Income-Tax Officer, Alleppey vs S. Veeriah Reddiar on 10 October, 1966

Equivalent citations: [1967]64ITR70(SC), AIRONLINE 1966 SC 28

Author: J.C. Shah

Bench: J.C. Shah

JUDGMENT

Bhargava, J.

1. A notice was issued by the appellant, the Income-tax Officer, Alleppey, to the respondent under section 34 of the income- tax Act (hereinafter referred to as "the Act") in respect of the income for the assessment year 1952-53, on March 27, 1961. The respondent challenged the validity of that notice by a petition under article 226 of the Constitution before the Kerala High Court. The facts and grounds, on which the notice was challenged, were given in an affidavit in support of the petition; and it appears from that affidavit that the notice was challenged on two grounds. The first ground was that there were no reasons whatever to enable the appellant to believe that any income of the respondent for the year in question had escaped assessment or had been under-assessed. The second ground was that there were no bona fides whatever in the issue of that notice, and that, since there was no reason to enable the appellant to issue the notice its issue was without the authority of law and lacked jurisdiction. It was averred that the notice had been issued arbitrarily in the vain hope that the department might, at a later stage, come across income which may have escaped assessment. In this connection, reference was made to an earlier order of the Kerala High Court by which a notice issued by the appellant under section 37 of the Act, calling upon the respondent to produce the books of accounts and other records of his branch business at Bombay, was quashed; and it was urged that these proceedings were taken for the purpose of getting over the effect of the decision of the High Court quashing that notice.

2. In reply to this affidavit, two affidavits were filed by the appellant in which the averment made in the affidavit on behalf of the respondent were controverted. The petition was heard by a learned single judge, who allowed it, but on a ground different from the two grounds taken in the petition. The notice was quashed on the ground that the appellant, though he was satisfied that there was escape of income from assessment, had not arrived at the belief that that escape of income was by reason of the omission or failure on the part of the respondent to disclose fully and truly all material facts necessary for the assessment. The appellant appealed to a Division Bench, but unsuccessfully. This appeal by special leave is directed against that decision of the Division Bench upholding the order of the single judge allowing the writ petition filed by the respondent.

3. The main point urged on behalf of the appellant in this appeal before us is that the High Court wrongly exercised its jurisdiction in quashing the notice issued by the appellant on a ground which was not raised by the respondent in his petition under article 226 of the Constitution. This submission has to be accepted. Learned counsel appearing for the respondent was unable to show any averment in the affidavit filed on behalf of the respondent where such a ground might have been raised. The respondent, in that affidavit, clearly understood that the notice issued by the appellant was under clause (a) of sub-section (1) of section 34 of the Act, and yet, confined the challenge to the ground that the appellant had no reasons whatever to believe that the income of the respondent had escaped assessment or had been under-assessed. It was at no stage stated that the appellant had no reason to believe that the escape of income from assessment, or the under-assessment of income, was the result of any failure or omission on the part of the assessee to make a return, or to disclose fully and truly all material facts necessary for his assessment. Since there were no such averments in the petition or the affidavit in support of it, the appellant also did not, in the counter-affidavits, make any specific averment that he had reasons to believe that the escarpment or under-assessment of income was occasioned by the failure omission on the part of the respondent to make the return, or to disclose fully and truly all necessary material facts. In spite of this circumstance that neither party had, in its affidavit, made averment relating to this question of fact, the High Court proceeded to infer from the affidavits that the appellant had not entertained any such belief, and allowed the writ petition. On the face of it, there was no justification for the High Court to set up such a new case on behalf of the respondent and to decide it in the absence of any averments of facts by the respondent to justify going into that question. On this ground alone, the order made by the High Court must be set aside.

4. We may add that in view of the circumstance that neither party had occasion to put before the High Court the facts on this question, we called upon learned counsel for the appellant to produce before us copies of the relevant file of the appellant which led to the issue of the notice in question. We have seen the report submitted by the appellant to the Commissioner of Income-tax, and it appears to us that that report, taken together with his letter asking for approval of the Commissioner for issue of notice under section 34(1)(a) which was accompanied by information in proforma "B" indicates that the appellant did have reasons to believe that the income of the respondent had been under-assessed because of reasons mentioned in section 34(1)(a) of the Act. We are, thus, satisfied that the notice issued under section 34(1)(a) was not at all invalid. We may also, in this connection, mention that the allegation of the respondent that the appellant had no reason to believe that the income of the respondent had escaped assessment or had been under-assessed was, in clear words, controverted, and even the High Court did not hold that this denial on behalf of the appellant was not correct.

5. Learned counsel appearing for the respondent, in these circumstances, tried to support the judgment of the High Court on an alternative ground that the appellant had not complied with the requirement of clause (iii) of the first proviso to section 34(1), as he had not recorded his reasons for issuing the notice. This is again a point which was not only not taken in the writ petition, but was not even urged before the High Court at the two stages when the case was heard by that court. Further, facts necessary for deciding this question were not brought out by the respondent in his writ petition or the affidavit filed in support of it. Consequently, this new ground cannot be

entertained by this court at this stage and must be rejected.

6. Learned counsel for the respondent also tried to support the judgment of the High Court on the ground that the issue of notice by the appellant was mala fide. The averments made in paragraphs 7 and 8 of the affidavit filed on behalf of the respondent, in which the bona fides of the appellant in issuing the notice were challenged, were, in our opinion, properly controverted in the counter-affidavits filed by the appellant, and there is no reason why the averment made by the appellant should not be accepted. It is true that there was no specific averment in the counter-affidavits against the allegation of the respondent that the purpose of issuing the notice was to try to get over the effect of the earlier decision of the High Court by which that court had prevented the appellant from making a fishing enquiry and proceeding with the matter without even mentioning the grounds on which the production of the books was sought; but we think that the answer given in the affidavit by stating that the notice was issued validly and did not contravene the earlier orders of the High Court was a sufficient answer to this allegation.

7. For the reasons given above, the appeal is allowed, the order of the High Court is set aside, and the petition filed by the respondent under article 226 of the Constitution is dismissed with costs in this court and in the High Court.

8. Appeal allowed.