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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9835 OF 2022

Prakash Krishnavtar Bhardwaj .... Petitioner
Versus
1. Income Tax Officer, Ward 2(1)
2. National Faceless Assessment Centre Delhi (NFAC)
3. Pr. Chief Commissioner of Income Tax, Pune
4. The Union of India .... Respondents

Mr. Vasudev Ginde a/w. Mr. Kumar Kale for the Petitioner.
Mr. Ajeet Manwani a/w. Ms. Samiksha Kanani for the Respondents.

CORAM : DHIRAJ SINGH THAKUR AND VALMIKI SA MENEZES, JJ.

RESERVED ON : 9th DECEMBER, 2022

PRONOUNCED ON : 9th JANUARY, 2023

JUDGMENT :- (PER VALMIKI SA MENEZES, J)

1. Rule. Rule made returnable forthwith by consent of the learned counsel for the parties.

2. This Writ Petition filed under Article 226 of the Constitution of India seeks from this Court, a Writ of Certiorari to quash and set aside the impugned notice under clause (b) of section 148A dated 21.03.2022, order under clause (d) of section 148A dated 02.04.2022 and notice u/s.148

dated 02.04.2022 passed by the respondents under the Income Tax Act, 1961 (the Act). The case pertains to the financial year 2014-15 relevant to the assessment year 2015-16.

3. It is the petitioner's contention that he is a non-resident Indian, residing in Dubai, UAE and since his total income for the relevant financial year was below the maximum amount chargeable to tax, he was not required to file his return of income for the relevant assessment year 2015-16. It was further his case that he received a notice dated 21.03.2022 under clause (b) of section 148A of the Act from Respondent No.1 stating that he had information that the income chargeable to tax for the relevant assessment year had escaped assessment, within the meaning of section 147 of the Act and called upon the petitioner to show-cause why a notice u/s.148 of the Act should not be issued. Details of the information received was enclosed as Annexure 'A' to the said notice.

4. The petitioner filed his response to the said notice electronically on 28.03.2022, pursuant to which, Respondent No.1 addressed an order under clause (d) of section 148A of the Act on 02.04.2022. It is the petitioner's case that this order was never received by him through e-mail; however, he has subsequently received a copy of this order on 16.04.2022 by speed post.

5. The petitioner further contends that Respondent No.1 issued notice u/s.148 of the Act dated 02.04.2022 stating that he had information suggesting that income chargeable to tax for the assessment year 2015-16 had escaped assessment within the meaning of section 147 of the Act and directed the petitioner to furnish return of income within 30 days from the

service of the notice. It is the petitioner's categorical case that this notice was never received by the petitioner by e-mail. It is his further categorical averment in the petition that this notice u/s.148 has not been signed by Respondent No.1. It is further averred that this unsigned notice alongwith the copy of order under clause (d) of section 148A of the Act was received by him by speed post on 16.04.2022.

6. Based upon these facts, it is the petitioner's contention that since the notice dated 02.04.2022 issued u/s.148 of the Act was unsigned and never sent to the petitioner, the same is invalid, bad-in-law and deserves to be quashed and set aside; that since the purported unsigned notice issued u/s.148 of the Act itself was never issued in the eyes of law and three years have been elapsed from the end of the relevant assessment year, in this case Assessment Year 2015-16, as prescribed u/s.149(1)(b) of the Act, the action is beyond limitation. It is the petitioner's case that on this count, the entire proceedings are barred and on that basis he invokes the jurisdiction of this Court under Article 226 of the Constitution of India, stating that the entire process is arbitrary and contrary to the provisions of Article 14 of the Constitution of India requiring this Court to quash and set side the impugned notice dated 21.03.2022 and notice dated 02.04.2022.

7. The respondents have filed an affidavit-in-reply dated 21.07.2022, wherein there is no substantial denial to the fact that the notice dated 02.04.2022 passed u/s.148 of the Act was not signed by the assessing officer digitally or manually. The affidavit also appears to be silent on the fact as to whether the unsigned notice was sent or received by the petitioner through e-mail.

At this juncture, it may be also noted that by an order dated 06.12.2022 of this Court, the respondents were directed to produce the original records containing the notice u/s.148 dated 02.04.2022 for the inspection of this Court. The original file was infact produced on 09.12.2022 at the time of hearing of the petition and we took note of the fact that the original notice infact did not contain manual signature, nor was it digitally signed on the file.

8. We have heard the learned counsel for the parties and perused the record of the petition.

9. It is the submission of the learned counsel for the petitioner that on perusal of the affidavit-in-reply of the respondents, there appears to be no categorical denial to the statements made by the petitioner that he has not received an order dated 02.04.2022 passed under clause (d) of Section 148A of the Act, rejecting the petitioner's submission and holding the petitioner's case to be one fit for issuing notice u/s.148 of the Act. Similarly, there is no substantial denial to the fact that the notice issued u/s.148 dated 02.04.2022 was unsigned both digitally and manually and was never received by the petitioner by e-mail or for that matter even uploaded onto the system via e-mail. Further, a copy of the said unsigned notice was received by the petitioner by speed post only on 16.04.2022.

10. It is, therefore, the contention of the petitioner that the notice u/s.148 being an unsigned notice, the same is invalid and consequently proceeding on the basis of an invalid notice vitiates the entire reassessment proceedings as the same is without any jurisdiction. It is further the argument of learned counsel for the petitioner that proceeding on the basis

of an invalid notice, which in any case, has been issued after three years from the end of the relevant assessment year, as required under the provisions of section 149(1)(b) of the Act, constitutes a jurisdictional error on the part of the respondents.

11. Learned counsel for the petitioner makes a reference to a Division Bench judgment of the High Court of Calcutta in ***Commissioner of Income-Tax v. Aparna Agency (P.) Ltd.***[1] to contend that the provisions of section 192(B) of the Act do not provide for a cure when the notice under the Act is invalid by virtue of it not having a signature affixed as is required under the relevant provisions. He further refers to another judgment of the High Court of Calcutta in ***B.K. Gooyee v. Commissioner of Income-tax***[2] and a judgment of a Division Bench of the Madhya Pradesh High Court in ***Umashankar Mishra v. Commissioner of Income-tax***[3] for the proposition that absence of a signature on notice is an invalid notice in the eyes of law and such an infirmity amounts to no notice at all.

12. Per contra, Mr. Ajeet Manwani, learned counsel for the respondents submits that assuming the notice u/s.148 of the Act was unsigned manually or digitally as is clear from the original record, this fact would not, by itself vitiate further proceedings in the matter, as according to him, provisions of Section 292B of the Act could cure this defect or mistake. He argues that applying the provisions of section 292B of the Act, the notice which is mistakenly not signed, would not be vitiated; since in any event the unsigned notice, at a later point of time, was sent to the petitioner by courier.

1 (2004) 139 Taxman 132
2 (1966) 62 IT 109
3 (1982) 11 Taxman 75

13. Learned counsel for the respondents refers to a judgment of the Delhi High Court in ***Sky Light Hospitality LLP v. Assistant Commissioner of Income-Tax***[4] and that of the Calcutta High Court in ***Commissioner of Income-Tax v. Anand And Co.***[5] in aid of his argument that even if the signatures were not applied on the notice, the authenticity of the notice was not denied; he argues that if the petitioner does not deny the authenticity of the notice, he has waived his right to raise an objection to its validity.

14. The High Court of Calcutta in ***B.K. Gooyee (supra)*** was considering the legal impact of an unsigned notice issued u/s.34 of the Income Tax Act, 1922 and whether there can be a waiver of a right of an assesse to challenge the same on the ground that the notice was unsigned. Whilst holding that a lack of signature on a notice invalidates the same, it has further gone on to hold that there can be no waiver to the right of an assessee to raise this objection where the condition precedent for assuming jurisdiction by the Assessing Officer is not fulfilled. To quote from the judgment it holds:-

> *In the present case there was more than a mere irregularity or a clerical mistake for, in my view, a notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice under section 34, a notice in terms of which is a condition precedent to the assumption of jurisdiction by the Income-tax Officer. It is notice with a body but without a soul. Hence, it is an invalid notice and consequently equivalent to no notice.*

4 [2018] 405 ITR 296 (Delhi)
5 1994 Vol.27 ITR 418

> *Hence, these cases do not militate against the principle that there can be no waiver where the condition precedent for assumption of jurisdiction is not fulfilled.*
>
> *Accordingly, my opinion is that the notice under section 34 of the Income-tax Act, 1922, to be a proper, valid and legal notice, requires to be signed by the Income-tax Officer, non-compliance of which would make it bad and all the proceedings started thereafter would be without jurisdiction. Mr. Meyer, however, in the last resort contended that in the facts of this case, the assessee in any event, waived the notice. The expression "wavier" has a professional meaning. It is true that the notice was duly served and was said to have been received by the assessee, but it is determined on high authority, that the notice under section 34 (I mean a valid notice) is a condition precedent for the assumption of jurisdiction. A notice under section 34 is therefore, not merely a procedural requirement. In its absence, it does not become a case of procedural defect. The difference between the cases of want of jurisdiction and those of irregular exercise of jurisdiction, is to be remembered in this context.*

15. Following the ratio laid down in *B.K. Gooyee (supra) and* another, a Division Bench of the High Court of Calcutta in *Aparna Agency (P.) Ltd. (supra)* whilst considering the validity of an unsigned penalty order issued u/s.271B of the Income Tax Act, 1961 and whether such a defect was curable in terms of provisions of section 292B of the Act, held thus :-

> *6. A close scrutiny of B.K. Gooyee's case (supra) could show that the question for consideration was regarding the irregularity in the issuing of a notice under section 34 of the Indian Income-tax Act, 1922. The notice did not contain the signature of the Income-tax Officer who issued it. It was held that service of a valid notice is a condition precedent to the assumption of jurisdiction by the Income-tax Officer to*

take further proceedings and that all proceedings taken in pursuance of a notice which does not contain the signature of the Income-tax Officer are invalid. It was further held that such irregularity cannot be waived and the question of its validity can be taken at any stage of the proceedings. Their Lordships of the Madhya Pradesh High Court have taken notice of the provisions contained in section 292B which provision was incorporated subsequent to the judgment in B.K. Gooyee's case (supra) and have specifically dealt with this question in the light of the provisions in section 292B. We are in respectful agreement with the view of their Lordships in Umashankar Mishra's case (supra) based on which the Tribunal in the case on hand reversed the order of the Commissioner of Income-tax (Appeals).

7. The observations in B.K. Gooyee's case (supra), which, in our view, have material bearing on the questions raised before us are extracted hereunder :

> *"In the present case, there was more than a mere irregularity or a clerical mistake, for, in my view, a notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice under section 34, a notice in terms of which is a condition precedent to the assumption of jurisdiction by the Income-tax Officer. It is notice with a body but without a soul. Hence, it is an invalid notice and consequently, equivalent to no notice."*

8. The service of a valid notice, as already noticed, is a condition precedent to the assumption of jurisdiction by the Assessing Officer. The existence of a valid notice is, therefore, a jurisdictional fact. The question, therefore, is not to be looked at from the perspective that the decision to issue notice was by an authority competent in that behalf under the Act and, therefore, submitting to his jurisdiction without objection, the

> *inference of waiver arises. The question being one of jurisdiction, to be more specific the condition precedent to the assumption of jurisdiction what has to be seen is that the person that purported to exercise the jurisdiction vested in him had in fact exercised that jurisdiction and signed the said notice. The said test has not been satisfied in the case on hand. Unlike the judgment of this court in Anand and Co. [1994] 207 ITR 418 relied upon by the Revenue the case on hand is not one where the authenticity of the show-cause notice is in question. In the case on hand as held by the fact-finding authority the show-cause notice has not been signed by any person and the place intended for signature was kept blank.*

16. The Madhya Pradesh High Court has taken a similar view in *Umashankar Mishra (supra)* whilst following the same line of thinking as the Calcutta High Court in *B.K. Goyee (supra)* and has held as under:-

> *4. The first question for consideration is whether the Tribunal was right in holding that the notice issued to the assessee under section 271(1)(a) of the Act was a valid notice. Now, the Tribunal has found that that notice was not signed by the ITO. Section 282 of the Act provides that a notice under the Act may be served on the person named therein as if it were a summons issued by a court under the Code of Civil Procedure, 1908. Sub-rule (3) of Rule 1 of O.5, CPC, provides that every summons shall be signed by the judge or such officer, as he appoints. In view of this provision, it must be held that the notice to show cause why penalty should hot be levied issued by the ITO should have been signed by the ITO and the omission to do so invalidated the notice. In B.K. Gooyee v. CIT [1966] 62 ITR 109 (Cal), the question for consideration was whether the absence of the signature of the ITO on the notice under section 34 of the Indian I.T. Act, 1922, was a mere irregularity or a clerical mistake. Dealing*

with this question, Datta J. Observed as follows (p. 119):

> *"In the present case, there was more than a mere irregularity or a clerical mistake, for, in my view, a notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice under section 34, a notice the terms of which are a condition precedent to the assumption of jurisdiction by the Income-tax Officer. It is notice with a body but without a soul. Hence, it is an invalid notice and consequently, equivalent to no notice."*

5. We respectfully agree with the aforesaid observations. The Tribunal distinguished the decision in [1966] 62 ITR 109 on the ground that the provisions of section 292B of the Act were introduced after that decision. But, that provision, in our opinion, is intended to ensure that an inconsequential technicality does not defeat justice. But, the signing of a notice under section 271(1)(a) of the Act is not merely an inconsequential technicality. It is a requirement of the provisions of O.5, rule 1(3) of the CPC, which are applicable by virtue of section 282 of the Act. Under the circumstances, the provisions of section 292B of the Act would not be attracted in the instant case and the Tribunal in our opinion, was not right in holding that the notice issued under section 271(1)(a) of the Act was a valid notice in the eye of law.

6. In view of our answer to the first question, our answer to the second question is that the Tribunal was not right in holding that the absence of the signature on the notice simply constituted a mistake or omission within the meaning of section 292B of the Act.

7. In view of the fact that no valid notice was served on the assessee before levying penalty, our answer to the third question is that, on the facts and in the circumstances of the case, the penalty levied under section 271(1)(a) of the Act was not valid. Thus, our

answers to all the three questions referred to this court are in the negative and in favour of the assessee.

17. *Anand And Co. (supra)* cited by the Revenue, proceeds on the basis that the notice issued u/s.148 of the Act did contain a signature, but the question before the Calcutta High Court was whether the signature was authenticated or not. In that case, the signature was affixed in the form of a curved line, which the assessee claimed was not an authentic signature. It is in that context that the High Court of Calcutta *in Anand And Co. (supra)* has held that the notice was proper, *Anand and Co. (supra)* was not a where there was no signature at all on the notice, but in view of the fact that the only challenge was to the doubtful authenticity of the curved line purporting to be his signature, the assessee could not raise an objection that the notice was infact invalid. In the facts of that case, the ratio laid down therein does not aid the argument of the respondents in any manner.

18. *Sky Light Hospitality (supra)* cited by the respondents was also not a case where the notice issued to the assessee was unsigned. That was a case where the notice u/s.148 was issued with a signature, but the address of the assessee was only partly correct. It was in that context that the Delhi High Court has held that the provisions of section 292B of the Act, where there was a mistake, defect or an omission in the complete address on which the notice was issued to the assessee, would cure such defect, and an objection to the validity of the notice could not be raised. In that fact of the matter, the judgment in *Sky Light Hospitality (supra)* would not be applicable to the facts of the present case, which is one where the signature of the Assessing Officer was not affixed on the notice.

19. Applying the ratio of the judgment of the Calcutta High Court in *B.K. Gooyee and Aparna Agency (P.) Ltd. (supra)* to the facts of the present case, the signature of the Assessing Officer admittedly not having been affixed on the notice issued u/s.148 of the Act, the notice itself would be invalid and consequently, the Assessing Officer could not assume jurisdiction to proceed in the matter in terms of section 148 of the Act. The Madhya Pradesh High Court in *Umashankar Mishra (supra)* has dealt with a similar fact situation where the first substantial question of law dealt with in that case had considered the effect of whether an unsigned notice can be considered as an irregularity or clerical mistake. The Madhya Pradesh High Court after making reference to the conclusions drawn in *B.K.Gooyee (supra)* by the Calcutta High Court, has taken the view, that a notice without a signature affixed on it is an invalid notice and is effectively no notice in the eyes of law.

20. The Madhya Pradesh High Court in *Umashankar (supra)* has further dealt with the second substantial question of law as to whether the Tribunal was right in holding that the absence of a signature on the notice constitutes a mistake or omission within the meaning of section 292B of the Act and while addressing itself to that question, has concluded that in the absence of a signature on the notice, the same would not constitute a mistake or omission and would not be curable under the provisions of section 292B of the Act.

21. We are, therefore, of the considered opinion that in the present case, the notice u/s.148 dated 02.04.2022 having no signature affixed on it, digitally or manually, the same is invalid and would not vest the Assessing Officer with any further jurisdiction to proceed to reassess the income of

the petitioner. Consequently, the notice dated 02.04.2022 u/s.148 of the Act issued to the petitioner being invalid and sought to be issued after three years from the end of the relevant assessment year 2015-16 with which we are concerned in this petition, any steps taken by the respondents in furtherance of notice dated 21.03.2022 issued under clause (b) of section 148A of the Act and order dated 02.04.2022 issued under clause (d) of section 148A of the Act, would be without jurisdiction, and therefore, arbitrary and contrary to Article 14 of the Constitution of India. Consequently, we quash and set aside the notice dated 02.04.2022 issued by the respondents u/s.148 of the Act, order dated 02.04.2022 under clause (b) of section 148A of the Act and notice dated 21.03.2022 issued under clause (b) of section 148A of the Act.

22. Rule is made absolute in terms of prayer clauses (a) & (b) of the petition.

[VALMIKI SA MENEZES, J.] [DHIRAJ SINGH THAKUR, J.]