the service and the giving of the notice.

64. Mr Meyer''s next argument is that if the strict requirement of the signature is insisted upon, serious consequences might follow In certain cases. The said submission, in my view, should not be accepted, on the principle laid down by K. C. Das Gupta and Bachawat JJ. (as both of their Lordships then were) in the case of Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others,

65. If we look at the matter from another aspect, it appears that there is difference in principle as to the notice between Section 35 and Section 34 of the Act. The notice in Section 35 is to be judged from the principle of natural justice, whereas the notice Section 34 creates jurisdiction. The notice u/s 14(2) of the Arbitration Act, cannot be brought in for comparison as the same does not give jurisdiction to the Court and therefore, Section 42 of the said Act is not comparable to Section 63 of the Income Tax Act.

66. Accordingly, my opinion is that the notice u/s 34, of the Income Tax Act 1928, to be a proper, valid and legal notice, requires to be signed by the Income Tax Officer, non-compliance of which would make it bad and all the proceedings started thereafter would be without jurisdiction.

67. Mr. Meyer however, in the last resort contended that in the facts of this case, the assessee in any event, waived the notice. The expression ''waiver'' has a professional meaning. It is true that the notice was duly served and was said to have been received by the assesses, but it is determined on high authority, that the notice u/s 34 (I mean a valid notice) is a condition precedent for the assumption of jurisdiction. A notice u/s 34 is therefore, not merely a procedural requirement. In its absence, it does not become a case of procedural defect. The difference between the cases of want of jurisdiction and those of irregular exercise of jurisdiction, is to be remembered to this context.

68. The notice u/s 34 of the Act is not an executive document, directing something to be done or not to be done. It might be true that everybody understood the notice alright. One might be struck also by the facts that prior sanction of the Commissioner of Income Tax was obtained and that the assessee was not misled by the notice; and the non-signing might be a case of inadvertent omission. Still in my view, it is not a mere irregularity that can be cured. Non-signing of a notice u/s 34 of the Income Tax Act does not come within the formula of an obvious clerical mistake. As the finality of the assessment is one of the main principles to be followed in tax cases and as the re-opening of the assessment u/s 34 is a matter of public policy (though I am not unmindful that it is not a case of fundamental right) and as a right u/s 34 is not intended to be conferred, only for the benefit of the assessee. (though it might dominate and condition the right of the assessee) i.e., it is not a private right, meant merely for individual benefit, there is a prima facie difficulty in my way to hold that there can be waiver of the notice u/s 34 of the Income Tax Act. The subsequent conduct of the assessee is also of no moment.

69. For these reasons the answer given by my learned brother in favour of the assessee along with the order for costs, has my entire concurrence.

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