

Commissioner Of Income-Tax, West ... vs Ramendra Nath Ghosh on 19 August, 1971

Equivalent citations: [1971]82ITR888(SC)

Author: K.S. Hegde

Bench: A.N. Grover, K.S. Hegde

JUDGMENT

K.S. Hegde, J.

1. These appeals by certificate raise a common question of law, namely, whether the assessees (respondents in these appeals) have been properly served before action was taken under Section 33B of the Indian Income-tax Act, 1922, which will be hereinafter referred to as " the Act ".

2. The assessment year with which we are concerned in these appeals are 1959-60, 1960-61 and 1961-62. The assessment for those assessment years was completed by the Income-tax Officer on November 28, 1961. There-after, the Commissioner of Income-tax initiated proceedings under Section 33B and issued notices to the assessees on October 19, 1963. Notices were issued by registered post. They were also entrusted to the income-tax inspector for personal service. It is conceded that the notices sent to the assessees by registered post were served long after the Commissioner passed his orders under Section 33B. He passed those orders on November 2, 1963, and the notices sent by registered post were only served on the assessees on November 18, 1963. Therefore, we can ignore those notices.

3. Now coming to the notices sought to be served personally by the income-tax inspector, Mr. Neogi, we have two reports of his before us. In the first report dated October 21, 1963, he stated :

Had been to the above address for serving the notice under Section 33B on the above assessee. I contacted two persons who had been working there and gathered from them that M. Ramendra Nath Ghosh, a member of their family, who is usually available there had just then left for Calcutta and that he would not turn up during the rest of the day. They have however asked me to call on Mr. Ghosh tomorrow. Accordingly I have fixed up a time and have left a slip requesting Mr. Ghosh to wait for me.

4. It may be noted that that report does not mention the names of the persons who pointed out the place of business of Mr. Ghosh to Mr. Neogi. Now we proceed to the next report submitted by Mr. Neogi on October 22, 1963. That report reads thus :

Today also I had been to the above address again but unfortunately Mr. Ramendra Nath Ghosh was not available at the appointed time. However I contacted the said persons whom I saw there yesterday. Enquired about Mr. Ramendra Nath Ghosh, they informed that Mr. Ghosh has left the station and is expected back after a month or so. On further enquiry they informed that there was no second man to receive the notice in the absence of Mr. Ghosh. Mr. Ghosh's correct address and the place for which he left were not also furnished. From my conversation with them it appeared to me that they were avoiding the service of the notice. In the circumstances, I contacted the Income-tax Officer concerned and served the notice by affixation under his orders.

5. On the strength of those reports, the Commissioner came to the conclusion that the assesseees were properly served and on that basis he proceeded to exercise his powers under Section 33B, ex parte.

6. The assessee, instead of appealing against those orders, straightaway approached the High Court of Calcutta under Article 226 of the Constitution. The High Court entertained those writ petitions. The learned single judge who heard the writ petitions at the first instance dismissed one of the petitions holding that the assessee had been given reasonable opportunity for representing his case before the Commissioner. But strangely enough he had earlier allowed a writ petition of one of the other assesseees whose case was identical with that of the assessee whose writ petition he later dismissed. But on appeal to the Letters Patent Bench the decision of the learned single judge was reversed. The Appellate Bench came to the conclusion that there was no proper service on the assesseees and therefore the impugned orders cannot be sustained. Thereafter, this appeal has been brought after obtaining a certificate from the High Court.

7. As mentioned earlier the only question that we have to decide in these appeals is whether the assesseees have been properly served. The facts in all these cases are identical. Therefore, it would be sufficient if we deal with the case of Ramendra Nath Ghosh.

8. Admittedly, the assesseees have not been personally served in these cases. Therefore, we have to see whether the alleged service by affixation was in accordance with law. It is necessary to mention that, according to the assesseees, they had no place of business at all. They claim that they have closed their business long before the notices were issued. Hence, according to them, Mr. Neogi must have gone to a wrong place. This contention of the assesseees has been accepted by the Appellate Bench of the High Court. Bearing these facts in mind, let us now proceed to consider the relevant provisions of law. Section 63(1) of the Act reads:

A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a court, under the CPC, 1908 (V of 1908).

9. Rule 17 of Order V of the Civil Procedure Code reads:

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

(emphasis applied)

10. As seen earlier the contention of the assesseees was that at the relevant time they had no place of business. The report of the serving officer does not mention the names and addresses of the person who identified the place of business of the assesseees. That officer does not mention in his report nor in the affidavit filed by him that he personally knew the place of business of the assesseees. Hence, the service of notice must be held to be not in accordance with the law. The possibility of his having gone to a wrong place cannot be ruled out. The High Court after going into the facts of the case very elaborately, after examining several witnesses, has come to the conclusion that the service made was not a proper service. Hence, it is not possible to hold that the assesseees had been given a proper opportunity to put forward their case as required by Section 33B.

11. We cannot leave this case without expressing our disapproval as regards the procedure adopted by the High Court. The question whether the assesseees had been served in accordance with the law or not is essentially a question of fact. The Income-tax Act provides for an appeal against the order under Section 33B. Normally, the assessee should have gone up in appeal against the order under Section 33B. They should not have been allowed to invoke the extraordinary jurisdiction of the High Court. This Court has emphasised that aspect in more than one decision. The learned judges while noticing those decisions have tried to bypass those decisions. But, it is needless to go into that question now. It cannot be said that the High Court had no jurisdiction to entertain the writ petitions though it should not have exercised its discretion in favour of the assessee in view of the adequate alternative remedy they had.

12. In the result these appeals fail and they are dismissed. In the circumstances of the case, we make no order as to costs.