

(1989) 09 GAU CK 0007

In the Gauhati High Court

Case No : Income-tax Reference No. 3 of 1981

Sonai River Tea Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-09-1989

Acts Referred:

Income Tax Act, 1961 — Section 144B, 251

Citation : (1989) 80 CTR 255 : (1990) 182 ITR 162

Hon'ble Judges : A. Raghuvir, C.J.;B.P. Saraf, J

Bench : Division Bench

Advocate : J.P. Bhattacharjee, Ranjan Gogoi and J.P. Sharma, for the Appellant;

Judgement

A. Raghuvir, C.J.—This reference is made under the Income Tax Act, 1961, at the instance of the assessee, a tea company called Sonai River Tea Company Ltd. The assessee for the assessment year 1975-76 returned an income of Rs. 72,288. The Income Tax Officer, after inquiry, varied the amount and held that the income was Rs. 3,05,735. The assessee successfully appealed. The assessment order was set aside. The Income Tax Officer was ordered to reframe the order. The assessee filed a further appeal against the order of remand as the assessee sought annulment of the Income Tax Officer's order. The Tribunal followed a decision in I.T.A. No. 211(Gauhati) of 1976-77 relating to Mahatta Construction Company, Tezpur, and dismissed the appeal. Thereupon, the following four questions are referred to this court at the instance of the assessee. The questions read as under :

"1. Whether the provisions of Section 144B of the Income Tax Act, 1961, are procedural or substantive ?

2. Even if it be conceded that the provisions are procedural, whether these are directory or mandatory ?

3. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the Appellate Assistant

Commissioner was right in setting aside the assessment and directing the Income Tax Officer to make a fresh assessment in accordance with law, as the assessment proceeding could not be considered to be null and void, but duly vitiated by a supervening irregularity ?

4. Whether the Income Tax Appellate Tribunal was bound to follow its earlier decision which was rendered on identical facts in the case of another assessee wherein the interpretation of a provision of law, viz., Section 144B of the Act, was at issue?"

2. The assessee sought annulment of the Income Tax Officer's order u/s 251 of the Income Tax Act of 1961 and in none of the four questions is there a reference to that section.

3. The first appellate authority in the instant case found that the Income Tax Officer while passing the assessment order was ignorant of Section 144B and did not follow the procedure incorporated in that provision and therefore it set aside the assessment order and remitted the inquiry to the Income Tax Officer to follow the procedure set cut in Section 144B.

4. The assessee sought annulment of the Income Tax Officer's order in precise terms. The assessee was not satisfied when the assessment order was set aside. The case of the assessee is that as the Income Tax Officer did not accept the income shown in the return and varied the income to Rs. 3,05,735, the Income Tax Officer had no jurisdiction to continue the proceedings. Further, it is contended that such orders which are passed in violation of Section 144B are non est in law. Therefore, such orders warrant to be annulled or quashed. To support the contention, Sub-section (1) of Section 251 is relied on by the assessee. In answering the questions, perforce it is required to consider whether Section 144B prescribed a mere procedure and further what are the consequences of not following the procedure laid down in that section. What is the character of such orders ? Are they void or irregular orders ? The words like irregular order, void order, as on today, are not terms of art. Since some of these aspects are not covered by the questions referred, we have reframed the four questions in one which reads as follows :

"Whether, on the facts of the case, the assessment order passed by the Income Tax Officer in ignorance of Section 144B of the Income Tax Act, 1961, warrant the annulment of the Income Tax Officer's order u/s 251 of the Act or on the facts of the case is it sufficient in law to set aside the Income Tax Officer's order as has been done in the instant case ?

5. Parliament, in the Taxation Laws (Amendment) Act, 1975, desired to strengthen the administration and, to achieve that object, incorporated a scheme in Section 144B. The scheme in Section 144B when proved to be counterproductive was repealed with effect from April 1, 1989, under the Direct Tax Laws (Amendment) Act, 1987. In the relevant period of 1975-76, all assessments involving addition of more than one lakh of rupees were required to

follow the procedure in Section 144B.

6. The scheme in Section 144B shows that whenever the Income Tax Officer finds that the income returned is to be varied and the variation involves more than one lakh of rupees, the assessee is to be informed and thereafter Section 144B procedure will have to be followed. If the assessee protests and files objections to the draft assessment order as prepared by the Income Tax Officer the draft order along with the objections of the assessee is sent to the Inspecting Assistant Commissioner for "directions". On receipt of the directions, the Income Tax Officer finalises the assessment order. This, in a nutshell, is the scheme incorporated in Section 144B.

7. All orders u/s 144B are appealable under Clause (d) of Section 246. The Commissioner of Income Tax (Appeals) will dispose of appeals u/s 251 of the Act. A second appeal as in Section 254 to the Tribunal is further provided. A special rule of limitation is prescribed in Sub-section (2A) of Section 153. For facility of reference, the above-referred to provisions are extracted hereunder :

"246. (1) Subject to the provisions of Sub-section (2), any assessee aggrieved by any of the following orders of an Assessing Officer may appeal to the Deputy Commissioner (Appeals) against such order --

251. Powers of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals).--(1) In disposing of an appeal, the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall have the following powers-

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) and after making such further enquiry as may be necessary, and the Assessing Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit...

254. Orders of Appellate Tribunal.--(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon, as it thinks fit....

153 2(A) Notwithstanding anything contained in Sub-sections (1) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment u/s 146 or in pursuance of an order u/s 250, Section 254, Section 263 or Section 264, setting

aside or cancelling an assessment, may be made at any time before the expiry of two years from the end of the financial year in which the order u/s 146 cancelling the assessment is passed by the Assessing Officer or the order u/s 250 or Section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order u/s 263 or Section 264 is passed by the Chief Commissioner or Commissioner,"

8. In this case, the appellate authority set aside the assessment order as the Income Tax Officer did not accept the income returned as Rs. 72,288. He held that the income was Rs. 3,05,735. In such a case, the procedure in Section 144B should have been followed. The issue raised is when the procedure in Section 144B is not followed, whether the order of the Income Tax Officer is to be set aside or to be annulled. The appellate authority in its power can annul an order and can set aside the order appealed from. The two are specified, as powers of the appellate authority in Section 251. There are no guidelines for the appellate authority as to when an order is to be set aside and as to when an order is to be annulled. In the absence of guidelines, what course is to be adopted became arduous and difficult for decision. In search of an answer, we traversed the powers of the appeal courts in criminal law in that discipline. When orders are passed without compliance with the statutory provisions, such orders are termed irregular orders and the effect of such orders is treated from the standpoint of curability of the orders. In constitutional law, orders passed per incuriam are quashed or annulled. There is no settled practice as on today in that discipline as to what orders are to be annulled or quashed and what orders are to be set aside. There is also no settled practice as to when an order is annulled and as to whether further inquiry can be held or not. In civil law, appellate authorities do confirm or modify orders under appeal. Expressions such as quash and annul have a constitutional flavour and generally the flavour is not shared by civil and criminal courts though in recent days to quash proceedings is a rage in criminal proceedings. Fiscal appeals share their meal with civil authorities and ordinarily assessment orders are not quashed.

9. The answer in the instant case turns on Section 251. Sub-section (1) of that section deals with (a) appeals against assessment orders, (b) appeals against orders of penalties, (c) appeals other than those under (a) and (b) such as appeals against orders where a firm was refused registration, etc. In the case of appeal under Clause (a), the appellate authority may confirm or reduce the liability of the assessee. We may say that assessment orders may be annulled or set aside, while in appeals pertaining to penalties, the orders can only be cancelled or confirmed, the appellate authority in (c) can pass orders as "it thinks fit".

10. As we see, in some appeals, the orders can only be cancelled. In certain appeals, orders can be annulled, and in certain appeals, "orders can be set aside. While the second appellate authority can pass orders as it thinks fit, it is seen that the whole subject-matter is arranged with meticulous care by Parliament but

no guidelines are there in the Act of 1961 as to when to annul and when to quash an order. The subject-matter is left inchoate for courts to grapple with the issues. The courts as on today have not drawn guidelines dividing the subject except in one case of the United Kingdom and another in Australia. The issue we see is entrenched in many legal difficulties.

11. In this case, learned counsel for the "Revenue argued that the appellate authority on the facts of the case rightly set aside the assessment order for not following Section 144B. Counsel also argued that there is no vice in the remand order. Learned counsel for the assessee argued that the appeal should have been annulled and, therefore, the consequential order of remand is not legal.

12. Before the issue is considered one or two collateral aspects that have emerged may be noted from the decided cases. The Madhya Pradesh High Court in Banarsidas Bhanot and Sons Vs. Commissioner of Income Tax, found that Section 144B was deviated from. In answering a similar question as in the instant case, the Tribunal's power in second appeal u/s 254 was pressed into service in that it was held that the Tribunal can pass orders as it thinks fit. The words "as it thinks fit" were interpreted in Babulal Nagar and Others Vs. Shree Synthetics Ltd. and Others, to mean to pass orders as per the statute which mean again as per Section 251 of the Act. This is to run in a circle without a destination or an end. With great respect, such a reasoning does not answer the issue.

13. In a case from the Andhra Pradesh High Court in H.S. Imam Vs. Commissioner of Income Tax, the assessment order was found passed without following the procedure in Section 144B. That court observed (at p. 219):

"Ends of justice would be met adequately by setting aside the assessment and giving a fresh opportunity to the assessee to make appropriate representations in a de novo assessment enquiry before the officer. It may be true that, in so doing, the period of limitation is enlarged. But this is a hazard associated with the direction to make a fresh assessment and it cannot be avoided ..."

14. Questions of limitation cannot be equated with hazards in litigation nor do the ends of justice warrant avoidance of statutory provisions and, for that reason, we cannot follow the ratio laid down in that case.

15. There is the case of the Madhya Pradesh High Court in H.H. Maharaja Raja Pawan Dewas Vs. Commissioner of Income Tax, where, in the face of deviation from Section 144B, it was concluded that no prejudice was caused. We cannot hold that the test of prejudice is either relevant or determinative of the issue raised in the instant case.

16. Two cases of the Karnataka High Court where there is discussion about invalidating an assessment order while considering the question incidentally are G.R. Steel and Alloys Pvt. Ltd. Vs. Commissioner of Income Tax, and in the case of K. Ashok Kumar and Others Vs. Commissioner of Income Tax, . In both the

cases, the assessment orders were not invalidated. In more than one sense, the instant issue was not considered in all its aspects in those cases as the issue arose only incidentally in the two cases.

17. Now, there are numerous cases where High Courts have held that deviation from Section 144B leads only to "procedural irregularity. But no case has been cited to hold that deviation from the procedure in Section 144B warrants annulment of the order.

18. There are cases where the issue was whether the assessment order is to be annulled when legal representatives were not given notice u/s 143 of the Act. These cases are cited to show how courts have viewed matters when statutory provisions are deviated from. We take the case of this court in *Jai Prakash Singh (Legal Representative of Estate of Late B. N. Singh) Vs. Commissioner of Income Tax, Assam*, where notices u/s 143(2) of the Income Tax Act were not served on nine out of ten legal representatives of the assessee. Among the three widows, three sons, four daughters, only one son was served with notice. The question arose as to whether non-service of notices on nine of the legal representatives was an irregularity to warrant cancellation of the assessment order or whether it was sufficient to set aside the order so that further proceedings can be continued. This court held that the "principles of natural justice take away the jurisdiction of the authority to proceed with the proceedings". Thus, further proceedings were stopped. There are cases of other High Courts wherein this view-point was followed. There are also cases where this view-point was not followed. In *COMMISSIONER OF Income Tax Vs. GYAN PRAKASH GUPTA.*, the Rajasthan High Court did not follow this case. It was held that non-service of notices on all the legal representatives does not make the assessment order void ab initio. The assessment order was not annulled. In a Gujarat case, the relevant legal representative was not served notice-- *Chootharmal Wadhuram (Decd.) (by legal representatives) Vs. Commissioner of Income Tax, (under Sections 24B(2), 34(1)(a) of the 1922 Act)*. In that case, cases under the CPC were considered. It was held that when after enquiry certain legal representatives were discovered who were earlier not served notices, it was held that the earlier orders are not nullified and it was observed (at p. 374) : "If this principle was rejected in its application to assessment proceedings, it would in many cases frustrate the proceedings for assessment of income of a deceased person and result in escapement of such income from taxation without any fault on the part of the revenue authorities." We have earlier referred to two Karnataka cases where more or less on the same reasoning assessment orders were not invalidated. *G.R. Steel and Alloys Pvt. Ltd. Vs. Commissioner of Income Tax*, and *K. Ashok Kumar and Others Vs. Commissioner of Income Tax*,

19. We may point out that under the CPC the effect of not bringing all the legal representatives on record was considered in *Raja Ram Mahadev Paranjype and Others Vs. Aba Maruti Mali and Others*, *Daya Ram and Others Vs. Shyam Sundari*, and *Babulal Nagar and Others Vs. Shree Synthetics Ltd. and Others*,

These three authorities show that when all the legal representatives are not brought on record and decrees are passed, such decrees in law are not nullities. The expressions "curable irregularity" and "non-curable irregularity" are elucidated in criminal law. There is an illuminating discussion in the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, as to what consequences follow in criminal proceedings when statutory provisions are not followed.

20. In cases arising under Article 226, there is no settled opinion to date. The concepts are inchoate on the question as to when to annul an order and when to set aside an order, since the expressions "quashing" and "annulment" are as yet not treated as terms of art. We may cite an example of a case where the affected party was not heard in a petition under Article 226. Such a person when he approaches the court which passed the order, the order is not quashed. The order is set aside. What is of importance is that the subject-matter is reheard after the order is set aside.

21. In the United Kingdom in *Ridge v. Baldwin* [1964] AC 40 it is noticed that when an order is void, when absolutely void or when voidable did not get a settled meaning. It was held in that case--"Every case must depend upon the willingness of the court to grant a remedy rather than upon any logic to be extracted from "absolutely void" and "voidable"." Three years later, commenting on a case, *Alfred Thangarajah Durayappah v. W. J. Fernando* [1967] 2 AC 337 (which today is held to have been wrongly decided), the Privy Council in that case considered the void and voidable aspects of orders. Professor Wade, who is the author of a leading book on Administrative Law, in two articles, one in 80 *Law Quarterly Review* at page 328, in the context of that decision wrote "quashing means something more than a declaration. In setting aside the decision the court is, in effect, exercising an indirect appellate jurisdiction on a point of law apparent on the record, and is going beyond the sphere of jurisdictional control." In another article in 90 *Law Quarterly Review*, at page 154, the same author stated that the key to the questions as to when an order is void or voidable is not in "absolutism but relativity": He propounded the same view-point in his Sixth Edition of Administrative Law, at page 353. Impelled by these ramifications, we state that the subject-matter even as on today is inchoate.

22. Before parting with the subject, we may refer to a case cited by, the Revenue in this regard, *Raleigh Investment Co. Ltd. v. Governor-General in Council* [1947] 15 ITR 332. The Revenue laid great stress on the following passage in that case (headnote) : "An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be ultra vires, is not a nullity like an order of a court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise", (para. 14). The Indian Supreme Court did not follow this case on the issue of ouster of jurisdiction of civil courts. What is laid down in the above passage is more relevant when orders are declared ultra vires. The last line in the passage

suggests that jurisdiction is different from the concepts of ultra vires. Even as to that aspect more will be stated in an appropriate case when an order is declared ultra vires. As it is, we are entrenched in jurisdiction in the instant case and searching for a solution in fields not relevant to ultra vires concepts. The instant subject was considered in an Australian case, *Hinton Demolitions Pvt. Ltd. v. Llwer* (No. 2) [1971] 1 S. A. S. R. 512. The Australian High Court wrestled with the problems created by the Privy Council decision in *Alfred Thangarajah Durayappah v. W.J. Fernando* [1967] 2 AC 337 and helplessly raised hands and said "the whole thing is in a state of flux and confusion."

23. Now, in a large number of cases, a case decided u/s 31(3) of the repealed Act of 1922 was considered. The case is *Sant Baba Mohan Singh Vs. Commissioner of Income Tax*, . In that case, the Allahabad High Court held (at p. 199) : Section 31(3) speaks of the powers of the Appellate Assistant Commissioner ; that is a power to be exercised where the assessment proceeding is a nullity in the sense that the Income Tax Officer has no jurisdiction ab initio to take the proceeding, The learned judge explained that the proceeding is a nullity when the authority taking it has no jurisdiction either because of want of pecuniary jurisdiction or of territorial jurisdiction or of jurisdiction over the subject-matter of the proceeding. Questions arising from territory and pecuniary value do not necessarily lead to annulment. See the case in [1954] SC 340 , *Kiran Singh and Others Vs. Chaman Paswan and Others*, In that case, there is discussion on the subject. What is decided thus in *Sant Baba Mohan Singh Vs. Commissioner of Income Tax*, does not furnish any solution.

24. Finally, we return to facts. The assessee in the instant case showed an income of Rs. 72,288 in the return. The Income Tax Officer did not accept the return. He varied the income to the sum of Rs. 3,05,735. Because of the variation, the Income Tax Officer should have followed the procedure in Section 144B. He did not give a draft order to the assessee and invite objections from the assessee. Instead, he arrogated to himself the powers to pass assessment order when in law he was not vested with the power to do so. In doing so, the Income Tax Officer transgressed the Board's notification and transgressed the statutory provision in Section 144B. We are unable to hold that the omissions and transgressions of the Income Tax Officer are mere irregularities. We hold that such an assessment order is to be annulled.

25. In that view, we answer the question reframed in the negative, in favour of the assessee and against the Revenue. No costs. Oral leave to appeal to the Supreme Court is refused.