

(1971) 09 SC CK 0035

In the Supreme Court Of India

Case No : Civil Appeal No's. 1301 of 1971 and 1981 of 1968

Mr. S.B. Jain, I.T.O., Nagpur

APPELLANT

Vs

Mahandera

RESPONDENT

Date of Decision : 07-09-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 30, 30(1), 30(2), 34, 34(1)
Income Tax Act, 1961 — Section 139, 139(2), 147, 148, 149
Industrial Disputes Act, 1947 — Section 24</p>
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challenged the validity of that notice by means of a writ petition under Article 226 of the Constitution before the High Court of Bombay. The High Court accepted that writ petition and quashed the impugned notice by its order dated March 6, 1963. On April 1, 1962 the income tax Act, 1961 came into force. Thereafter the income tax Officer again issued a notice on March 26, 1963 u/s 148 of the new Act in respect of the very assessment which he earlier unsuccessfully sought to reopen by means of a notice u/s 34(1) (a) of the 1922 Act. The assessee again challenged the validity of the notice issued to him by means of another writ petition, before the High Court of Bombay. The High Court quashed that notice on the ground that the income tax Officer was not competent to issue that notice. It is against that decision, the present appeals have been brought to this Court.

4. Section 147 of the 1961 Act provides: If-

(a) the income tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the income tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the income tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of Sections 148 to 153 assess or re-assess such income or re-compute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in Sections 148 to 153 referred to as the relevant assessment year).

5. Section 148 reads:

(1) Before making the assessment, re-assessment or re-computation u/s 147, the income tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that Sub-section.

(2) The income tax Officer shall, before issuing any notice under this Section record his reasons for doing so.

6. Section 149 prescribes the time limit for issuing a notice u/s 148. Sub-section (i) of Section 149 says:

No notice u/s 148 shall be issued-

(a) in cases falling under Clause (a) of Section 147-

(i) for the relevant assessment year, if eight years have elapsed from the end of

that year, unless the case falls under Sub-clause (ii);....

7. Section 297 deals with repeals and savings.

8. Section 297(d)(ii) reads thus:

Notwithstanding the repeal of the Indian income tax Act 1922 (ii) of 1922 (hereinafter referred to as the repealed Act)...(d) where in respect of any assessment year after the year ending on the 31st day of March 1940:

(i)...

(ii) any income chargeable to tax had escaped assessment within the meaning of that expression in Section 147 and no proceedings u/s 34 of the repealed Act in respect of any such income are pending at the commencement of this Act, a notice u/s 148 may, subject to the provisions contained in Section 149 or Section 150, be issued with respect to that assessment year and all the provisions of this Act shall apply accordingly.

(Emphasis supplied).

9. The only question for decision in these appeals is whether the proceedings initiated by the notice u/s 34(1) (a) of the 1922 'Act were pending at the time when the new Act came into force. It is not denied that such proceedings were factually pending. But what was contended by Mr. B. Sen, learned Counsel for the department was that that notice being an invalid notice on the ground that that was barred by limitation, the proceedings initiated on basis of that notice should be considered as not pending in the eye of the law. We are unable to accept this contention. What Section 297(2)(a)(ii) requires is the factual pendency of a proceeding u/s 34 of the repealed Act. The question whether that proceeding was barred by limitation or not is irrelevant. It is not denied that those proceedings were initiated by a competent authority. Those proceedings were quashed for the reason that notice u/s 34 of 1922 Act was issued beyond the time prescribed by law. Hence it cannot be said that no proceeding u/s 34 of the 1922 Act either factually or legally was pending at the time when the new Act came into force.

10. Our above conclusion receives support from the decision of this Court in *Raja Kulkarni and Others Vs. The State of Bombay*, . Therein the question that arose for decision was whether an appeal u/s 24 of the Industrial Disputes Act, 1950 can be said to have been pending if that appeal was incompetent or invalid for some reason. This Court ruled that what was necessary was the factual pendency of the appeal and not that it should have been a valid or competent one under the provisions of the limitation Act or such other adjectival law.

11. The proceedings pending before a competent authority cannot be said to be not pending merely because that no relief can be granted in that proceedings because of the bar of limitation. In *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, it was contended before this Court that any appeal which is

barred by limitation cannot be considered as an appeal properly presented u/s 30 of the Indian Income Tax Act, 1922. This Court rejected that contention observing:

if an appeal is not presented within that time (within the prescribed time) does that cease to be an appeal as provided u/s 30(1) ? It is well established that rules of limitation pertain to the domain of adjectival law and that they operate only to bar the remedy but not to extinguish the right. An appeal preferred in accordance with Section 30(1) must, therefore, be an appeal in the eye of law, though having been presented beyond the period mentioned in Section 30(2) it is liable to be dismissed in limine.

12. We have no doubt in our mind that the proceedings initiated u/s 34(1) (a) of the 1922 Act were pending at the time 1961 Act came into force and that being so the income tax Officer was not competent to issue any fresh notice u/s 148 of the 1961 Act.

13. In the result Civil Appeal No. 1301 of 71 fails and the same is dismissed with costs. Civil Appeal No. 1981 of 68 is dismissed as not being maintainable. Parties to bear their own costs in this appeal.