

(1958) 04 CAL CK 0009
In the Calcutta High Court
Case No : Matter No. 153 of 1957

Shri Debi Dutt Moody

APPELLANT

Vs

Shri Belan and Others

RESPONDENT

Date of Decision : 22-04-1958

Acts Referred:

Finance Act, 1956 — Section 18
Income Tax Act, 1922 — Section 22(2), 34, 67

Citation : AIR 1958 Cal 398 : (1959) 35 ITR 781

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.N. Sinha, J.—The petitioner is Debi Dutt Moody. On or about the 29th January, 1951 the petitioner was assessed for income tax for the assessment year 1948/1949, on a total income of Rs. 79319/-, by the Income Tax Officer, Companies District IV, Calcutta. Thereafter, a notice u/s 29 of the Income Tax Act, 1922, was served upon the petitioner for payment of the sum of Rs. 14,501/- as income tax. This amount was duly paid. On the 27th March, 1957 notice was issued u/s 34 of the said Act; to be precise, u/s 34 (I)(a). One copy of the notice was sent by post and another copy was purported to have been served upon the petitioner personally on the 28th March, 1957. This service is disputed, and I shall have to deal with it in greater detail. The copy that was sent by post was received on the 4th April, 1957. One of the disputed points-raised in this application is as to whether the period of Limitation for 8 years applies to the re-opening of the assessment u/s 34 (I)(a). If it does, then the service by post is, admittedly, too late. In such a case, the re-assessment can only be supported if there has been a valid service on the 28th March, 1957.

2. On or about the 29th July, 1957 notice was issued u/s 28(3) of the Act. On the 30th July, 1957 there was an ex parte assessment, because the petitioner did not comply with the notice purported to have been served upon him, and in this re-

assessment, his total income was assessed at a very much higher figure than before. It is alleged that a sum of Rs. 53,987/- was added to his income, although the petitioner states that the said amount was not his income but the income of his wife Sm. Banaresi Devi. On the 8th August, 1957 the petitioner wrote a letter asking for the date of service of the notice u/s 22(2), read with Section 34. On the 14th August, 1957 there was a reminder. It was pointed out that the assessment of the year 1948/1949 u/s 34 (1) (a) was time-barred. On the same date, notice was served upon the petitioner u/s 29 of the Act, asking for payment of Rs. 29,595.94 nP., and it was intimated that if the said amount was not paid within the specified period, proceedings would be taken for levying a penalty.

3. On the 20th August", 1957 the petitioner wrote a letter repeating that the notice u/s 34 was time-barred. On the 28th August, 1957 a reply was given by the Income Tax authorities, dealing with the letters of the 8th August, 14th August, 19th August, and 20th August. It was, inter alia, pointed out that the notice u/s 34 was personally served on the petitioner on the 28th March, 1957] and therefore the re-assessment was quite in-order and not time-barred. This rule was taken out by the petitioner on the 30th August, 1957 and, in effect, challenges the re-assessment u/s 34.

4. The ground upon which this application is based is a simple one, namely, that the eight year period of limitation applies to the facts of this case, and that the notice was served beyond that date.

5. Mr. Meyer, appearing on behalf of the respondent, argues as follows : Firstly, he states that the notice was served within time, because the notice was personally served on the 28th March, 1957 which was within the eight-year period. That this date is within the eighty year period is not disputed, but the factum of the service is disputed.

6. Next, Mr. Meyer argues that even if the service on the 28th March, 1957 was bad, the service by post on the 4th April, 1957 is quite sufficient, because, according to him, the eight years period of limitation no longer applied to the facts and circumstances of this case, as the result of an amendment of Section 34. Under the amended Act, it is sufficient if the notice is issued within 8 years. It may be served at any lime thereafter.

7. I shall first deal with the point of service. As stated above, if there has been a valid service on the 28th March, 1957 the notice is admittedly within time, provided, of course, that the time-bar at all applies.

8. On this point of service, affidavits have been filed. In any other case, where it was possible do file a suit, I might have held that this is a disputed question of fact and therefore ought not to be dealt with in this jurisdiction, but, as Mr. Gupta has rightly pointed out, a suit cannot be brought to challenge the assessment and therefore his client would be without a remedy if he cannot agitate this point of service.

9. On the question of service, an affidavit has been filed by the serving officer, Haridas Chatterji, Income Tax Inspector, affirmed on the 28th March, 1957. He took a notice u/s 34 (a) (1) of the Income Tax Act for the assessment year 1948/1949 addressed to the petitioner at No. "8 Middleton Street Calcutta. He went there at about 3 p.m. on the 28th March, 1957 and personally met the petitioner and served the notice upon him. The petitioner instructed one Sri Bengani (whose correct name is Jbumarmall Bengani) one of his clerks, to sign his acknowledgment slip. The acknowledgment slip is a printed slip. It is known as I.T.57. It is called a "Tear-off Acknowledgment slip". A specimen thereof has been filed as an exhibit, being included in Exhibit 1. The Inspector came back to his office and handed over this acknowledgment slip to the personal clerk of the Income Tax Officer, Companies District IV, Calcutta, on the same date.

10. There are 2 documentary records which corroborate this testimony. The first is the Inspector's own entry in his personal diary. Mr. Gupta called to see the diary which has been produced and a copy of the entry has been exhibited, being Exhibit 2.

11. The second supporting evidence is an entry in the order sheet (Ex. 1). This entry has been made by Mr. T. Belan, the Income Tax Officer, and runs as follows :--

"Notice u/s 34 served on 28-3-57. Seen. I.T. 57".

In the next column we find the following entry :--

"I.T. 57. Put up."

12. It will thus be seen that on the 28th March, 1957 there is a contemporaneous entry stating that- notice u/s 34 was served and also that the acknowledgment in form I.T. 57 was put up and was seen by the Income Tax Officer. This acknowledgment slip is missing and cannot be found on the record. The authorities have commenced departmental proceedings against the clerks concerned in respect thereof, which proceedings are still pending.

13. It appears that on the 4th July, 1957 a statement was recorded as made by the serving Inspector. (This is Exhibit A to the affidavit of Haridas Chaterji). It is not quite clear why this statement was made; perhaps it was in connection with the discovery that the acknowledgment slip was missing.

14. This being the evidence, the question is whether I am satisfied that there was service on the 28th March, 1957, of the notice of the petitioner.

15. Mr. Gupta has, firstly, pointed out that in the personal diary there is a statement that the notice was served, but particulars are not there. He also comments on the loss of the acknowledgment slip. I do not say that such comment is unjustified. But, as Mr. Meyer pointed out, the result of holding that there was no service on the 28th of March, 1957 would mean holding that the Income Tax Officer, Mr. Belan, has made a false entry in the order sheet, or that

the order-sheet was subsequently forged. It also means that the Inspector has made a false statement and that in order to save limitation, extensive substitution of original documents have taken place. Any one looking at the original order-sheet would have to come to the conclusion that it was not possible to change only one entry. It would mean that whole pages would have to be replaced. The inevitable consequence of holding non-service of the notice means that the Income Tax Officer concerned, the serving officer and other people, in concert and collusion, have invented this fictitious service and have falsified the records.

16. I am unable to hold thus. Having, looked into the original documents and the order sheet, and having considered the affidavits, I am satisfied that as a fact the petitioner, was served in the manner stated in the affidavit of Haridas Chaterji on the 28th March, 1957 with the notice u/s 34 of the Income Tax Act.

17. That being so, I have only to deal with the comment of Mr. Gupta as to why the subsequent correspondence was not being answered in time. The Income Tax authorities should have been more diligent in answering the correspondence, and I do not say that the petitioner has not some legitimate grievance on this score. However, the delay is not such as would support a case of concoction of evidence.

18. Since I have held that the petitioner was served on the 28th March, 1957 within the period of limitation, it is scarcely necessary to deal with the other question, but since that point has been raised, I have to deal with it.

19. The point is as follows : u/s 34 as it stood before the Finance Act of 1956, it was incumbent on the Income Tax Officer, in cases falling under Clause (a) of Sub-section (1) of Section 34, "at any time within 8 years" to serve on the assessee etc., a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and he may proceed to assess or re-assess such income, profits or gains etc., and the provisions of the Act would apply as if the notice was a notice issued under that sub-section.

20. Then there was a proviso. That proviso has also been changed By the Finance Act of 1956. But even before the amendment, the form was the same, namely, that under the proviso as it existed before and as it exists now, it is laid down that the Income Tax Officer "shall not issue a notice under Clause (a) of Sub-section (1)", for any year if eight years have elapsed after the expiry of that year, etc.

21. So far as the main provision is concerned, the bar of limitation of 8 years in respect of cases falling under Clause (a) of Sub-section (1) has now been removed, and the provision reads as follows :

"He may in cases falling under Clause (a) at any time. 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 22 and may proceed to assess or re-assess such income

22. It will therefore appear that under "Section 34, as it was before the amendment by Section 18 ."of the Finance Act of 1956, it was laid down in the body of the section that so far as notices under Clause (a) of Sub-section (1) are concerned, they must be "served"" within 8 years. But under the proviso it was laid down that notice should be issued within 8 years.

23. The question came to be determined as to what was the consequence of this difference in the wording, because in the body of the section it was laid down that service or the notice had to be made within 8 years, whereas under the proviso it was merely laid down that the notice should be issued within 8 years.

24. The matter came up for consideration by a bench of the Bombay High Court in Commissioner of Income Tax, Bombay South Vs. D.V. Ghurye, . Chagla, C. J. pointed out that It was difficult to understand why the Legislature has used in the proviso words relating to the .service of a notice, while in the body it has used the word "served". The learned Chief Justice opined that it was necessary to equate the two expressions, and stated as follows :--

"The Advocate-General suggests that we must read the proviso to Sub-section (3) as an independent and substantive provision of law, and he suggests that the reason for enacting this proviso in the language in which the Legislature has enacted it is to deal with cases where after the issue of the notice the assessee seeks to evade service. Now, if the Legislature wanted to deal with such a contingency, the proper place to deal with it would have been in Section 34 (1) itself. But we cannot possibly construe a proviso to Sub-section (3) as in effect and in substance curtailing the rights of the assessee to have the notice served within the time mentioned in Section 34(1), because if we were to accept the Advocate-General's contention, this must be the result, that after the Legislature has clearly provided that the assessee was entitled to have the notice served upon him within the period of eight years mentioned in Section 34(1), in order that there should be a valid assessment u/s 34 the Legislature proceeded u/s 34(3) to take away that right and provided for the notice being issued within eight years and not necessarily served within eight years."

The learned Chief Justice held that in spite of the proviso it must be held that notice must be both issued and served within 8 years.

25. Now, if the position in law remained the same, then there can be no doubt that here, also, notice should not only have been issued before the expiry of 8 years but also served within that period of time.

26. We find, however, that shortly after the Bombay judgment by Section 18 of the Finance Act of 1956, the provisions of Section 34, including the proviso, have been altered, as stated above While in the body of the section it was previously laid down that the notice issued under! Clause (a) of Sub-section (1) of Section 34 should be served within 8 years, it is now provided that it can be served at any time. This, therefore, completely distinguishes the present case from the Bombay decision. In fact, the amendment, coming as it did, very shortly after

the decision of the learned Chief Justice of the Bombay High Court; makes me think that the amendment was induced by the judgment. Now that the section expressly provides that notice in connection with Clause (a) of Sub-section (1) of Section 34 can be served "at any time", it appears to me to be impossible to interpret it as laying down that it should still be served within 8 years. In that event, the amendment would be of no consequence whatever. Reading the section and the proviso as they now stand, it appears to me to lay down that a notice under Clause (a) of Sub-section (1) is to be, issued within the time specified in the proviso, but it could be served at any time. It has been pointed out that this would place the assessee in a very disadvantageous position. It may so happen that a notice is issued by the office within 8 years, but a large number of years" expire before it is served. This may be a defect in the Act, but it can only be remedied in the appropriate manner. I have, however, to interpret the Act as I find it. It seems to me impossible to interpret it in any other fashion. That being so, the notice herein, having been issued within 8 years and being in terms of the proviso, the fact that it was served beyond the 8 years would not invalidate it.

The result is that on both the points the petitioner has lost. There is, therefore, no reason to interfere in this matter, and the application must be dismissed. The rule must be discharged. The interim order is vacated. There will be no order as to costs.

The operation of this order will be stayed for 3 weeks, in order to enable the petitioner to appeal.