
(1983) 09 RAJ CK 0020

In the Rajasthan High Court

Case No : Civil Income Tax Reference No. 33 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Girdharilal

RESPONDENT

Date of Decision : 19-09-1983

Acts Referred:

Income Tax Act, 1961 — Section 262, 263, 282

Citation : (1984) 38 CTR 348 : (1984) 147 ITR 379

Hon'ble Judges : S.K. Mal Lodha, J;K. Bhatnagar, J

Bench : Division Bench

Advocate : L.R. Mehta and R. Mehta, for the Appellant; J.P. Joshi, for the Respondent

Judgement

S.K. Mal Lodha, J.—The following question has been referred by the Income Tax Appellate Tribunal, Delhi Bench "A" (for short "the Tribunal ") to this court for answer :

"(1) Whether, on the facts and in the circumstances of the case, the service of the notice on Shri Rawat Singh complied with the requirements of Section 263 that the assessee should be provided a reasonable opportunity of being heard against the proposed order u/s 263 ?"

2. The assessee-respondent is an individual. The assessment year is 1961-62. The assessee-respondent filed a return for the assessment year 1961-62 on June 4, 1965. The assessee had income from a lime kiln business at Banner. He had income from contract for removal of coal ash from Northern Railway, income from trucks and jeeps, income from confectionery business and also income from property and share income from a firm. The return showed an income of Rs. 3,000. No basis for the return was given by the assessee. The ITO completed the assessment on a total income of Rs. 97,511 on March 10, 1966, u/s 143(3) of the I.T. Act (No. XLIII of 1961) (for short "the Act"). The Commissioner of Income Tax (CIT) was of the opinion that the ITO ought to have charged while completing the assessment, interest from the assessee u/s 18A(3) of the Indian

I.T. Act, 1922 ("the old Act" herein) read with Section 217 of the Act. Section 18A(3) of the old Act provided that the assessee should furnish an estimate of its income in advance and also pay Income Tax in advance. The assessee had neither filed an estimate nor paid advance-tax in respect of the assessment year 19.61-62. The CIT was of the opinion that interest was chargeable under the above provision. As the ITO failed to charge such interest, the CIT considered the order dated March 10, 1966, of the ITO to be prejudicial to the interest of the Revenue. He, therefore, initiated proceedings u/s 263 of the Act for revision of the assessment order. The CIT issued a letter dated February 3, 1969, to the assessee asking him to show cause why action should not be taken u/s 263 of the Act for restoring loss to the Revenue caused in the said matter. Show-cause notice was not served and it was received back with the postal remark "left without address". The CIT issued another notice to the assessee fixing February 24, 1968, for hearing. This notice was served on Shri Rawat Singh, who held a power of attorney for the assessment year 1961-62 from the assessee. The power of attorney dated March 31, 1965, in favour of Shri Rawat Singh, is as follows : "Stamp for Rs. 3/-

Before the Income Tax Officer, C-Ward, Jodhpur.

Power of attorney

I, Girdharilal, s/o Trilokchand, hereby appoint and authorise Shri Rawat Singh, I.T.P., to appear before all Income Tax authorities, on my behalf, proceedings for the assessment year 1961-62.

He is authorised to attend, to file applications, seek adjournments, produce books, answer queries, and is authorised to do all those acts, which I am personally authorised to do, in connection with the said proceedings.

His acts, pleadings, arguments, applications and submissions made by him, on my behalf before all authorities, under his signatures, shall be effectively and irrevocably lawfully binding on me.

Barmer 31-8-1965.

Sd/- (Assessee)

I being a qualified practitioner, hereby accept the above appointment.

Sd/- Rawat Singh, I.T.P.

Barmer."

3. The date of hearing fixed on February 24, 1968, was adjourned to February 28, 1968. A notice of this adjournment was served on Shri Rawat Singh. On February 27, 1968, Shri Rawat Singh sent a telegram asking for extension of time for one month on the ground that he was ill and also to enable him to contact the assessee. The CIT fixed the hearing on March 4, 1968, as the action u/s 263 of the Act was to become time-barred on March 10, 1968. Shri Rawat

Singh was asked to produce material evidence in support of the contentions. On March 4, 1968, a telegram was again received from Shri Rawat Singh seeking further adjournment. The contents of the telegram are as under :

"Self confined to bed could not contract assessed. No instructions please serve further communications directly on assessee. However circumstances do (sic) lawfully warrant proposed action which would be illegal pray accordingly Rawat Singh."

4. Having regard to the proceedings that had been taken till then, the CIT was of the opinion that the Income Tax Practitioner for the assessee was trying to drag on the proceedings. It was observed by the CIT that the notice has been served on Shri Rawat Singh, as early as on February 16, 1968, and as such he should have consulted the assessee by March 4, 1968. The CIT did not consider personal service on the assessee necessary. He, therefore, proceeded to decide the matter ex parte. The CIT came to the conclusion that the charge of penal interest u/s 18A(8) of the old Act (Section 217 of the Act) for the assessee's default u/s 18A(3) of the old Act (Section 212(3) of the Act) was mandatory and that the ITO had no discretion to waive or reduce it except to the extent and in the manner provided for in Rule 48/40 of the I.T. Rules, 1922/1962. The CIT by its order dated March 6, 1968, directed the ITO to modify the assessment suitably and levy penal interest chargeable u/s 18A(8) of the old Act/ Section 217 of the Act in accordance with law. An appeal was filed by the assessee to the Tribunal. The Tribunal reached the conclusion by its order dated August 1, 1970, that the notice issued by the CIT has not been properly served and, therefore, the order u/s 263 of the Act cannot be upheld. The reasons given by the Tribunal in support of its order are : (i) that the notice issued by the CIT was not properly served on the assessee ; and (ii) that the power of attorney given by the assessee in favour of Shri Rawat Singh did not authorise him to receive any notice and that at any rate it did not authorise him to receive any notice in proceedings u/s 263 of the Act. In view of the aforesaid reasons, the Tribunal set aside the order of the CIT. The CIT submitted an application for reference u/s 256(1) of the Act stating the question of law arising out of the order of the Tribunal dated August 1, 1970. The Tribunal has referred the aforesaid question.

5. We have heard Mr. Mehta, learned counsel for the Revenue, and Mr. J. P. Joshi, learned counsel appearing for the assessee-respondent.

6. It was contended by Mr. Mehta that the opportunity of being heard was afforded to the assessee-respondent against the proposed order u/s 263 as service of the notice on Shri Rawat Singh was substantial compliance with the requirements u/s 263 of the Act.

7. The material portion of Section 263 of the Act reads as under: "263(1). The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may,

after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.....

(3) Notwithstanding anything contained in Sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court."

8. It may be stated that this section corresponds to Section 33B of the old Act, which, however, did not contain any provision similar to the present Sub-section (3) and the Explanation. There is no room for debate that a notice, as in the case of Section 147 of the Act, is not required to be served on the assessee.

9. It was held in *Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others*, that Section 33B of the old Act does not in express terms require a notice to be served on the assessee as in the case of Section 34 of the old Act and that Section 33B of the old Act merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice u/s 34 cannot, therefore, be applied to a proceeding u/s 33B. Their Lordships agreed with the conclusion drawn by the High Court to the effect that the appellant was given an opportunity of being heard before the *Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others*, was followed in *Commissioner of Income Tax, West Bengal II Vs. Electro House*, wherein it was observed (see head-note) ;

"Unlike Section 34, Section 33B of the Income Tax Act, 1922, does not require any notice to be issued by the Commissioner before he assumes jurisdiction to proceed to revise an order passed by the Income Tax Officer. The jurisdiction of the Commissioner to proceed u/s 33B is not dependent on the fulfilment of any condition precedent. He is not required to give any notice before commencing the inquiry. All that he is required to do, before reaching his decision and not before commencing the inquiry, is to give the assessee an opportunity of being heard and make or cause to make such inquiry as he deems necessary. These requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner."

10. From the aforesaid decisions, it is clear that the CIT is not required to give any notice before taking action u/s 263 of the Act. What is required u/s 263 is that before passing any order, the assessee should be given an opportunity of being heard and make or cause to make such an enquiry as he deems necessary.

11. Section 288 of the Act deals with appearance by an authorised

representative. In other words, Section 288 permits^ the assessee to be represented before an Income Tax authority or the Appellate Tribunal in connection with any proceedings under the Act by an authorised representative. The term "authorised representative" has been denned in Section 288(2) of the Act.

12. Here, it will be relevant to refer to Section 282 which deals with service of notice generally. Sub-section (1) of Section 282 provides that a notice 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.

13. Order III, Rule 2, CPC, deals with recognised agents. Under Order III, Rule 2, it has, inter alia, been provided that a person holding a power of attorney authorising him to make and do such appearances," applications and acts on behalf of such parties, from whom he holds the power of attorney.

14. Order III, Rule 2, CPC, is as follows ;

"2. Recognized agents.--The recognized agents of parties by whom such appearances, applications and acts may be made or done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected, with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts."

15. Order III, Rule 3, CPC, provides for service on recognised agent. A reading of the above rule shows that it provides for the manner of service of the recognised agents. Mr. Mehta made reference to Order V, Rule 12, CPC also, which shows that service is to be effected on defendant in person when practicable, or on his agent. According to this rule, summons must be served on the defendant in person unless he has an agent empowered to accept service in which case it would be enough if it is served on him. On the basis of Order III, Rules 2 and 3, and Order V, Rule 12, CPC, Mr. Mehta submitted that service of notice on Shri Rawat Singh, in the facts and circumstances of the case, was sufficient and that that substantially meets the requirement of opportunity of being heard, as envisaged u/s 263 of the Act. We have already reproduced the power of attorney. It is addressed to the ITO, C-Ward, Jodhpur. According to it, in connection with the assessment proceedings for the year 1961-62, Shri Rawat Singh by virtue of the powers conferred under it, can appear before Income Tax Authorities on behalf of the assessee-respondent. The assessee had authorised him to appear on his behalf to file applications, ask for adjournment, produce books, answer queries, and do all those acts, which he in law is personally authorised to do. The Tribunal was of the opinion that this power was limited for the proceedings

relating to the assessment for the appeal in regard to assessment year 1961-62 and that this power is conspicuously silent as regards acceptance of notice of the proceedings under the Act, which might be issued to the assessee.

16. A controversy was raised by the learned counsel appearing for the assessee-respondent that the words "assessment" or "appeal proceedings" used in the power of attorney are confined to the assessment proceedings or appeal proceedings relating to the assessment year 1961-62 and they do not embrace within their scope the revision by the CIT u/s 263 of the Act. Mr. J. P. Joshi, learned counsel for the assessee, relied on *Moolchand v. Ram Babu* AIR 1961 MP 323, wherein the learned single judge of the Madhya Pradesh High Court had occasion to consider the provisions of Order III, Rule 4 and Order XLI, Rule 1, CPC. A preliminary objection was raised therein regarding the maintainability of the revision which was filed after 45 days without power of attorney. When the revision petition was presented by the advocate signed by him, there was no power of attorney with it. In that connection, it was observed by the learned judge that the revision is not a continuation of the suit, but is altogether a separate proceeding.

17. So far as *Krishnaji Mahadeo Bapat Vs. Wamanrao Balwantrao Shinde and Another*, is concerned, the question arose whether the authority of an advocate in the original court would come to an end if the suit or the proceeding is transferred from one court to a totally distinct court. The learned judge opined that all vakalatnamas and appearances are filed for a particular court and it is for a suit or a proceeding in that court that the advocate is authorised to and obliges himself to appear and that neither the client nor the advocate can be bound by that authority given with reference to a particular court if the proceedings are transferred to a different court.

18. The question for consideration in *K.P. Chaganlal v. CIT* ILR [1955] Hyd 80 was whether the notice u/s 46(1) of the Hyderabad Income Tax Act was validly served upon the assessee ? In that connection, it was observed by the learned judge as follows :

"No assessee as a general rule will ordinarily envisage the reopening of a completed assessment in the same way as a successful party in a civil appeal does not envisage the filing of a review. The vakalatnama should, therefore, be limited to the original assessment, and appeals, if any, pertaining to that assessment till the matter is concluded before the Tribunal. Therefore, the power given to the auditor to represent the assessee did not continue after the assessment is concluded and the cancellation of the registration of the firm is not valid. "

19. In the aforesaid case, reliance was placed on *Shaik Mohammed Jamil v. Musammam Bibi Tufailan* [1921] 63 IC 47 wherein the learned judges of the Patna High Court while considering the provisions of Order III, Rule 5, CPC, held that the ex parte decree could not have been set aside without serving notice upon

the plaintiff. On the other hand, learned counsel for the Revenue submitted that the revision partakes the nature of an appeal. He invited our attention to Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat,

20. Mr. Mehta also placed reliance on Sunder Lal Janeshwar Dass Vs. The Commissioner, Sales Tax, wherein revision u/s 10(3B) of the U. P. Sales Tax Act, 1948, was filed and the limitation for the revision under the said provision commenced from the date of service of the order and the mode of service of the order is prescribed by Rule 77. Rule 77 is a special rule dealing with the modes of service. Rule 70 is a general provision in regard to the communication" of the orders. It was held therein that the lawyer was the agent of the assessee within the meaning of Rule 77 of the Rules and service on him was due service on the assessee within the meaning of Section 10(36) of the said Act and was sufficient to make the period of limitation to run for filing the revision against the appellate order. In view of the language of Section 282(1) of the Act, Sunder Lal Janeshwar Dass Vs. The Commissioner, Sales Tax, being distinguishable, is of no avail to the learned counsel for the Revenue.

21. Our attention was drawn to S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, for showing that a wider meaning should be given to the word "assessment". In that case, there was a rectification of an error and the question was whether the order of assessment and orders making corrections or rectifications are part of the proceedings of assessment. It was held by their Lordships that they are assessment proceedings. This decision cannot be availed of by Mr. Mehta in the case on hand.

22. In this case, we are concerned with the power of attorney dated August 31, 1965, and the question is whether that power of attorney continued even after the assessment order has been passed by the ITO or after the decision of the appeal in respect of the assessment year 1961-62. In other words, the question is whether that power continued to hold good even in the proceedings u/s 263 of the Act. There are certain well-recognised principles in regard to the construction of a power of attorney. Such principles have specifically been stated in Bowstead on Agency (sixth edition), as follows:

"Powers of attorney must be strictly pursued and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction :

1. The operative part of the deed is controlled by the recitals.
2. Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.
3. General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary and only when necessary for that purpose.

4. The deed must be construed so as to include all medium powers necessary for that purpose."

23. It is well settled that the power of attorney given to an agent should be construed strictly and from that power of attorney only such authority which has been conferred expressly or by implication should be taken consideration. Reference may be made to a Full Bench decision of the Nagpur High Court in *Jiwibai v. Ramkuwar Shrinivas Murarka Agarwala* AIR 1947 Nag 17. The power of attorney given to Shri Rawatsingh was in respect of the assessment year 1961-62 and the proceedings contemplated by that power of attorney are assessment proceedings of the assessment year 1961-62 and the proceedings relating to appeal from the assessment order pertaining to the assessment year 1961-62. The authority given by this power of attorney was for the purposes of putting appearances, filing of applications, seeking adjournments, production of account books, answering of queries and all other acts necessary in connection with the assessment proceedings or appeal proceedings relating to the assessment year 1961-62. After completion of the assessment proceedings relating to the assessment year 1961-62 or for that matter after the decision in the appeal relating to the assessment year 1961-62, the assessee could not contemplate any proceedings for revision of the assessment so made u/s 263 of the Act. Giving the proper construction to the power of attorney dated August 31, 1965, we are of the considered opinion that this power did not hold good for the purpose of acting and pleading in the proceedings which were initiated u/s 263 by the CIT as the proceedings for assessment year 1961-62 had already been completed when the assessment order was passed by the ITO. The matter, however, does not stop at that.

24. Section 263 of the Act contemplates "after giving the assessee an opportunity of being heard" and it does not envisage a stringent notice to the assessee like Section 147 of the Act, We have already held above that the power of attorney dated August 31, 1965, did not enure after the completion of the assessment proceedings in respect of the assessment year 1961-62 or after the decision of the appeal against the assessment order, if any. From the statement of the case, it is clear that the letter was issued to the assessee in his name to show cause why action should not be taken u/s 263 of the Act. That letter/notice was not served on the assessee and it was received back with the postal endorsement "left without address". It was, thereafter, that a notice was issued to Shri Rawat Singh fixing the date of hearing as February 24, 1968, which was adjourned to February 28, 1968. In the first telegram, Shri Rawat Singh has clearly stated for extension of time on the ground that he was ill and for the purpose of seeking instructions from the assessee-respondent. In other words, he wanted time to contact the assessee. In the telegram which was received on March 4, 1968, the ground of illness was repeated and the CIT was requested to send further communication to the assessee himself as he had no instructions from him. The power of attorney dated March 31, 1965, did not subsist on the date when the notice fixing February 24, 1968, as the date of hearing was issued

to Shri Rawat Singh, In these circumstances, we are disposed to "think that the service of the notice on Shri Rawat Singh did not meet the requirement of opportunity of being heard as contemplated by Section 263 of the Act. The service of notice on Shri Rawat Singh was not a proper service on the assessee so as to hold that the assessee had opportunity of being heard for the purpose of passing an order u/s 263 of the Act.

25. For the reasons aforesaid, we answer the question referred by the Tribunal in the negative, that is, in favour of the assessee and against the Revenue.

26. There will be no order as to costs.