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(1983) 03 AHC CK 0012

Allahabad High Court

Case No: Second Appeal from Order No. 25 of 1976

Commissioner of Income Tax — APPELLANT

Vs

Smt. Phoolmati Devi — RESPONDENT

Date of Decision: March 3, 1983

Acts Referred:

- Income Tax Act, 1961 - Section 269D(1), 269D(2), 292B

Citation: (1983) 35 CTR 331 : (1983) 144 ITR 954 : (1983) 15 TAXMAN 126

Hon'ble Judges: O.P. Saxena, J; K.C. Agarwal, J

Bench: Division Bench

Advocate: M. Katju, for the Appellant; R.K. Gulati and R.S. Agarwal, for the Respondent

Final Decision: Dismissed

Judgement

K.C. Agarwal, J.
This appeal u/s 269H has been filed by the Commissioner of Income Tax against the judgment of the Income Tax Appellate Tribunal, Allahabad Bench. The dispute is in respect of house No. D-48/136, Misri Pokhra, Varanasi. This property belonged to Smt. Kumud Kumari, resident of Deleep Nagar, Deoria. She sold it to Smt. Phoolmati Devi, respondent No. 1, and her son, Jagdish Mohan. At the time of the execution of the sale deed, admittedly, Jagdish Mohan was a minor.

2. After receipt of Form No. 37G in respect of transfer of the aforesaid property, inquiry was made regarding its fair market value through an inspector of the I.T. Dept. The inspector estimated the market value on the relevant date to be Rs. 80,000 which was much higher than the purchase price of Rs. 45,000. On receipt of the report, proceedings for acquisition were initiated by issue of notices and by publication in Official Gazette. The notice was issued on December 5, 1973, and the same was published in the Official Gazette on December 22, 1973. A reply to the notice was filed by Smt. Phoolmati Devi alleging that the purchase price value of the house was correct and that the proceedings of acquisition could not be lawfully

initiated against it. On 31st October, 1975, the IAC, Acquisition Range, Lucknow, held that the fair market value of the house on the date of sale was Rs. 73,198 as he found that the difference between apparent consideration of Rs. 45,000 and the fair market value was about 60%. He held that the agreed consideration for transfer had not been truly stated in the instrument of transfer with the following objects :

(a) Facilitating reduction of the liability of the transferor to pay tax under this Act in respect of any income arising from the transfer, or

(b) Facilitating the concealment of any income or moneys or other assets which have not been or which ought to be disclosed by the transferor for the purpose of the Indian Income Tax Act, 1922, or this Act or the Wealth-tax Act, 1957.

3. On the aforesaid findings, he ordered for the acquisition of the property under Chap. XX-A of the I.T. Act. Being aggrieved by this order Smt. Phoolmati Devi, the respondent, preferred an appeal before the Income Tax Appellate Tribunal, Allahabad.

4. Before the Tribunal the point urged on behalf of respondent was that as the notice required by Sub-section (2)(a) of Section 269D of the I.T. Act, had not been served on Jagdish Mohan, who was a predecessor (owner) of the property along with Smt. Phoolmati Devi, the entire proceedings of acquisition were illegal and that the order passed by the Commissioner was erroneous. The Tribunal accepted the submission of the respondent, Phoolmati Devi and allowed the appeal. It did not consider it necessary to decide the question of valuation of the property in question. Against this order, the Commissioner has filed the present appeal.

5. Before us the controversy that arises for decision is about the effect of not serving on Jagdish Mohan with a notice required by Section 269D, Sub- Section (2) of the I.T. Act. This provision reads as under :

"The Competent Authority shall-

(a) cause a notice under Sub-section (1) in respect of any immovable property to be served on the transferor, the transferee, the person in occupation of the property, if the transferee is not in occupation thereof, and on every person whom the Competent Authority knows to be interested in the property..... "

6. Sub-section (2) imposes a duty on the Competent Authority to issue a notice by using the expression "shall". Upon the receipt of notice that person becomes entitled to file an objection to the proceedings of acquisition. The notice is also required to be published. Since, however, we are not concerned with the publication of the notice, it is not necessary for us to discuss the matter.

7. In the instant case, admittedly notice was not sent to Jagdish Mohan. At the time of the execution of the sale deed he was a minor, but as to whether he had become a major by the time the proceedings under Chap. XX-A, were initiated is not known

to us. There was nothing on the record to hold that he continued to be a minor even on this date. It had been admitted before the Income Tax Appellate Tribunal and also before us that Jagdish Mohan was not mentioned in the notice issued by the Competent Authority. The learned counsel for the Department, however, urged that omission of his name was not material as Jagdish Mohan was fully represented by his mother, Smt. Phoolmati Devi in these proceedings. We do not agree with this submission. Smt Phoolmati Devi was admittedly not a legal guardian of Jagdish Mohan. She had no right to represent him. She had filed the objection to the acquisition proceedings on behalf of herself exclusively. Nothing had been brought on record to show that she had any valid power on behalf of Jagdish Mohan. Under the Hindu law the guardian of Jagdish Mohan can be his father, Jaggi Ram, to whom, admittedly, no notice had been issued. It would, therefore, be seen that the case of Jagdish Mohan went unrepresented. He was not given by the Competent Authority a notice, which under the law he was obliged to do.

8. When a statute requires that something shall be done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the omission of not doing that in the manner prescribed in some case has been held fatal to its validity. In the present case, the omission to serve notice on Jagdish Mohan appears to us to have vitiated the entire proceedings and would result in rendering the acquisition to be invalid in its entirety. The use of the expression "shall" does not (give) us any information (sic) of the Legislature that the compliance of serving the person against whom action is proposed to be taken is a must.

9. In Mohammed Mahboob Ali Saheb and Others Vs. Inspecting Assistant Commissioner of Income Tax, , in a proceeding for acquisition the notice of proposed acquisition had not been served on all the transferees. The service on whom it had not been made was the son of Smt. Ahisa Begum on whom service had been effected. The Andhra Pradesh High Court held that as Section 269D(2)(a) of the I.T. Act was mandatory, non-compliance with the requirement of that Section vitiated the entire proceedings.

10. It is true that the aforesaid case was that of a Mohammedan family to which the principles of joint family applicable to Hindus did not apply, but that to our mind, would not make any difference to the result of the present case. The person on whom the service had been effected in the instant case was neither a karta of the family nor guardian of Jagdish Mohan. Jagdish Mohan, therefore, had had no opportunity to contest the acquisition proceedings to which he was entitled. Notice as specified in Sub-section (1) has to be served on the transferor of the immovable property, the transferee, the person in occupation of the property. The object is to provide an opportunity to him of being heard.

11. Relying upon Section 292B of the I.T. Act inserted by the Taxation Laws (Amendment) Act of 1975 learned counsel submitted that the defect of non-service

of notice was fairly a technical objection and as such the same should not come in the way of the validity of the acquisition. We are unable to agree. Section 292B may apply to a case where service has already been effected, but there is a technical mistake in the notice. But where, as here, no notice has bean served, this Section will not come to the rescue of the Department. Moreover, this section came into force with effect from 1st October, 1975, whereas the proceedings in the instant case has been initiated earlier. For this reason also this section will not apply.

12. In the result, the appeal fails and is dismissed with costs.