

(1969) 01 CAL CK 0019
In the Calcutta High Court
Case No : Matter No. 151 of 1965

Mohini Debi Malpani

APPELLANT

Vs

Income Tax Officer, "D"-Ward and Another

RESPONDENT

Date of Decision : 20-01-1969

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 131, 143, 143(2), 144

Citation : (1970) 77 ITR 674

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : A.C. Bhabra, for the Appellant; Dipankar Gupta, for the Respondent

Judgement

T.K. Basu, J.—On or about the 13th March, 1963, the petitioner, Mohini Debi Malpani, submitted a return of her income for the assessment year 1960-61 to the Income Tax Officer, "J" Ward, District I (I), Calcutta, who at that time had jurisdiction over the case of the petitioner, Thereafter, a notice u/s 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), was issued by the said Income Tax Officer calling upon the petitioner to produce the evidence on which the petitioner relied in support, of her return. At the request of the petitioner, the time for production of the evidence was extended by the said Income Tax Officer until the 12th February, 1964. On the 12th February, 1964, one C. M. Chopra, on behalf of the petitioner, produced certain rokar and khata on which the petitioner relied in support of her return.

2. On the 30th March, 1965, the petitioner received a notice of demand dated the 23rd March, 1965, issued u/s 156 of the Act calling upon the petitioner to pay a sum of Rs. 81,882.06 as Income Tax for the assessment year 1960-61. A copy of the order of assessment for the said assessment year dated the 22nd March, 1965, was also served on the petitioner along with the said notice.

3. The order of assessment was passed to the best of the judgment of the Income Tax Officer, "D" Ward, Dist I (I), Calcutta, the respondent No. 1 herein,

under the provisions of Section 144 of the Act. Paragraph 2 of the order of assessment, which is material for our purpose, is as follows :

"Later this file was transferred from I.T.O. "J" Ward, Dist. I(I) to I.T.O. "D" Ward, Dist. I(I) under C.I.T.'s order. Accordingly, the case was refixed for hearing giving the assessee an opportunity of being heard. A notice u/s 131 of the Income Tax Act, 1961, was issued at the different addresses shown in the return for the personal attendance of the assessee and for the production of books of accounts and for the proof of the sources of income and for the production of evidence regarding the sources of the investments. But the summonses which were issued under registered post came back unserved. Thus, it appears that the assessee filed voluntary returns giving false addresses and that the assessee did not carry on any business there. As there was no compliance on the date of hearing I proceed to complete the assessment to the best of my judgment on the materials available on the record."

4. It is this order of assessment dated the 22nd March, 1965, which is challenged before me in this application.

5. Mr. A. C. Bhabra appearing on behalf of the petitioner drew my attention in the first place to the provisions of Section 144 of the Act which are as follows:

"444. If any person-

(a) fails to make the return required by any notice given under subsection (2) of Section 139 and has not made a return or a revised return under Sub-section (4) or Sub-section (5) of that Section, or

(b) fails to comply with all the terms of a notice issued under Subsection (1) of Section 142, or

(c) having made a return, fails to comply with all the terms of a notice issued under Sub-section (2) of Section 143,

the Income Tax Officer, after taking into account all relevant material which the Income Tax Officer has gathered, shall make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."

6. Mr. Bhabra contended that an order of assessment to the best of the judgment of the Income Tax Officer can be passed only when there is a failure to make a return required by a notice u/s 139(2) of the Act or to make a return or a revised return u/s 139(4) or Section 139(5) thereof or a failure to comply with all the terms of a notice issued either u/s 142(1) or Section 143(2) of the Act. Such failure or non-compliance with the various notices mentioned in Section 144 of the Act was a condition precedent to the assumption of jurisdiction by the Income Tax Officer to make an order of assessment under the said Section 144 of the Act.

7. Mr. Bhabra next drew my attention to the opening paragraph of the order of

assessment in the present case where it has been found by the Income Tax Officer as a fact that the notice issued to the petitioner u/s 143(2) of the Act had been complied with by the petitioner. Mr. Bhabra further contended that since a return was filed by the petitioner in the present case there was no question of any failure as contemplated u/s 144(a) of the Act. Further, it was nowhere stated in the order of assessment that any notice was issued u/s 142(1) of the Act or there was any failure to comply with all or any of the terms thereof in the present case.

8. Mr. Bhabra next drew my attention to paragraph 2 of the order of assessment which has been set out hereinabove and where it has been stated that a notice u/s 131 of the Act was issued at the different addresses shown in the return for the personal attendance of the assessee and for production of the books of account and for the proof of the sources of income and for the production of evidence regarding the sources of the investments. The said summons according to the order of assessment which was issued by registered post came back unserved. It further appears from paragraph 2 of the order of assessment that the Income Tax Officer proceeded to complete the assessment u/s 144 of the Act as there was no compliance with the notice u/s 131 of the Act on the date of the hearing.

9. On the basis of the aforesaid statements in the order of assessment, Mr. Bhabra contended that the conditions precedent for the assumption of jurisdiction u/s 144 of the Act were entirely absent in the present case and as such the order of assessment u/s 144 of the Act was void as being entirely without jurisdiction. He pointed out that even assuming that there has been a non-compliance with a notice u/s 131 of the Act, such non-compliance was not a valid ground for the assumption of jurisdiction to make an order of assessment u/s 144 of the Act.

10. Mr. Bhabra also drew my attention to paragraph 3 of the affidavit-in-opposition affirmed on behalf of the respondents by Shyamal Dhan Ghosal on the 29th January, 1965, wherein it has been admitted that one C. M. Chopra produced certain rokar and khala in pursuance of a notice u/s 143(2) of the Act. He next drew my attention to paragraphs 4 and 6 of the said affidavit where it has been stated that the Income Tax Officer was competent to pass the said order of assessment u/s 144 of the Act as there has been no compliance with the terms of the letter dated the 12th November, 1964, issued by Income Tax Officer, "D" Ward, District I(I), Calcutta, which letter was served on the petitioner on the 16th November, 1964.

11. The letter dated the 12th November, 1964, which has been annexed to the affidavit of Shyamal Dhan Ghosal runs as follows :

"Income Tax Officer, Dist. I(I), "D" Ward, Calcutta

File No. I(1)/M-790/D.

Dated: 12-11-64.

Ref:- Assessment year--Refixation of

Your case is refixed on 19-11-64 finally when you are required to produce all books of a/c and other evidences in support of your return. In case of non-compliance it is to be noted that assessment will be completed ex parte.

Sd/- S. D. Ghosal. Income Tax Officer."

12. Mr. Dipankar Gupta appearing on behalf of the respondents drew my attention to the last four lines of paragraph 3 of the affidavit of Shyamal Dhan Ghosal wherein it has been denied that the assessment was made to the best of the judgment of the respondent No. 1 due to non-compliance of the notice u/s 131 of the Act. Mr. Gupta contended that it was open to him to establish aliunde that there has been a non-compliance on the part of the petitioner with any of the notices mentioned in Sub-clauses (a), (b) and (c) of Section 144 in justification of the order of assessment in the present case.

13. According to this contention, the mere omission to mention the fact in the order of assessment that there has been a non-compliance with any of the notices mentioned in the several Sub-clauses of Section 144 of the Act would not vitiate the order of assessment as being without jurisdiction. According to Mr. Gupta, what gives jurisdiction to the Income Tax Officer to make an order of assessment u/s 144 of the Act is the fact of non-compliance with any of the notices mentioned in the various sub-clauses of Section 144 and not the mention thereof in the order of assessment.

14. Mr. Gupta next invited me to hold that the letter dated the 12th November, 1964, which has been set out hereinabove was, in effect, a notice u/s 143(2) of the Act and non-compliance with the terms thereof was sufficient to authorise the Income Tax Officer to assume jurisdiction u/s 144 of the Act to make the order of assessment in the present case. Mr. Gupta pointed out that no statutory form was prescribed for notices u/s 143(2) of the Act. He further contended that the mere fact that the letter dated the 12th November, 1964, is not expressed to be issued under any particular Section of the Act does not stand in the way of my coming to the conclusion that it is, in fact, a notice u/s 143(2) of the Act.

15. I am unable to accept this contention of Mr. Gupta. A notice u/s 143(2) of the Act can only be issued where a return has been made by the assessee u/s 139 of the Act, but the Income Tax Officer is not satisfied that the return is correct and complete without requiring the presence of the assessee or the production of books of account or other evidence on which the assessee may rely in support of his return. It is to be noted that such a notice u/s 143(2) of the Act may be confined only to the personal attendance of the assessee or to the production of books of account or other evidence or may require both.

16. From the admitted facts of the present case, a notice u/s 143(2) of the Act was issued to the assessee and the notice was complied with by the production of certain books of account by one C. M. Chopra on behalf of the assessee.

Admittedly, the file in the present case was transferred from the Income Tax Officer, "J"-Ward, Dist I(I), Calcutta, to the Income Tax Officer, "D"-Ward, Dist I(I), Calcutta. Before the new officer could issue another notice u/s 143(2) of the Act in the present case, he, in my view, had to be satisfied that in spite of compliance with an earlier notice u/s 143(2) of the Act, he could not complete the assessment on the basis of the books of account and documents produced but required further production by way of evidence or the attendance of the assessee before completing the assessment. There is nothing on the records of the present case to show that the Income Tax Officer, "D"-Ward, Dist I(I), Calcutta, felt any such difficulty in completing the assessment without the production of further books of account and documents in pursuance of notice u/s 143(2) of the Act. It is significant that Shyamal Dhan Ghosal who passed the impugned order of assessment in the present case does not in his affidavit before me state that the letter dated the 12th November, 1964, was a notice u/s 143(2) of the Act or that he considered it necessary to issue a fresh notice u/s 143(2) of the Act in the facts of the present case. Consequently, I am constrained to hold that the letter dated the 12th November, 1964, cannot be construed as a notice u/s 143(2) of the Act.

17. In the circumstances, I must hold that the conditions precedent for the assumption of jurisdiction u/s 144 of the Act were not present in the instant case and the order of assessment u/s 144 of the Act must be therefore struck down as being without jurisdiction.

18. Even if I were to accept Mr. Gupta's contention on this point, there is, in my view, a more fundamental difficulty in Mr. Gupta's way. It is well settled that, where the jurisdiction of a tribunal is limited jurisdiction depending on a preliminary finding as to some collateral fact necessary for the assumption of jurisdiction, the tribunal cannot give itself jurisdiction on a wrong finding of such collateral fact. If it does assume jurisdiction on such a wrong finding of collateral fact, the High Court in exercise of its writ jurisdiction can set aside such an erroneous finding on a collateral fact and the assumption of jurisdiction on the basis thereof.

19. Reference may be made in this connection to Halsbury's Laws of England, third edition, volume 11, paragraph 270, where the following passage occurs:

"The case is more difficult where the jurisdiction of the inferior tribunal depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact is collateral to the actual matter which the inferior tribunal has to try, that tribunal cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess unless by statute the inferior tribunal is given power to determine conclusively questions relating to its own jurisdiction. The inferior tribunal must, indeed, decide as to the collateral fact, in the first instance; but the superior court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower court if such decision is erroneous."

20. The above passage has been quoted with approval in a decision of the Supreme Court in the case of Smt. Ujjam Bai Vs. State of Uttar Pradesh, .

21. Mr. Bhabra in this connection drew my attention to the decision in the case of R. v. Shoreditch Assessment Committee [1910] 2 K.B. 859 . Farwell L.J. in the above case observed as follows at page 879 of the report:

"The existence of the provisional list is a condition precedent to their jurisdiction to hear and determine, and as the claimant is entitled to require them to hear and determine, they cannot refuse to take the steps necessary to give rise to such jurisdiction ; if they do, their refusal may be called in question in the High Court. No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction, such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure--such a tribunal would be autocratic, not limited--and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a court with jurisdiction confined to the City of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the Ward of Chepe."

22. He also drew my attention to another decision of the English Court of Appeal in the case of White and Collins v. Minister of Health [1939] 2 K.B. 838 ; [1939] 3 All E.R. 548 where similar observations have been made by Luxmoor L. J. at pages 855-856 of the report.

23. In the present case, the legislature has chosen to give the Income Tax Officer the power and authority to make an assessment to the best of his judgment u/s 144 of the Act under certain circumstances. That jurisdiction is a limited jurisdiction dependent upon the existence of certain collateral facts, viz., the non-compliance by the assessee with the various notices mentioned in Sub-clauses (a), (b) and (c) of that Section. If, in a particular case, the Income Tax Officer had chosen to assume jurisdiction u/s 144 of the Act and to make a best judgment assessment on a wrong finding as to a jurisdictional fact, viz., non-compliance with any of the notices mentioned in Section 144 of the Act, the High Court in exercise of its jurisdiction under article 226 of the Constitution is competent to enquire into the correctness of such finding on a jurisdictional fact. If the High Court finds that the jurisdictional fact has been wrongly found by the Income Tax Officer, it could set aside the exercise of power by the Income Tax Officer on such a wrong finding on a jurisdictional fact. In other words, if the Income Tax Officer had passed the order u/s 144 of the Act on a finding that the

assessee has failed to comply with all the terms of a notice issued u/s 143(2) of the Act, where in fact, there had been no such non-compliance, I could in exercise of my jurisdiction under article 226 of the Constitution of India set aside the best judgment assessment u/s 144 of the Act on the basis of such a finding.

24. In my view, it must follow from the above propositions of law that where a tribunal of limited jurisdiction assumes authority on a finding of a collateral fact such finding must be recorded either in the order of the authority concerned or in the record of the proceedings. In other words, before the Income Tax Officer can assume jurisdiction u/s 144 of the Act it must record the finding in the first instance that there has been a non-compliance with any of the various notices mentioned in that Section. Otherwise, on a challenge being thrown, the High Court would not be in a position to ascertain whether such a finding on a jurisdictional fact is correct or not and to give relief on that basis in an appropriate case.

25. After an anxious perusal of the order of assessment, in the present case, and the records with regard thereto, I have been unable to discover any finding by the Income Tax Officer that there has been any non-compliance with any of the notices mentioned in the Sub-clauses (a), (b) and (c) of Section 144 of the Act. In that view of the matter, the order of assessment in the present case must be struck down. The only finding in paragraph 2 of the order of the assessment is non-compliance with a notice u/s 131 of the Act, which non-compliance has not been made a ground for assumption of jurisdiction u/s 144 of the Act.

26. Lastly, Mr. Bhabra contended that there has been no non-compliance with the notice u/s 131 of the Act in the facts of the present case. He argued that the letter dated the 12th November, 1964, which is described as notice u/s 131 of the Act in the order of assessment was not served on his client. He argued in the alternative that the said notice was not served on the petitioner in accordance with law and in the mode published under the Income Tax Act, 1961. He drew my attention to the various authorities on the question of a valid service of a notice under the provisions of the Indian Income Tax Act, 1922, and the Income Tax Act, 1961. In this connection, Mr. Gupta also referred me to various decisions and made submissions in answer to the contentions of Mr. Bhabra on this point.

27. In view of my finding on the other points it is not necessary for me to decide this question in the present case. As I have already observed, even if there was no valid service of the notice u/s 131 of the Act and there has been non-compliance with the terms of such notice, this would not, as I have already indicated, invest the Income Tax Officer with jurisdiction to make an order of best judgment assessment u/s 144 of the Act.

28. In the result, this application must succeed and the rule must be made absolute. There will be a writ in the nature of certiorari quashing and setting aside the order dated the 22nd March, 1965, and the notice of demand dated the 23rd March, 1965, and a writ in the nature of mandamus directing the

respondents to forbear from giving effect to the said order dated the 22nd March, 1965, and the notice of demand dated the 23rd March, 1965, in any manner whatsoever. This will, however, not preclude the respondents from proceeding according to law.

29. There will be no order as to costs.