

(1968) 08 GAU CK 0003

In the Gauhati High Court

Case No : Income-tax Reference No. 3 of 1967

Commissioner of Income Tax

APPELLANT

Vs

Sabitri Devi Agarwalla

RESPONDENT

Date of Decision : 29-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20
Income Tax Act, 1922 — Section 33B

Citation : (1970) 77 ITR 934

Hon'ble Judges : S.K. Dutta, C.J;P.K. Goswami, J

Bench : Division Bench

Advocate : J.P. Bhattacharjee, for the Appellant; S.M. Lahiri and J.K. Barua, for the Respondent

Judgement

P.K. Goswami, J.—This reference involving two applications, one u/s 66(1) of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act") and the other u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the new Act"), is made by the Income Tax Appellate Tribunal, "A" Bench, Calcutta, in respect of the assessment years 1960-61 and 1961-62. The questions which have been referred to us may be set out:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the notices to show cause u/s 33B of the Indian Income Tax Act, 1922, and Section 263 of the Income Tax Act, 1961, for the assessment years 1960-61 and 1961-62 were not validly served on the assessee ?

(2) If the answer to question No. 1 is in the affirmative, then whether the Tribunal was right in holding that the proceedings u/s 33B of the Indian Income Tax Act, 1922, and Section 263 of the Income Tax Act, 1961, were invalid and illegal ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in refusing to direct the Commissioner to pass fresh orders u/s 33B of

the Indian Income Tax Act, 1922, and Section 263 of the Income Tax Act, 1961, after giving the assessee a further opportunity of being heard ?"

2. The facts material for coming to a decision on the above questions may be briefly stated. The assessee, Smt. Sabitri Devi Agarwalla, filed voluntary returns of income for the assessment years 1949-50 to 1958-59 before the Income Tax Officer, "A" Ward, Special Survey Circle IV, Calcutta, on September 30, 1958, and the assessment for those years was completed by the Income Tax Officer on the same date. The returns for the years 1960-61 and 1961-62 are also said to be filed on the dates of the assessment orders. The assessee gave two addresses in her returns, one at P-17, B.L. Pal Avenue, Calcutta, and the other at HA. Haralal Das Street, Calcutta. The Commissioner of Income Tax, Calcutta, considered that the assessment orders for the years 1960-61 and 1961-62 passed by the Income Tax Officer were erroneous and were prejudicial to the interests of the revenue and he issued a letter dated July 24, 1968, calling upon the assessee to show cause why the order for those assessment years should not be revised u/s 33B of the old Act and Section 263 of the new Act, respectively. These notices were attempted to be served by post as well as through an officer of the department, but none could be served on the assessee as it was reported that the assessee was untraced and not known in the addresses given. In this context, the Income Tax Officer in charge, of judicial matters in the office of the Commissioner of Income Tax passed an order on July 25, 1963, to the following effect:

"Shri S.K. Sengupta, Inspector, appears and states that the assessee is not traceable at both the addresses. He is asked to make another attempt to serve the notice on the assessee failing which he is asked to serve it by affixation at both the addresses. "

3. Another order was passed by the same officer on the following day as follows:

"Shri S.K. Sengupta, Inspector, reports that assessee could not be found in spite of his best efforts. So the notices have been served by affixation. Service is valid."

4. There is another order of the same date stating;

"Shri S.K. Sengupta, Inspector, appears and affirm service of show cause notice by affixation at Amratola Street and Harlal Das Street addresses. Services are valid."

5. The matter came up before the Commissioner on 5th of August, 1963, which was the date fixed for hearing in the notices which had been issued to the assessee, and as none appeared on that date, the case was posted for the next day when the Commissioner passed his order cancelling both the assessment orders and directing the Income Tax Officer to make fresh assessment according to law after due enquiry. The assessee preferred appeals against these two orders to the Income Tax Appellate Tribunal and the latter allowed both the appeals holding that there was no proper service of notice u/s 33B, and hence,

the entire proceeding was invalid and illegal. The Tribunal also refused to accede to the prayer of the department for a direction to the Commissioner to take up the matter after issuing proper notices from the stage where the illegality has been found to occur.

6. In order to determine the question of law involved in this case, we may read Section 33B of the old Act. Section 33B(1) and (2) of the old Act and Section 263(1) and (2) of the new Act are in pari materia except that in Sub-section (2) (a) of the new Act. Section 147 has taken the place of Section 34. We may, therefore, read Section 33B(1) and (2) as also Sub-section (3):

"33B. (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 enquiry 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.

(2) No order shall be made under Sub-section (1)-

(a) to revise an order of reassessment made under the provisions of Section 34; or

(b) after the expiry of two years from the date of the order sought to be revised.

(3) Any assessee objecting to an order passed by the Commissioner under Sub-section (1) may appeal to the Appellate Tribunal within 60 days of the date on which the order is communicated to him. "

7. From a perusal of Sub-section (1) above, it appears that there are two parts in this sub-section, the first part relates to the Commissioner's power to call for and examine the record of any proceeding under the Act and to consider whether any order passed by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of revenue and the other part is that after he comes to a decision that the order is erroneous on the ground of being prejudicial to the interests of revenue, he has to give the assessee an opportunity of being heard before he is in a position to pass further orders in the case to the prejudice of the assessee. He may also make or cause to be made any enquiry as he thinks necessary before passing such orders against the assessee.

8. The assessee in this case complains that she has not been given an opportunity of being heard inasmuch as she was not served with any notice of hearing of these matters. The department's case is that the assessee had given to the department in her returns two addresses and the department had taken necessary steps for sending notices by post to these addresses which were returned with the remark that "the addressee not known". An officer of the department was detailed to serve the notices personally on the assessee at her

address and he failed to trace her at these addresses. It is only then the department ordered for service of these notices "by affixing at both the addresses" and when this was done, the service was held to be valid. The department contends that no objection could be taken to the validity of the service of notices in the manner followed in this case.

9. Mr. Bhattacharjee, the learned counsel for the department, at the outset contends that Section 33B does not provide for any notice such as is provided u/s 34 of the old Act. He submits that even an oral information to the assessee is enough for the purposes of Section 33B, enabling the assessee an opportunity of being heard. The learned counsel relies on a decision of the Calcutta High Court in the case of Netai Chandra and Surendra Nath Dey Vs. Corporation of Calcutta, to support the aforesaid submission. He particularly relies on the following observation in the said judgment:

"To hold that in a proceeding u/s 33B a notice in writing must be served, as provided in Section 63(1) of the Act, would be reading into Section 33B something which is not there at all. The stringent requirement of the service of a notice u/s 34 of the Act cannot be applied to a proceeding u/s 33B of the Act."

10. It is true that Section 34 of the Act contains in terms a reference to a notice which is not to be found in that manner in Section 33B and the notice which is mentioned in Section 34 is notice u/s 22(2) of the Act. It is specifically mentioned in that section that after issue of the notice the provisions of the Act, so far as may be, shall apply as if the notice were a notice issued under Sub-section (2) of Section 22. Apart from this, there is no reference in Section 34 to a special opportunity of being heard before making the assessment as the provisions of Section 23 and other provisions of the Act will necessarily apply. Section 33B provides for a revisional power of the Commissioner where he considers that the order passed by the Income Tax Officer is erroneous in so far as it is prejudicial to the interest of the revenue. Under this section, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, he may pass such order as the circumstances of the case justify including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. When law provides for empowering an authority to pass such drastic orders and has therefore necessarily to provide in the Act itself for giving the assessee an opportunity of being heard, it cannot for a moment be considered that such a proceeding can be initiated without a written order of the Commissioner in that behalf, and once the Commissioner formally incorporates his order after examining the records which he has called for, it is implicit in the section itself that a written notice must be given to the assessee to inform him of the proceeding initiated against him so that he is in a position to appear and satisfy the officer that the earlier assessment is correct. Although, therefore Section 33B does not specifically provide for a notice to the assessee after initiation of the proceeding, the fact that no order can be passed against the assessee without

offering him an opportunity of being heard, clearly points out that a written notice must be given to him so that there is no room for any doubt or vagueness about the action which is proposed to be taken against the assessee and the materials on which the decision to start the proceeding has been taken. In a matter where the assessee's interests are going to be seriously affected by some order that may be passed in a proceeding u/s 33B, a mere oral information cannot be considered as sufficient in law and it must be held that the first essential preliminary of such an opportunity must be a written notice to the assessee. It may be remembered that a large number of assessees may be illiterate or may not be conversant with legal process and formalities and to dispense with a written notice u/s 33B in the case of those people and to hold that the Commissioner's oral information to them at his office, giving orally the grounds which have impelled him to take action for revision of the proceedings under this section, as sufficient will defeat the very object of giving an opportunity of being heard as provided u/s 33B. In order that an assessee may have an opportunity of being heard, he must know what are the grounds on which the proceedings are taken against him and this object will not be fulfilled unless the notice to him is in writing. It is difficult to conceive that the Commissioners of Assam, Nagaland, Tripura and Manipur, at Shillong, will send for the assessees spread out in these farflung areas under his jurisdiction to his Shillong office and convey his orders to them orally there together with the grounds. One may ask, how will he get the assessees in his Shillong office without a notice to them ? It is not to be supposed that he will send one of his employees to meet the assessee in person to verbally intimate to him that he is required at the Shillong office for taking note of the contemplated order u/s 33B. Official business is not usually performed in that way. Therefore, even for this limited purpose some sort of a written notice must be sent to the assessee and if that is an essential condition, about which there can be no doubt, it follows a fortiori that the order u/s 33B itself should be communicated in writing to the assessee. If, however, in an extraordinary given situation an assessee is found by the Commissioner at his office and the order u/s 33B is communicated to him verbally together with the reasons, which the assessee himself admits to have taken down, another written notice may, in that event, be dispensed with or even waived. That is, however, a most unusual instance and is not a practical proposition. Ordinarily, therefore, a written notice must be given to the assessee communicating the order u/s 33B of the Act. In my judgment, therefore, there must be given a written notice to the assessee after the Commissioner has decided to take up proceedings u/s 33B against him. With respect, I am, therefore, unable to agree with the decision of the Calcutta High Court in the case of Commissioner of Income Tax v. Smt. Kiran Devi Singhee, when it proceeds to lay down that an oral information will be sufficient u/s 33B and no notice is necessary. The contention of Mr. Bhattacharjee is, therefore, overruled.

11. The learned counsel next contends that Section 63 of the old Act provides for service of notice in the following terms:

"63. (1) A notice or requisition under this 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 (V of 1908)...."

12. He submits that the notice in this case was sent to the assessee by registered post and this is a clear compliance with Section 63(1) of the Act. According to him, when the department has taken recourse to both the modes laid down u/s 63 and did all that was possible for causing service of the notices, the affixation of the notices at the addresses given by the assessee is a valid service and sufficient in law. The facts revealed in this case go to show that the notice sent by post was returned unserved with the remark "addressee not known". The officer who went to serve the notice on the assessee, at the addresses given on her returns, also could not find the assessee at the given places. It is clear from the records that the department was unable to serve the notices on the assessee personally or on any of her agents and it is also not proved that the assessee has her residence in the addresses given. When a notice is sent by registered post, Section 27 of the General Clauses Act will come to the aid of the department, when it is shown that it has been properly addressed, pre-paid and posted by registered post. This section does not contemplate a case of the registered letter returning to the sender, which is the present case. If registered notices were refused when tendered that would have been also proper service under the law. That is again not so in the instant case. The department having taken the position that the assessee could not be served personally and could not be found in the addresses given in the returns, and the further fact not being proved that the assessee at any time had resided in these addresses, mere affixing of the notices in the addresses, given, in absence of the proof showing that it was her ordinary place of residence or office, a service by hanging(?) cannot be considered as a valid or sufficient service in law. Mr. Bhattacharjee has drawn our attention to Order 5, Rule 17, of the Code of Civil Procedure, as amended in Assam, and may be read:

" Order 5, Rule 17.--Procedure when defendant refuses to accept service, or cannot be found.--Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

13. Even to call in aid the provisions of the above rule, it must be shown that the service was made at a place where the assessee was ordinarily residing or carrying on her business or personally working for gain and the service report must contain the name and address of the person, if any, by whom the house was identified. There is some meaning in these provisions, inasmuch as before a service by affixing may be held in law to be effectual service, it must be shown that the notice is affixed at the place the person is ordinarily residing or carrying on business and it must be also pointed out by a person if there be any that this residence is of the addressee of the notice. As noted earlier, the department does not say that these addresses are the genuine addresses of the assessee and that she ever resided in these addressees, nor has the department shown from the reports of the serving officer that this house was identified as the assessee's residence. As a matter of fact, the records clearly show that the assessee is unknown in these localities where the notices had been served. Under that situation Order 5, Rule 20, of the CPC was the only provision which could have been invoked, and we may read the same :

"20. Substituted service.--(1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Effect of substituted service.--Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.--Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require."

14. Even under Rule 20A of the CPC where, for any reason whatsoever, the summons is returned unserved, the court may either in lieu of or in addition to the manner provided for service of summons in the foregoing rules direct the summons to be served by registered post addressed to the defendant or to his agent empowered to accept service at a place where the defendant ordinarily resides or personally works for gain. The summons has to be served by affixation amongst other places upon some conspicuous part of the house if any, in which the defendant is known to have last resided, etc. There is also reference to the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain under Rule 20A. It is, therefore, clear that if notice cannot be served personally on a defendant at his given address or at the address which is given or known, under Order 5, Rule 20, the court may pass orders for substituted service. Mr. Lahiri, the learned counsel for the assessee, submitted that this was a case where service was in accordance with Rule 20 and

he submits that service under Rule 20 is only possible if the court, and in this case the Commissioner, decides upon passing an order in that behalf. The learned counsel points out that there is no order of the Commissioner for causing service in a substituted manner. The only order which is pointed out is an order passed by the Income Tax Officer, who is said to be the personal assistant of the Commissioner, and the service which is effected in this case is not in pursuance of the order of the Commissioner who is the competent authority to pass an order under Order 5, Rule 20, Civil Procedure Code, in the circumstances of the case. It is pointed out on behalf of the department that this service which was held valid at the first instance by the personal assistant of the Commissioner was ratified and adopted by the Commissioner as will appear from his order in appeal. I am unable to accept this argument. When law confers jurisdiction to a specified authority to determine a matter and pass necessary orders, that authority alone can exercise the discretion and pass the orders and it will not satisfy the legal requirements if the authority merely adopts an order which has been passed by a subordinate authority deciding on its behalf. I am, therefore, clearly of the opinion that the service of the notices in this case on the assessee has not taken place as required under the law and is, therefore, not a valid service. The first question, therefore, is answered in the affirmative.

15. Regarding the second question whether the Tribunal was right in holding that the proceedings u/s 33B of the Indian Income Tax Act, 1922, and Section 263 of the Income Tax Act, 1961, were invalid and illegal, it is sufficient to state that the proceedings which had commenced on the Commissioner taking action u/s 33B cannot be vitiated by any irregularity or illegality of the service of notices which he was bound under the law to give in order to offer reasonable opportunity to the assessee to show either that the proceedings are void and illegal or that the earlier assessment orders are correct. The entire proceedings u/s 33B cannot be wiped out because an irregularity or illegality has taken place in a subsequent step in the course of the disposal of the proceeding. As noted earlier, Section 33B has two parts. The first part is confined to the action of the Commissioner ex parte at that stage when no notice or opportunity need be given to the assessee before arriving at the decision to take action u/s 33B against her. In this case, the proceedings were initiated and legally commenced on 23rd July, 1963, when the Commissioner issued the show cause notice u/s 33B fixing the case on 5th August, 1963, at 11-30 a.m. The entire proceedings, therefore, are not vitiated because of the finding that the service of the notices which had been issued is not held to be valid. The sin attaches to the proceedings at the stage when an irregularity or illegality has supervened. Mr. Bhattacharjee has drawn our attention to a decision of the Supreme Court in the case of Guduthur Bros. v. Income Tax Officer, Special Circle, Bangalore, AIR [1960] S.C 298 which was of course a case u/s 28(3) of the old Act. The following passage at page 301 is apposite:

"In our opinion, the notice issued to the appellants to show cause why penalty should not be imposed on them did not cease to be operative, because the

Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding after it was lawfully initiated. That notice having remained still to be disposed of, the proceedings now started can be described as during the course of the assessment proceedings, because the action will relate back to the time when the first notice was issued."

16. The principle laid down, while deciding the case u/s 28(3) of the old Act, would apply in this case u/s 33B. My answer to the second question is, therefore, in the negative.

17. Question No. 3 involves two parts, one relating to an order u/s 33B of the old Act and the other part relating to an order passed u/s 263 of the new Act. The reasons given by the learned Tribunal for not remanding the case back to the Commissioner for disposal of the proceedings after serving a valid notice on the assessee are as follows. The Tribunal passed the order on the basis of Section 33B which provides under Sub-section (2)(b) that no order shall be made under Sub-section (1) after the expiry of two years from the date of the order sought to be revised. The Tribunal found that when it passed the order on 14th October, 1965, the impugned assessments dated 10th August, 1961, and 18th July, 1962, already became barred under the above proviso. In this view of the law, the Tribunal refused to remand the case. The learned counsel for the department placed reliance on a decision of the Bombay High Court, in the case of Commissioner of Income Tax v. Kishoresinh Kalyansinh Solanki, [1960] 39 ITR 522 (Bom.) before the Tribunal, which could not induce the Tribunal to make the order in favour of the department. The Tribunal distinguished that case holding that in the Bombay case, the Appellate Tribunal had set aside the order of the Commissioner and directed the Commissioner to pass fresh orders after giving the assessee sufficient opportunity of being heard and to find as a fact whether there was or was not a genuine firm in existence. According to the Tribunal, in the present case, the department was asking for such a direction to be given by the Tribunal and the Tribunal was not inclined, on the facts of the present case, to give such a direction. The Tribunal has also observed that:

"The legislature in its wisdom has fixed the period of two years for passing of order u/s 33B by the Commissioner of Income Tax. Therefore, if we give such a direction, in the particular facts of the case, we consider that we will be extending the time limit given by the legislature which we, therefore, do not propose to do."

18. It appears, therefore, that the Tribunal refused to pass the order on two grounds. They did not want to exercise their discretion in remanding the case, a power which undoubtedly the Tribunal has u/s 33(4) of the old Act. There can be no obligation to exercise this power and no objection in law can be taken if the Tribunal refuses to exercise the discretion in remanding the case to the authority below. The Tribunal has also given a second ground which, of course, comes directly in conflict with the decision of the Bombay High Court in Commissioner of Income Tax v. Kiskore sink Kalyansinh Solanki. I will, therefore, now turn to that

decision. Sub-section (2) of Section 33B has undoubtedly put a restriction on the Commissioner to pass an order u/s 33B(1) after the expiry of two years from the date of the order sought to be revised. This restriction is in clearest language. The Bombay High Court in the aforesaid decision has come to the conclusion that the bar of limitation under Sub-section (2)(b) is only confined to the orders of the Commissioner passed suo motu and not those orders which he may be required to pass in pursuance of appellate orders or orders from higher courts. After giving my anxious and most careful consideration which the judgment of the Bombay High Court is entitled to, with great respect, I am unable to accept the reasonings given in the aforesaid decision in the interpretation of Section 33B regarding the bar of limitation. I am unable to find any justification for extending the period of limitation in certain types of orders passed by the Commissioner u/s 33B(1). We are dealing with a fiscal statute, the provisions whereof, it is well-settled, must be strictly construed. I may only just refer to *Bank of Chettinad Ltd. v. Commissioner of Income Tax*, AIR [1940] P.C 522 and *A.V. Fernandez Vs. The State of Kerala*, which have been cited by Mr. Lahiri in support of insistence upon a strict construction of the provision. The legislature in a similar case of time-limit laid down u/s 34 of the old Act provided for a situation arising out of an appellate or revisional order. A proviso was added to Section 34 in the following terms:

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made u/s 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

19. Section 33B was introduced into the Act in 1948, and the legislature had before it the provisions of Section 34 with the proviso which were already there. Even so, the legislature did not provide for such a contingency in Section 33B itself although even this section in due course found place in the proviso to Section 34 as already noticed. It is, therefore, a clear and intended omission and it is not for the courts to supply the *casus omissus*. It is strenuously argued by Mr. Bhattacharjee that the provision of appeal provided for against orders passed u/s 33B would be meaningless and an absurd position will ensue when a remand order is passed in appeal if the Commissioner is unable to carry out the order on the ground of limitation. There may be two answers to this. u/s 33(4) the Appellate Tribunal "may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner". The Tribunal may undoubtedly in an appropriate case based on judicial considerations pass an order of remand u/s 33(4). But when the Tribunal finds that in view of Clause (b) of Sub-section (2) of Section 33B the order of remand will be infructuous, it will not consider it fit to pass such an order. The suggested absurd position will, therefore, not arise. Secondly, if the legislature having provided for such a

contingency in Section 34, deliberately omitted to make similar provision in the preceding section that has been subsequently introduced, the appeal should be to the legislature and not to the courts.

20. In fact, such an appeal has been heard and the legislature in the new Act has added Sub-section (3) in Section 263 to deal with such cases and there is no scope for any controversy now on this point. The learned judges of the Bombay High Court observed:

"Where an alternative meaning is possible,... we must prefer that meaning which can fairly lead us to give effect to the intention of those who framed the law, if we can do so without doing violence to any established principle of construction."

21. With, respect, there can be no doubt about the correctness of the above principle, but the application of the same leads to difficulties. I am clearly of the opinion that in construing a fiscal statute when alternative meanings are possible, the meaning which is in accord with benefit to the subject must be adopted. There is another principle which may not also be lost sight of and that finds place at page 8 of Maxwell on the Interpretation of Statutes, 11th edition:

"It was repeatedly decided at law that the statutes of limitation which enacted that action should not be brought after the lapse of certain periods from the time when the cause of action accrued, barred actions brought after the time so limited, though the cause of action was not discovered, nor was, practicably, discoverable by the injured party at the date of accrual, or, though discoverable, was fraudulently concealed by the wrongdoer until the time limited by the Act had expired. The hardship of such decisions was obvious, but the language admitted of no other construction."

22. Besides, as observed by Lord Evershed M.R. at page 549 in *Tinkham v. Perry*, [1951] 1 K.B. 547 A I.R.[1951] 249, 250. "words plainly should not be added by implication into a statute unless it is necessary to do so to give the language sense and meaning to its context". In this case, sense and meaning can be given to Section 33B with all the sub-sections, as it is clear and unambiguous that no order can be passed under this section beyond two years of the date of the impugned assessment. I may also refer to a passage in *Crates on Statute Law*, 6th edition, at page 70 :

". . . "a statute may not be extended to meet a case for which, provision has clearly and undoubtedly not been made". . . "Where the literal reading of a statute. . . produces an intelligible result... there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament".

23. In *Crawford v. Spooner*, [1846] 6 Moo. P.C. I. the Judicial Committee said :

"We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there."

24. In *Magor and St. Mellons R.D.C. v. New Port Corporation* [1951] 2 All E.R. 839 it was held by the House of Lords that "a court has no power to fill any gaps disclosed in an Act. To do so would be to usurp the function of the legislation. "As Lord Loreburn L.C, observed in the House of Lords appeal, *Vickers, Sons & Maxim Ltd. v. Evans*, [1910] A.C. 444 (H.L.) at page 445 :

"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

25. The old Act here makes provision for an identical situation in Section 34 and omits to do so in Section 33B. The court is not to delve into the policy or even the reasons for the omission. In my judgment, it is a case where it can be legitimately said that the clear reason for reading the expression "suo motu" in Section 33B is not to be found within the four corners of the Act. The legislature has barred certain investigation in respect of some orders after the expiry of a certain period. The assessee after the passing of that time acquires a right to rely upon that order without question. This right cannot be taken away by implication. If the legislature intended that Sub-section (2)(b) of Section 33B will not be applicable to the orders of the Commissioner passed in pursuance of the orders of higher authorities, it would have clearly made express provision in the section itself. There is no reason why the legislature would not have inserted a suitable provision in that behalf in the section itself. Even though the orders are passed after the matter has come back to the Commissioner in remand, the order that may ultimately be passed does not cease to be an order passed by the Commissioner and, as such, the same will come within the mischief of Sub-section (2)(b) of Section 33B. I am, therefore, unable to supply the *casus omissus* in this case by judicial interpretation.

26. So far as the assessment order dated 10th August, 1961, is concerned, the Tribunal was justified in refusing to direct the Commissioner to pass fresh orders u/s 33B, after the period of two years having already run out from the date of the assessment order in question. This leaves me to consider the effect of the Tribunal's order so far as the assessment order dated 18th July, 1962, is concerned. It is admitted by both sides that the new Act is applicable to the assessment of 1961-62 and the new Section 263 has taken the place of Section 33B. The law has been amended and Section 263(3) now clearly provides an answer to this question, and may be read:

"263. (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.

Explanation.--In computing the period of limitation for the purposes of Sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129 and any period during which any proceeding

under this section is stayed by an order or injunction of any court shall be excluded."

27. The Tribunal's first ground holding that this order dated 18th July, 1962, will be barred, falls through in view of the provisions of Section 263(3) of the new Act. The Tribunal has refused to direct the Commissioner to pass fresh order u/s 263 of the new Act, being largely influenced by a consideration of the provisions of Section 33B of the old Act and not referring to Section 263 of the new Act at all. In view of the provisions of Section 263(3) and also the answer to question No. (2), it cannot be said that the Tribunal was justified, on the facts and in the circumstances of the case, in refusing to direct the Commissioner to pass fresh orders u/s 263 of the new Act after giving the assessee a further opportunity of being heard. My answer to the first part of this question is in the affirmative but the same is in the negative with reference to the second part.

28. In the result, the questions are answered as follows:

(1) On the facts and in the circumstances of the case, the Tribunal was right in holding that the notices to show cause u/s 33B of the the Indian Income Tax Act, 1922, and Section 263 of the Income Tax Act, 1961, for the assessment years 1960-61 and 1961-62 were not validly served on the assessee.

(2) The Tribunal was not right in holding that the proceedings u/s 33B of the Indian Income Tax Acts 1922, and Section 263 of the Income Tax Act, 1961, were invalid and illegal.

(3) On the facts and in the circumstances of the case, the Tribunal was justified in refusing to direct the Commissioner to pass fresh orders u/s 33B of the Indian Income Tax Act, 1922. The Tribunal was, however, not justified in refusing to direct the Commissioner to pass fresh orders u/s 263 of the Income Tax Act, 1961, after giving the assessee a further opportunity of being heard.

29. The reference is answered accordingly. But I make no order as to costs.

S.K. Dutta, C.J.

30. I agree.