BELLAND AND ANOTHER Vs SMT. BANARASI DEBI.

Court: Calcutta High Court

Date of Decision: March 13, 1961

Acts Referred: Calcutta Municipal Act, 1951 â€" Section 553, 553, 554, 555
Income Tax (Amendment) Act, 1959 â€" Section 4
Income Tax Act, 1961 â€" Section 34(i)(a)

Citation: (1962) 46 ITR 28

Hon'ble Judges: Bose, C.J; James, J; G.K. Mitter, J

Bench: Full Bench

Judgement

BOSE C.J. - This is an appeal from an order of Sinha J. directing issue of a write in the nature of mandamus forbidding the Income Tax Officer,

Companies District IV, Calcutta, the Commissioner of Income Tax and the Union of India from giving effect to or acting upon a notice of

reassessment issued u/s 34(i)(a) of the Indian Income Tax Act and further directing the issue of a writ of certiorari quashing the said notice.

The respondent No. 1, who is a Hindu lady, filed her return in respect of the assessment year 1947-48 before the Income Tax Officer, Companies

District IV, Calcutta. The assessment was completed in 1948, but it was found that no tax was payable by her. On April 2, 1956, a notice dated

March 19, 1956, issued u/s 34(1)(a) of the Indian Income Tax Act, was served on the respondent. u/s 34(1)(a), the notice had to be served within

eight years from the end of the assessment year, that is, by March 31, 1956. But it was actually served on April 2, 1956, that is, two days later.

The relevant portion of section 34 may be set out hereunder :

(1) 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 of his income

u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to

Income Tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of

excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or.....

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of

that year, serve on the assessee, or, if the assessee is a company, on the principle officer thereof, a notice containing all or any of the requirements

which may be included in a notice under-sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains or

recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a

notice issued under that sub-section;

Provided that -

(i) the Income Tax Officer shall not issue a notice under this sub-section, unless be has recorded his reasons for doing so and the Commissioner is

satisfied on such reasons recorded that it is a fit case for the issue of such notice;.....

(3) No order of assessment u/s 23 to which clause (c) of sub-section (1) of section 28 applies or of assessment or re-assessment in cases falling

within clause (a) of sub-section (1) of this section shall be made after the expiry of eight years, and no order of assessment or re-assessment in any

other case shall be made after the expiry of four years, from the end of the year in which the income, profits or gains were first assessable :

Provided that where a notice under sub-section (1) has been issued within the time therein limited, the assessment or re-assessment to be made in

pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the

period of eight years or four years, as the case may be.

Prior to the date of service of this notice, section 34 was amended by section 18 of the Finance Act, 1956. The relevant portion of such

amendment is set out hereunder :

34.(1) 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 of his income

u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to

Income Tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of

excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or.....

he may in case falling under clause (a) at any time..... 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 22 and may proceed to assess or re-assess such income, profits or gains or recompute the

loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under

that sub-section :

Provided that the Income Tax Officer shall not issue a notice under clause (a) of sub-section (1) -

(i) for any year prior to the year ending on the 31st day of March, 1941;

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to Income Tax which have

escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act,

or the loss or depreciation allowance which has been computed in excess, amount to, or are likely to amount to, one lakh of rupees or more in the

aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a

year or years ending before the 31st day of March, 1941;

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case falling under clause (ii), unless the Central Board of Revenue,

and, in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for the issue of such notice :

Provided further that the Income Tax Officer shall not issue a notice under this sub-section for any year, after the expiry of two years from that

year, if the person on whom the assessment or re-assessment is to be made in pursuance of the notice is a person deemed to be the agent of a

non-resident person u/s 43 :

Provided further that the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped

assessment or full assessment, as the case may be.

On March 19, 1957, the respondent affirmed a petition under article 226 of the Constitution and obtained a rule nisi on March 20, 1957. The rule

came up for hearing before Sinha J. and the only point raised before the learned judge was the question of limitation, that is, the notice u/s 34(1)(a)

was issued or served beyond the period of limitation prescribed in the section. On September 11, 1958, the rule was made absolute and writs

were issued directing the respondents to for bear from giving effect to the notice u/s 34(1)(a). The learned judge delivered judgement in Debi Dutta

Moody v. T. Bellan and followed this judgement in disposing of this case which is before us and which is numbered as Matter No. 48 of 1957. On

March 2, 1959, the respondents preferred the present appeal against the order of Sinha J.

After the filing of this appeal on March 12, 1959, section 34 was further amended by section 2 of Act 1 of 1959 in the following manner :

(4) A notice under clause (a) of sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of

eight years specified in that sub-section before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired in

respect of the year to which the notice relates.

And a further section numbered as section 4 was introduced in the Indian Income Tax (Amendment) Act, 1959, in the following terms :

4. Saving of notices, assessments, etc., in certain cases. - No notice issued under clause (a) of sub-section (1) of section 34 of the principal Act at

any time before the commencement of this Act and no assessment, re-assessment or settlement made or other proceedings taken in consequence

of such notice shall be called in question in any court, Tribunal or other authority merely on the ground that at the time the notice was issued or at

the time the assessment or re-assessment was made, the time within which such notice should have been issued or the assessment or re-

assessment should have been made under that section as in force before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of

1956), had expired.

It is not disputed before us that the judgement of Sinha J. is a correct one according to the law as it then stood, but it is argued that the appeal

before us being in the nature of a rehearing and continuation of the original proceeding, this court of appeal should grant relief to the appellants on

the basis of the law as it stands at the time of the hearing of the appeal and the main contention of Mr. Meyer, the learned counsel for the

appellants, is that in view of section 4, which has been introduced by the amending Act 1 of 1959, which as pointed out already, came into force

during the pendency of the appeal and which bars all challenge to the issue of the notice on the ground of limitation, this appeal court should hold

that the notice dated March 19, 1956, which was served on April 2, 1956 is immune from attack on the ground of limitation and so it was a good

and valid notice. The learned counsel has argued that, although it is clear that in the ordinary way a court of appeal cannot take into account all

statutes which have been passed in the interval since the case was decided by the court of first instance inasmuch as the rights of the litigants are

generally to be determined according to the law in force at the date of the hearing before the court of first instance, the position is different when

the statute is made retrospective in operation either by express words or necessary intendment. In such a case, the court of appeal can give effect

to the retrospective intendment of the Act passed in the interval since the case was decided by the court of the first instance,. The learned counsel

has, in support of this argument, relied on a decision of the Federal Court in Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhari and on

another decision of the Federal Court in Raja Bahadur Kamakshya Narain Singh v. Commissioner of Income Tax. In the last mentioned case,

Kania J., who delivered the judgement of the Federal Court, made the following observation :

When an Appellate Tribunal (whether it is the Assistant Commissioner, or the Tribunal of Appeal, or the High Court, or the Federal Court)

decides the appeal it has to do so according to the law then in operation. If pending the litigation or pending the appeal some relevant legislation is

enacted by the appropriate legislative authority, the deciding tribunal must give effect to it.

The learned judge, in support of this proposition, referred to the decision of the Judicial Committee reported as Mukherjee v. Ramratan Kuer and

to the earlier Federal Court case of Lachmeshwar Prasad Shukul and concluded the discussion on this point with the following words :

It was the agreed view of all the judges that in deciding the appeal they had to take into account legislative changes made since the decision under

appeal was given. It was pointed out that this rule of law has been accepted not only in England (Attorney-General v. Birmingham, Tame, and Rea

District Drainage Board), but also in the United States of America. Once the new legislation is held to have retrospective operation it is clear that

the court of appeal had to decide the appeal according to the law then prevailing, because the adjudication on the rights of the parties as made by

the lower court was not final.

The propositions laid down in this case have not been disputed on behalf of the respondent and both parties before us accept the position that this

court can in deciding this appeal give relief on the basis of the change in the law now brought about by the amendment of 1959. For the purpose of

invoking the provisions of section 4 as introduced by the amending Act 1 of 1959, Mr. Meyer has argued that the word ""issue"" as used in the

proviso to sub- section (3) of section 34 of the Indian Income Tax Act, as it stood before the amendment of 1956, should be equated with the

expression ""serve"" as used in sub-section (1) of section 34 of the Act and as the notice dated March 19, 1956, was actually served on April 2,

1956, the notice can be said to have been issued beyond the period of eight years as contemplated in section 4 of Act 1 of 1959 and as such, such

notice is protected from challenge on the ground of limitation by virtue of the express terms of the said section of Act 1 of 1959. In support of this

contention, our attention has been drawn to a decision of the Bombay High Court reported as Commissioner of Income Tax v. D.V. Ghurye. It

has been held by the Bombay High Court in this case that the proper construction of section 34(1)(a) read with the proviso to sub-section (3) of

section 34 is that the expression ""issued"" as used in the proviso to sub-section (3) of section 34 should be equated with the expression ""served"" as

occurring in sub-section (1) rather than the word ""served"" should be equated with the expression ""issued"" : used in the proviso to sub-section (3).

At page 686, Chagla C.J. in dealing with the question of construction observed :

If the notice is served beyond the time limited by section 34, then the notice is bad and any proceedings taken pursuant to that notice are also bad.

What is relied upon in the proviso is the language used in the first part of it, namely, where a notice under sub-section (1) has been issued within the

time therein limited, and what is urged is that we must read in section 34, instead of the language used by the legislature, namely, that the notice

must be served the language used by the legislature in the proviso to sub-section (3), namely, that the notice has been issued. In other words, the

attempt is to equate the expression served used in section 34 with the expression issued used in the proviso to sub-section (3). Now we must

frankly confess that we find it difficult to understand why the legislature has used in the proviso the expression where a notice under sub-section (1)

has been issued within the time therein limited. In sub-section (1) no time is limited for the issue of the notice : time is only limited for the service of

the notice; and therefore it is more appropriate that the expression issued used in the proviso to sub-section (3) should be equated with the

expression served rather than that the expression served used in sub-section (1) should be equated with the expression issued used in the proviso

to sub-section (3). But assuming we are prepared to concede the Advocate-Generals contention that we must construe the expression limited as

mentioned and all that the proviso refers to is the actual quantum of time mentioned in section 34(1), and that for the purpose of that proviso we

must consider as the material or relevant date the issue of the notice and not the service of the notice, even so, as already pointed out, the question

of the application of the proviso only arises when an assignment order is made.

It may be pointed out that in this Bombay case, there is a reference to a judgement of the Allahabad High Court in Sri Niwas v. Income Tax

Officer, Sitapur where a similar view with regard to the construction of the proviso to sub-section (3) and sub-section (1)(a) of section 34 was

taken.

Our attention has also been drawn to an unreported decision of this court being Appeal from Original Order No. 146 of 1958 (Shri Debi Dutt

Moody v. T. Bellan, judgment dated July 8, 1960) where a division bench of this court had to consider this question of construction, but neither

Lahiri C.J. nor Bachawat J., who constituted the division bench, has expressed any definite opinion on this point. After referring to the decision of

the Bombay High Court in Commissioner of Income Tax v. D.V. Ghurye the learned Chief Justice proceeded to observe as follows :

Sinha J. has held that the effect of amendment of 1956 is to supersede the decision of the Bombay High Court referred to above. As against this

view Mr. Chowdhury has contended that the first proviso to sub-section (3) of section 34 and section 4 of the Indian Income Tax (Amendment)

Act (I of 1959) make it clear that the legislature used the words issue and serve in the same sense. It has also been contended that the word issue

connotes a continuous process which terminate in the delivery of the notice to the assessee. According to this argument the word service means

and includes issue plus delivery of the notice to the assessee and therefore there can be no service if at any stage before the actual delivery of the

notice to the assessee, the issue ceases to be a valid issue. Mr. Meyer on the other hand has put forward an extreme contention to the effect that

issue is complete as soon as the order of issue has emanated from the mind of the Income Tax Officer and found its place in an entry in the order

sheet. The argument advanced by Mr. Chowdhury finds some support from the language of the first proviso to sub-section (3) of section 34 and

also of section 4 of Act 1 of 1959. As it is not necessary to express any final opinion on the merits of the rival contentions in this appeal, I do not

propose to decide this question now. The question will be decided in a case where a notice is issued within the period of eight years specified in

clause (ii) of the first proviso to sub-section (1) of section 34, but served beyond the period of eight years.

The learned Chief Justice thereafter proceeded to observe that the observations of Sinha J. to the effect that u/s 34 as it now stands all that is

necessary is that the notice should be issued within eight years, but it may be served at any time beyond eight years should be expunged from his

Lordships judgement. Bachawat after dealing with the arguments on this particular point observed :

There is considerable force in these arguments and they... require careful consideration. Without further consideration I am not prepared to say

that the notice was issued within the time prescribed although it was not served within that time.

The learned counsel for the respondent, Mr. Chaudhuri, has argued before us that, in the present case, the notice u/s 34 having been issued on

March 19, 1956, before the expiry of the period of eight years from the end of the assessment year, the provisions of section 4 of the amending

Act 1 of 1959 were not attracted to this case and it is further submitted by Mr. Chaudhuri that the word ""issued"" as used in the proviso to sub-

section (3) of section 34 of the Act, as it stood before the amendment of 1956, cannot be equated with the word ""served"" as used in sub-section

(1) of section 34. His argument is that, when the legislature has used two different expressions ""issued"" and ""served"" it is reasonable to presume

that the legislature used the two different words in different senses, or otherwise the legislature could have used the same expression in the different

parts of the same section. According to the learned counsel, the ""issue"" of the notice must precede service and, as the period specified in sub-

section (1) of section 34 was eight years, in the proviso to sub-section (3), the expression ""within the time therein limited"" was used after the word

issued"" as merely referring to the period prescribed in sub-section (1) and the combined effect is that issue and service both are to be effected

within eight years. So the stand taken up by the learned counsel in the case before us is quite different from the stand which was taken by him in the

case before Lahiri C.J. and Bachawat J. in Appeal No. 146 of 1958, already referred to.

It appears that the dictionary meaning of the word ""issue"" is the act of sending out, put into circulation, deliver with authority or delivery. It also

appears from other statutes that the expressions ""issued"" and ""served"" are used as interchangeable terms. Thus, in sections 553, 554 and 555 of

the Calcutta Municipal Act, 1951, the two expressions ""issued to"" or ""served upon"" are used as equivalent expressions. Similarly, in the General

Clauses Act (X of 1897) in section 27 which deals with the meaning of service by registered post, the expressions ""serve"", ""give"" or ""send "" are

treated as interchangeable expressions. Although I am fully alive to the fact that it is neither safe nor permissible to refer to provision in one statute

for the purpose of construction of the provision of a different statute, unless the two statutes are in pari materia, I have referred to the provisions in

the Calcutta Municipal Act and other Acts to show how in one branch of law the legislature has used these familiar words ""issue"" and ""serve

which are of such common occurrence in legislative enactments. But, apart from these provisions in the Calcutta Municipal Act and the General

Clauses Act, there are definite pronouncements by the Allahabad High Court and the Bombay High Court on this question of interpretation as to

the meaning which should be ascribed to the expressions ""issued"" and ""serve"" as used in the proviso to sub-section (3) and sub-section (1) of

section 34 of the Indian Income Tax Act and when the legislature has used the same expression ""issued"" in section 4 of Act 1 of 1959, it is only

reasonable to presume that the legislature used the same expression in the same sense in which it was used in section 34 of the Indian Income Tax

Act. In the case of Barras v. Aberdeen Steam Trawling and Fishing Company, Viscount Buckmaster laid down the principle of construction to be

followed in such cases in the following words :

It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has

received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be

construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.

James L.J. in the case of Ex parte Campbell, expresses this rule in the following terms :

Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has

repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning

which a court of competent jurisdiction has given to them.... It is in my opinion a salutary rule and one necessary to confer upon Acts of Parliament

that certainty which, though it is often lacking, is always to be desired.

In my view, having regard to the context in which the expressions ""issue"" and ""serve"" are used in section 34 and having regard to the scheme of that

section, it is quite legitimate to hold that the two words used in section 34 have been used as interchangeable or equivalent expressions and the

same meaning has to be given to the word ""issued"" as used in section 4 which has been introduced by the amending Act 1 of 1959. Therefore, the

notice dated March 19, 1956, having been served on the assessee on April 2, 1956, it must be held that the notice was issued after the expiry of

the period of eight years as prescribed in section 34(1)(a) of the principal Act as it stood before the amendment of 1956 and, consequently, the

provisions of section 4 of Act 1 of 1959 are attracted to the present case and save the notice from the challenge of limitation.

Another argument, which was put forward by Mr. Chaudhuri with regard to the construction of section 4 of Act 1 of 1959, may be noticed. It was

submitted by the learned counsel that the true construction of the provisions of section 4 is that it has reference only to notices which are issued u/s

34 as amended by section 18 of the Finance Act of 1956. But we do not find any warrant for putting any such limitation on the very wide words

used in the section. It appears to us that even a notice which is issued under the provisions of section 34(1)(a) as it stood before the amendment of

1956 is also covered by the language employed in that section. In fact, it appears that the precise object of enacting the section was not only to

save notices which were issued u/s 34(1)(a) as it stood before the amendment as also notices which were issued subsequent to the amendment of

1956. (See also Onkarmal Meghraj v. Commissioner of income tax).

In the result, this appeal must be allowed, the order and judgement of Sinha J. are set aside and the application under article 226 of the

Constitution is dismissed.

There will be no order as to costs.

G.K. MITTER J. - I agree.

Appeal allowed.