

(1964) 01 AHC CK 0037

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3979 of 1963

DURGA PRASAD AND ANOTHER

APPELLANT

Vs

Income Tax OFFICER, A-WARD, MUZAFFARNAGAR, AND
ANOTHER.

RESPONDENT

Date of Decision : 01-01-1964

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1965) 57 ITR 583

Hon'ble Judges : S. C. Manchanda, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S. C. MANCHANDA J. - This is a writ petition under article 226 of the Constitution directed against the notice issued u/s 34(1)(a) of the Indian Income Tax Act, 1922, (hereinafter referred to as the Act), for the assessment year 1949-50 on the 27th of September, 1958.

The facts are not in dispute. Briefly stated they are that the petitioner No. 1 is one of the ex-partners of firm, Messrs. Mayaram Durga Prasad, which was a registered firm carrying on business of commission agency, speculation business and business in gur in his own account. The firm filed a return showing a loss of Rs. 6,099 for the assessment year the Income Tax Officer noticed certain cash credits in the books of the firm in various names totaling Rs. 45,500. The firm failed to prove the genuineness of the cash credits and the Income Tax officer, therefore, added a sum of Rs. 45,500 as income for the assessment year 1950-51 as from an undisclosed source. The Appellate Assistant Commissioner confirmed this finding. On further appeal to the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) the appeal was allowed on the short ground that if the cash credits were the income of the assessee-firm they could not be assessed in the assessments year 1950-51. The order of the Tribunal is a short one and may be reproduced with advantage as the entire point in this writ

petition turns on the question as to whether the impugned notice u/s 34(1)(a) issued on the 27th September, 1958, was a notice which could be said to have been issued in consequence of the finding given by the Tribunal. The order of the Tribunal reads :

The unexplained cash credits which have been included in the total income as suppressed income appear in the books of the assessee prior to April 1, 1949, and are not, therefore, liable to be considered in the assessment year 1950-51. We have pointed out in many cases that on a true interpretation of sub-section (11) of section 2 of the Indian Income Tax Act the previous year for income from some undisclosed year of the business in the books of which the credits appear. As the cash credits are liable to be considered in the assessment year 1949-50, they must be excluded from the total income of the assessment year 1950-51. The addition is accordingly deleted and the appeal is allowed."

This order of the Tribunal is dated 4th August, 1958. As already observed a notice u/s 34(1)(a) was issued on the 27th of September, 1958, for the assessment year 1949-50. The period of eight years, which is the normal period for making an assessment under the provisions of section 34(3) as it then existed was eight years. That eight years period expired on the 31st March, 1958. The notice, therefore, which was issued on the 27th September, 1958, was, prima facie, barred by time. The only way in which the Income Tax Officer could have obtained jurisdiction to issue such a notice was by invoking the second proviso to section 34(3) of the Act. The relevant portion of this proviso reads :

"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 assessment or reassessment any finding or direction contained in an order u/s 31, section 33...

The issue of a notice u/s 34 beyond the period limitation of eight years is justified on the ground that action was taken in the present case in consequence of the findings contained in the order of the Tribunal. Prima facie, the order of the tribunal does not contain any finding that the impugned cash credits were the undisclosed income of the assessment year 1949-50. It is, therefore, difficult it not impossible to hold that the action u/s 34(1)(a) was in consequence of the order passed by the Tribunal. The words "in consequence of" came up for consideration by a Division Bench of this court in Pt. Hazari Lal v. Income Tax Officer Kanpur. The interpretation of these words caused some difficulty but the Bench held that the words "in consequence of" required not merely a remote connection between the order u/s 31 or section 33 of the Act but a casual connection. In other words, notice u/s 34 must automatically or directly flow from the order u/s 31 or section 33.

The attention of the bench which decided in Hazari Lal's case does not appear to have been drawn to an earlier case decided by the Bombay High Court v. R.

Indurkar v. Pravinchandra Hemchand, where the same view had already been taken. In that case the Appellate Assistant Commissioner in allowing the appeal for assessment year 1945-46, had further stated :

"They could be assessed, if at all for the tax year 1944-45, for which the Income Tax Officer may make assessment if so advised."

The words "if so advised" and "if at all" were held not to amount to a finding or direction in consequence of which or to give effect to which the notice was issued.

In Lakshmi Narain Agarwal v. Income Tax Officer, Kanpur, which was a writ matter following Pt. Hazari Lal's case, it was held that the observations of the tribunal made in respect of the two cash credits in any year other than the year 1949-50, which was the years under appeal, could neither be properly called a "finding" nor could the Tribunal give any direction within the meaning of the second proviso to section 33 and as such the notice issued u/s 34 in respect of the year 1948-49 could not be considered to be a notice issued in pursuance of any direction or in consequence of any finding given by the Tribunal.

The learned Chief Justice while presiding over the Full Bench in Lakshman Prasad v. Commissioner of Income Tax was inclined to take the view that Pt. Hazari Lal's case may require reconsideration. The order two judges constituting the Full Bench however, did not consider it necessary in that case to consider the correctness of that decision. The position, therefore, is that so far as this court is concerned the view taken by the Division Bench in Pt. Hazari Lal's case still holds the field. That view as already observed, is supported by the Bombay High Court and also to some extent by the Calcutta High Court and also to some extent by the Calcutta High Court in Brindaban Chandra Basak v. Income Tax Officer. The only High Court in Simrathmull v. Additional Income Tax officer Ootacamund and in A. S. Khadar Ismail v. Income Tax Officer, Salem. On facts, however, these cases are distinguishable. In the former the position was that the Appellate Assistant Commissioner had held that the amount of Rs. 31,000, which was added, was income from an undisclosed source but as it was argued for the assessee that the income fell in the assessment year 1945-46 and not in the year 1946-47. The said amount stood to be detected but it was further added that the Income Tax officer will be at liberty to reopen the assessment for the position was that the Appellate Assistant Commissioner, after allowing the appeal further stated :

The Income Tax Officer is directed to consider the credits for the assessment year 1944-45 after initiating the appropriate proceeding."

There was thus some kind of a direction given to initiate proceedings for the earlier year. It is no doubt true that the decisions of the Madras High Court do not rest on this factual position but on the larger ground of the interpretation to be placed on section 34(3) of the Act.

So far as this state is concerned, the law must be taken to be that laid down in

Pt. Hazari Lal's case by a Division bench of this court and a judge sitting singly is bound to follow that decision in view of the decisions of the Supreme Court in *Jaisri Sahu v. Rajdewan Dubey* and in *Mahadeolal Kanodia v. Administrator-General of West Bengal*. Following that decision, it must be held that the notice issued after the expiry of eight years was not as a result or in consequence of the order of the Tribunal and as such the second proviso to section 34(3) could not have been pressed into service in giving jurisdiction to the Income Tax officer to issue the impugned notice beyond the period of limitation of eight years.

Learned counsel for the opposite party contended that it could not be said that there was a patent error of law or that there was any failure of justice by the issue of the notice u/s 34(1)(a) and as such this was not a fit case for the exercise of the extraordinary writ jurisdiction of this court. The Supreme Court in *Calcutta Discount Co. Ltd. v. Income Tax Officer, Calcutta*, has observed as follows :

"That though the writ of prohibition or certiorari will not issue against an executive authority, then high Courts have power to issue in fit cases an order prohibiting an executive authority from acting without jurisdiction. What such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts it is well settled will issue appropriate orders or directions to prevent such consequences.... The existences of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action... When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the court would be failing to perform their duty if relief is refused without adequate reasons."

If Pt. Hazari Lal's case lays down the law correctly and it must be taken to lay down the law correctly until such time it is not overruled by a larger bench or the Supreme Court then there is no escape from the conclusion that there was a patent error of law and the issue of notice by the Income Tax officer u/s 34(1)(a) in the teeth of that decision had inevitably caused failure of justice.

For the reasons given above the notices issued u/s 34(1)(a) dated the 27th of September, 1958, are directed to be quashed and the Income Tax Officer is restrained from proceeding any further.

The writ petition is accordingly allowed with costs.

Petition allowed.