

S. B. Jain, Income-Tax Officer, Nagpur

Vs

Mahendra

Civil Appeals Nos. 1301 of 1971 and 1981 of 1968

(K.S. Hegde, A.N. Grover JJ)

03.09.1971

JUDGMENT

HEGDE J. -

1. Civil Appeal No. 1301 (NCT) of 1971 is by special leave. This appeal was filed under the following circumstances :

Civil Appeal No. 1981 of 1968 was brought on the strength of a certificate issued by the High Court. That certificate, being not in accordance with law inasmuch as the High Court gave no reason in support of the same, the appeal filed on the strength of that certificate turned out to be not maintainable. Hence, the appellant had to move this court for special leave to appeal against the judgment of the High Court. The same having been granted he has brought Civil Appeal No. 1301 of 1971. Hence, these two appeals against the same judgment.

Now, coming to the merits of the case, the Income-tax Officer issued a notice to the respondent on January 5, 1962, under section 34(1) (a) of the Indian Income-tax Act, 1922, seeking to reopen his assessment for the assessment year 1946-47, the relevant accounting year being the calendar year 1945. The assessee-respondent 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, under section 148 of fully sought to reopen 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 the present appeals have been brought to the court.

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 under section 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 section 148 to 153 assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in section 148 to 153 referred to as the relevant assessment year)."

Section 148 reads :

"(1) Before making the assessment, reassessment or recomputation under section 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 that sub-section.

(2) The Income-tax Officer shall, before issuing any notice under this section record his reasons for doing so."

Section 149 prescribes the time limit for issuing a notice under section 148. Sub-section (1) of section 149 says :

"No notice under section 149 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);...."

Section 297 deals with repeals and savings. Section 297(2) (d) (ii) reads thus :

"Notwithstanding the repeal of the Indian Income-tax Act, 1922, (11 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, -

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

The only question for decision in these appeals is whether the proceedings initiated by the notice under section 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 the 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 under section 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 under section 34 of the 1922 Act was issued beyond the time prescribed by law. Hence, to cannot be said that no proceeding under section 34 of the 1922 Act either factually or legally was pending at the time when the new Act came into force.

Our above conclusion receives support from the decision of this court in *Raja Kulkarni v. State of Bombay*. Therein, the question that arose for decision was whether an appeal under section 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.

The proceedings pending before a competent authority cannot be said to be not pending merely because no relief can be granted in those proceedings because of the bar of limitation. In *Mela Ram & Sons v. Commissioner of Income-tax*, it was contended before this court that any appeal which is barred by limitation cannot be considered as an appeal properly presented under section 30 of the Indian Income-tax Act, 1922. This court rejected that contention observing :

"If an a appeal is not presented within that time (within the prescribed time) does that cease to be an appeal as provided under section 30(1) ? It is well-established that rules of limitation pertain to the domain of adjustival 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."

We have no doubt in our minds that the proceedings initiated under section 34(1) (a) of the 1922 Act were pending at the time the 1961 Act came into force and that being so the Income-tax Officer was not competent to issue any fresh notice under section 148 of the 1961 Act.

In the result Civil Appeal No. 1301 of 1971 fails and the same is dismissed with costs. Civil Appeal No. 1981 of 1968 is dismissed as not being maintainable. Parties to bear their own costs in this appeal.

Appeals dismissed.

</html