Malchand Surana Vs. Commissioner of Income-tax

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Court : Kolkata

Decided On : Nov-19-1970

Reported in : [1971]82ITR314(Cal)

Judge : Sankar Prasad Mitra and ;K.L. Roy, JJ.

Acts : Income Tax Act - Sections 22(2), 23(4), 27, 33, 33(6) and 34; ;Indian Income Tax Act - Sections 63 and 66(2); ;General Clauses Act - Section 27

Appeal No. : Income-tax Reference No. 2 of 1957

Appellant : Malchand Surana

Respondent : Commissioner of Income-tax

Advocate for Def. : B.L. Pal and ;A.K. Sengupta, Advs.

Advocate for Pet/Ap. : J.C. Pal and ;J.B. Pal, Advs.

Judgement :

K.L. Roy, J.

1. This reference under Section 66(2) of the Income-tax Act, 1922 (hereinafter referred to as 'the Act') raises a short but an interesting question for the decision of the court.The facts as given in the statement of the case are as follows : The assessee, Malchand Surana, was served with a notice under Section 34 of the Act for reassessment of his income for the assessment year 1945-46 in February, 1949. As no return was filed in response to the said notice a best judgment assessment was made under Section 23(4) on the 19th April, 1949, on a total income of Rs. 41,500. The assessee made an application under Section 27 of the Act asking the Income-tax Officer to cancel the assessment and to make a fresh assessment as the aforesaid notice under Section 34 was not served on him and he had no reasonable opportunity to comply therewith. His case was that the registered letter containing the notice was actually delivered to his brother who had no authority to receive such notice and who failed to hand over the notice to him in time. The Income-tax Officer rejected the assessee's application under Section 27. Two appeals were taken to the Appellate Assistant Commissioner, one against the order of assessement and the other against the order under Section 27, and both these appeals were dismissed by the Appellate Assistant Commissioner. Two further appeals were taken to the Income-tax Appellate Tribunal by the assessee, the appeal from the assessment order being I.T.A. No. 7546 of 1950-51, while the appeal from the order under Section 27 was I.T.A. No. 7547 of 1950-51. The Tribunal disposedof both the appeals by a single order dated the 9th April, 1952. It held that though service by registered post was a mode of service

allowed under Section 63 of the Act, it was open to the assessee to allege and prove that the notice had not been served on him. In the present case as there was no dispute that the notice had been served on the brother of the assessee who had no authority to accept such service, the service of the notice had not been properly effected. The Tribunal thereafter passed the following order :

'Consequently, the assessment is cancelled and the case remanded to the Income-tax Officer for reassessment. In the result, both these appeals are accepted.'

2. At the instance of the Commissioner the following question was referred to this court under Section 66(2), namely, 'Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that service of the notice under Section 34 of the Indian Income-tax Act by registered post, which had been received by Chaganlal, a brother of the assessee at the place of business of the assessee, was not sufficient service within the meaning of Section 63 of the Indian Income-tax Act ?' This court gave the following answer to the said question :

'No, in the absence of any consideration of the presumption under Section 27 of the General Clauses Act and any finding that the said presumption had been rebutted.'

3. In conformity with the answer given by this court the Tribunal reconsidered its decision in I.T.A. No. 7547 of 1950-51 under Section 66(5) of the Act and as no evidence was tendered by the assessee for rebuttal of the presumption arising under Section 27 of the General Clauses Act in spite of notice being given to him, the Tribunal directed that its former order in the appeal would stand vacated and the assessee's application under Section 27 would be rejected.

4. On the 2nd March, 1956, the Tribunal reheard I.T.A. No. 7546 of 1950-51, that is, the appeal preferred by the assessee against the order of assessment land made, inter alia, the following order:

'Under Section 66(5) of the Indian Income-tax Act, in conformity with the order of the High Court, we have directed that Appeal No. I.T.A. 7546 must be dismissed. In consequence of that order, Appeal No. 7546 is now being taken into consideration as the order passed by the Tribunal on 9th April, 1952, was in consequence of the order passed by it with respect to the appeal against the order of rejection of application under Section 27. We are, therefore, disposing of this appeal, which has been restored to our file.'

5. After considering the appeal on merits the Tribunal finally dismissed the appeal.

6. On the refusal of the Tribunal to state a case on the application of the assessee, the following question has been directed to be referred under Section 66(2) by this court:

'Whether, on the facts and circumstances of this case, the Tribunal was right in vacating the order which it had passed in the appeal against the assessment in contravention of Section 33(6) of the Act ?'

7. Before considering the contentions urged by the learned counsel it would be useful to set out the relevant provisions of the Act. Section 27 entitles an assessee to apply to the Income-tax Officer to cancel an assessment already made and make afresh assessment if he can satisfy him that he was prevented by sufficient cause from either

filing the return or from complying with the notices under Sections 22 and 23. An appeal from an order refusing an application under Section 27 to the Appellate Assistant Commissioner is provided in Section 30, Section 33 deals with appeals to the Appellate Tribunal. Sub-section (1) of that section entitles any assessee objecting to any order passed by the Appellate Assistant Commissioner to appeal to the Appellate Tribunal within a certain period. Sub-section (4) of that section empowers the Tribunal, after giving both parties to the appeal an opportunity of being heard, to pass such orders thereon as it thinks fit and communicate any such order to the assessee and to the Commissioner. Sub-section (6) of that section, on which great reliance was placed by Mr. J. C. Pal, learned counsel for the assessee, provides that, save as provided in Section 66, orders passed by the Appellate Tribunal on appeal would be final. Section 66 which deals with reference to the High Court provides by Sub-section (5) that the Appellate Tribunal shall pass such orders as are necessary to dispose of the case conformably to the judgment delivered by the High Court in deciding the question of law referred to it.

8. Mr. J. C. Pal submitted that as by its order dated the 9th April, 1952, the Tribunal had allowed the assessee's appeal against the order of assessment as a result of which the assessment stood cancelled, that order had become final under Section 34(6) and there was no provision in the Income-tax Act authorising the Tribunal to restore the appeal to its file, recall its former order and decide such an appeal afresh. In purporting to act in that manner the Tribunal has really attempted to legislate and not exercise any powers entrusted to it by the Act. The action of the Tribunal in restoring I T. A. No. 7546 of 1950-51 and disposing it of on the merits was ultra vires of its powers and was wholly illegal.

9. Mr. B. L. Pal, learned counsel for the Commissioner, submitted that the Tribunal in fact never decided I. T. A. No. 7546 of 1950-5-1. Its decision was on the assessee's appeal against the Income-tax Officer's orderrefusing to cancel the assessment under Section 27 and its order allowing the assessee's appeal against the assessment was merely consequential on its decision in the appeal against the order under Section 27. This is quite clear from the Tribunal's order of the 9th April, 1952. As a consequence of the High Court's answer to the first reference the Tribunal had to reject the assessee's appeal against the order under Section 27 and confirm the Income-tax Officer's order refusing to cancel the order of assessment. A necessary corollary to that would be that the appeal against the order of assessment must be decided on merits and that is what the Tribunal did in this case and it could not be said that the Tribunal exceeded its jurisdiction.

10. The principles governing the powers conferred by an enabling statute had been laid down by authorities and mention may be made to the following : In Halsbury, 3rd edition, volume 36, page 436, paragraph 657, it is stated that powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured, and reference is made to Martin v. Bannister, [1879] 4 Q.B.D. 491(C.A.).. In Sutherland's Statutory Construction, 3rd edition, Article 5401, it is emphasised that it is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use reasonable means to make such grant effective. In Maxwell on the Interpretation of Statutes, 11th edition, page 350, the following passage occurs :

'Where an Act confers a jurisdiction, it impliedly also grants the power of doing all

such acts or employing such means, as are essentially necessary to its execution. Cut jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit. Thus, an Act which empowered justices to require persons to take an oath as special constables, and gave them jurisdiction to inquire into an offence, impliedly empowered them to apprehend the persons who unlawfully failed to attend before them for those purposes. Otherwise, the jurisdiction could not be effectually exercised.'

11. These authorities were considered by the Supreme Court in Income-tax Officer, Cannanore v. M. K. Mohammed Kunhi, [1969] 71 I.T.R. 815 (S.C.).. The question in that case was whether the Income-tax Appellate Tribunal had inherent jurisdiction to grant stay of realisation of tax pending appeals by the assessee. After considering the aforesaid authorities the court observed, at page 819, that the powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. Again, at page 822, it was observedthat it could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory. It may be mentioned that their Lordships were considering in that case Section 254 of the Income-tax Act, 1961, Sub-section (1) of which is more or less in identical terms with Section 33(4) of the Act.

12. It must, therefore, be held that the Tribunal has impliedly power under Section 33 for doing all such acts or employing such means as would be essentially necessary to the execution of its appellate jurisdiction. In the present case the appeal against the order of assessment was not decided but was allowed as a consequential relief on the decision of the Tribunal on the appeal against the order under Section 27. As the appeal against the order under Section 27 had subsequently to be dismissed in accordance with the answer given by this court, consequential orders must also be passed in the appeal against the order of assessment. Otherwise, the function of the Tribunal in exercising its appellate jurisdiction under Section 33 and deciding the appeal on merits would be rendered nugatory. It must, therefore, he held that by necessary implication Section 33 authorises the Tribunal to pass such orders as to make its decision on appeals pending before it effective. As its former order was merely consequential there was no decision in that appeal on merits and on the appellate order under Section 27 being reversed the order in appeal against the order for assessment must also be revised. We are of the opinion that the question as framed does not bring out correctly the issue between the parties because it assumes that there has been a contravention of Section 33(6) of the Act. We would reframe the question in the following manner :

'Whether, on the facts and circumstances of the case, the Tribunal was right in vacating the order which it had passed in the appeal against the order of assessment and deciding the appeal afresh ?'

and answer it in the affirmative. Each party to pay and bear its own costs.

Sankar Prasad Mitra, J.

13. I agree.