it* **HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 10th August, 2010
% Judgment Pronounced on: 25th August, 2010

\+ **ITA 978/2010**

RITZ THEATRE ..... Appellant
Through: Mr. Kannan Kapur, Adv.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Sonia Mathur, Adv.

AND

ITA 980/2010

RITZ THEATRE ..... Appellant
Through: Mr. Kannan Kapur, Adv.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Sonia Mathur, Adv.

AND

ITA 981/2010

RITZ THEATRE ..... Appellant
Through: Mr. Kannan Kapur, Adv.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Sonia Mathur, Adv.

AND

ITA 982/2010

RITZ THEATRE ..... Appellant
Through: Mr. Kannan Kapur, Adv.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Sonia Mathur, Adv.

AND

ITA 984/2010

RITZ THEATRE ..... Appellant
Through: Mr. Kannan Kapur, Adv.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Sonia Mathur, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

The controversy involved in this batch of appeals being similar, it was heard analogously and is disposed of by a common order. Be it noted, the appeals that are directed against the common order passed by the Income Tax Appellate Tribunal, Delhi Bench F, New Delhi on 19.6.2009 (for short 'the tribunal') which disposed of ITA Nos.1779 to

1783/Del/2009 pertaining to the Assessment Years 1990-91 to 1992-93 and 1995-96 & 1996-97, have been admitted on the following substantial questions of law:

> "(i) Whether in the facts and in the circumstances of the case, the impugned order of the Income Tax Appellate Tribunal in not acknowledging the jurisdictional infirmity in respect of the returns having never been regularised on account of non service of (jurisdictional) notice under Section 148 of the Act has caused the impugned order to be ridden with perversity and liable to be set aside by this Court?
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> (ii) Whether in the facts and in the circumstances of the present case, the order of the tribunal having been passed in contravention to the settled judicial principles and binding judicial authorities of the Supreme Court as well as those of various High Court is perverse?
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> (iii) Whether in the facts and in the circumstances of the present case, the re-assessment proceedings were barred by time as the same were issued beyond the statutory period of 6 years?"

2. The brief facts which are imperative to be exposited for adjudication of these appeals are that the assessee had filed returns of income for the assessment years in question on 2.12.1999 and the said returns were processed under Section 143(1) on 5.3.2002. The assessing officer noted that the assessee company had made disclosure of income under the VDIS, 1997. The assessee failed to deposit the taxes in accordance with the VDIS and, therefore, the declaration was held to be void in terms of Section 67(2) of the Scheme. Notices under Section 148 of the Act were issued on 24.12.1999. The assessing officer had issued notices under Section 143(2) / 142(1) along with the questionnaire. In

response to the said notices, the Managing Director of the company appeared before the assessing officer from time to time and filed details as called for. The assessing officer found that the assessee had not made any payment of tax under self-assessment or under the provisions of VDIS, 1997. In this backdrop, he completed the assessment under Section 143(3) of the Act.

3. Being dissatisfied with the order of assessment, the assessee challenged the same in appeals and a number of grounds were urged. One of the grounds that was highlighted was that the notice under Section 148 dated 24.12.1999 was not served on the assessee and, therefore, the order of reassessment framed under Section 147 on 26.3.2002 was bad in law.

4. The CIT(A), while dealing with the said aspect, came to hold as follows:

> "I have considered the facts and circumstances of the case. Under Section 282 of the Income Tax Act, 1961, the Income Tax authorities can adopt any one of the alternative modes of service of notices, i.e. by post or in the manner provided in the code of Civil Procedure for the service of summons. The word "issue" and "service" are not synonymous, yet in the light of the provisions of Section 114 of the Indian Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897, a notice is deemed to have been served on the addressee if it has been sent through pre-paid registered post or letter. In the facts of the present case, it is a matter of record that the notices under Section 148 for all the impugned assessment years were sent by registered post. This has also been stated by the ITO, Ward 15(2), New Delhi in her report dated 28.8.2002 and postal receipt for issue of notices under Section 148 by registered post is pasted on the office copy of the notice. Hence there is a

> presumption regarding service of notices under Section 148 upon the assessee. The assessee has failed to rebut the presumption regarding service of notices. Apart from a mere averment that the notices had not been received, no evidence has been adduced by the assessee. Hon'ble Punjab & Haryana High Court in Ramesh Khosla v. ITO 154 ITR 556 has held that mere averment by the assessee that notice of demand was not served while the assessee had responded to notices under Section 143(2) sent by registered post showed that presumption of service of notice of demand was not rebutted and recovery proceedings were valid. In the facts of the present case, also notices under Section 148 were sent by registered post and the Managing Director of the assessee company had duly attended the reassessment proceedings in compliance of notices under Section 143(2) & 142(1). Hence there is no valid ground to challenge the service of notices under Section 148."

5. It is worth noting that the CIT(A) had also considered the other contentions of the assessee and dismissed the appeal.

6. Being grieved by the aforesaid order, the assessee carried the appeal to the tribunal and the tribunal decided the appeals on 25.2.2003 pertaining to the assessment years 1990-91, 1991-92 and 1992-93 and the appeals relating to the assessment years 1995-96 and 1996-1997 on the same day by a separate order. The tribunal took note of the submissions of the learned counsel for the appellant therein and proceeded to pass the following order:

In these three appeals directed against the consolidate order passed by the CIT(A), common grounds have been raised and for purposes of deciding these appeals, which have been head together, we reproduce the grounds pertaining to A.Y. 1990-91 as under:-

> "On the facts and in the circumstances of the case and in law, the authorities below erred:-

(1) In invoking provisions of section 147 of the Income Tax Act, 1961 and in thereafter assessing the income at Rs.4,91,400/-;
(2) In framing reassessment u/s 147 of the Act ignoring the fact that the impugned notice u/s 148 of the Act issued by the Assessing Officer was never served at all;
(3) In ignoring the fact that the notice u/s 148 dated 24.12.99 is without jurisdiction as the condition precedent to the exercise of jurisdiction u/s 148 viz. the 'recording of reasons' is totally absent;"

xxxx
xxxx
xxxx

4. As regards the first three common grounds pertaining to the invocation of the provisions of Section 147/148, the view about canvassed by both the parties was considered but as in our opinion, the views of the tax authorities in respect of the aforesaid provisions were correct, we decline to interfere. It is an accepted fact that the assessee itself asked the A.O. to regularize the returns and which he did by issue of notice under Section 148 and subsequently the assessee participated in the assessment proceeding. The learned counsel could not point out any infirmity in law vis-à-vis the views expressed by the tax authorities and we, therefore, have no option but to reject the first three common grounds in all these three appeals."

7. After so holding, the tribunal remanded the matter to the assessing officer requiring him to re-examine the question of double taxation as also to examine on merits the assessee's contention that no addition/ disallowances could be made over and above the figure returned and which was also the figure shown in the VDIS declaration.

8. In pursuance of the order of remit, the assessing officer framed an order of assessment in respect of all the assessment years on 28.3.2005

He determined the taxable income at Rs.2,98,840/-, Rs.3,88,390/-, Rs.1,09,490/-, Rs.6,54,670/- and Rs.3,69,750 in respect of the assessment years 1990-91, 1991-92, 1992-93, 1995-96 and 1996-97 respectively.

9. The assessee, being dissatisfied, assailed the said orders before the CIT(A). The first appellate authority, as is evincible from his order, instead of dwelling upon the merits of the additions, investigated the issue whether reopening of assessment by issuance of a notice under Section 148 is in accordance with law or not. He arrived at the conclusion that notice under Section 148 of the Act had not been served on the assessee. Being of this view, he opined that the returns submitted were invalid and, hence, no assessment could be framed on the basis of invalid returns.

10. Grieved with the aforesaid order of the CIT(A), the revenue preferred appeals before the tribunal and in appeal, it was contended that the issue regarding reopening of assessment had attained finality by the tribunal in the first round of litigation and if the assessee was grieved, it was open to attack the same by preferring a further appeal before the superior court and the authorities below being bound by the terms of the order of remand could not have looked into other grounds, especially which had been put to rest. It was urged that the CIT(A) cannot sit over the judgment of the tribunal as that would lead to anarchy and create a dent in the hierarchy of adjudicatory system.

11. The said stand and stance was opposed by the learned counsel for the assessee contending, inter alia, that valid service of notice under Section 148 of the Act confers jurisdiction on the assessing officer to frame an assessment order and if no valid notice was served upon the assessee, then the proceedings were totally without jurisdiction. It was urged that in the second round of litigation, the CIT(A) had specifically recorded a finding that no notice was served and, hence, the order of assessment was without jurisdiction and thereby a nullity. The counsel for the assessee pressed into service the decisions rendered in ***Barada Kanta Mishra v. High Court of Orissa***, AIR 1976 (SC) 1899, ***State of UP v. Mohd. Nooh***, 1958 I SCR 595, ***P.V. Doshi v. CIT***, 113 ITR 22, ***Rawatmal Harak Chand v. CIT***, 125 ITR 346, ***CIT v. Rane Break Lining***, 272 ITR 405, ***Pun Kunnam Traders v. Additional ITO, Kotayam***, 83 ITR 508, ***Deep Chand Kothari v. Commissioner of Income Tax***, (1988) 171 ITR 381 (Raj.) and ***CIT v. Avtar Singh***, 304 ITR 333.

12. The tribunal distinguished the decisions cited by the learned counsel for the appellant and after placing reliance on ***CIT v. Sun Engineering***, 198 ITR 297 came to hold that the CIT(A) could not have delved into the issue of limitation as the same was put to rest by him as well as by the tribunal and, in fact, had no right to look into the matter because a matter of remand was specific in nature. It has been observed by the tribunal that if the lower authorities are allowed to examine all the issues which have attained finality, then there will be no end to litigation

and a chaos would be created in the administration of tax litigation. Being of this view, the tribunal set aside the order passed by the CIT(A) and directed the first appellate authority to adjudicate the matter on merits in compliance with the directions of the tribunal passed on the earlier occasion.

13. We have heard Mr. Kaanan Kapur, learned counsel for the assessee – appellant, and Ms. Sonia Mathur, learned counsel for the revenue – respondent.

14. Calling in question the vulnerability and legal acceptability of the order of the tribunal, Mr. Kapur has raised the following proponements:

A. When there is non-service of notice under Section 148 of the Act within the time stipulated therein, the same renders the entire proceeding a nullity and makes the whole action *ab initio* void.

B. The finding recorded by the first appellate authority goes to the heart of the matter, i.e., non-service of the notice dated 24.12.1999 and the same being a jurisdictional issue, it could have been addressed to by the CIT(A) irrespective of the scope of remand by the order of the tribunal on 25.2.2003.

C. The Commissioner has appositely expressed the view that when there has been no notice, the assessment proceedings have been initiated without there being a jurisdictional foundation. The assessing officer had

erroneously assumed that the jurisdiction to reassess the assessee cannot be found fault with as the first appellate authority had scrutinised the record in a minutest manner and such a finding could not have been dislodged by the tribunal solely on the ground that the CIT(A) could not have delved into the same because of the scope of remand. The tribunal has fallen into serious error by unsettling the order of the CIT(A) despite plethora of decisions to the effect that when an order is passed without jurisdiction, the same is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution or even in a collateral proceeding.

D. The tribunal has failed to appreciate the ratio laid down by the Gujarat High Court in ***CIT Gujarat II v. Nanalal Tribhovandas and Anr.***, (1975) 100 ITR 734 though the same is squarely applicable to the case at hand.

E. The tribunal on the earlier occasion had decided the factum of service of notice upholding it as deemed service and not as an actual factum of service on the assessee and, therefore, the same was available for scrutiny by the CIT(A) and there was no impediment in law.

F. The concept of attachment of finality to an order as has been pressed into service by the tribunal is fallacious inasmuch as a finality or conclusiveness of an order could only arise in respect of orders which are

competent orders with jurisdiction and if an order has been passed without valid initiation, the same cannot be treated as a final or conclusive order.

To buttress the aforesaid submissions, the learned counsel for the assessee has pressed into service the decisions rendered in ***Y. Narayana Chetty and Anr. V. The Income Tax Officer, Nellore and Ors.***, (1959) 35 ITR 388 SC, ***Jindal Photo Films Ltd. V. The Deputy Commissioner of Income Tax***, (1998) 234 ITR 170 Delhi, ***Commissioner of Income Tax v. Hotline International Pvt. Ltd.***, 296 ITR 333 Delhi, ***Commissioner of Income Tax v. Shitalal Prasad Kharag Prasad***, (2006) 280 ITR 541 (All), ***Commissioner of Income Tax v. Sh. Ashok Kumar Bharti and Anr.***, (2006) 282 ITR 496, ***State of Uttar Pradesh v. Mohammad Noah***, (1958) 1 SCR 595, ***Koran Singh and ors. V. Chaman Paswan and ors.***, AIR 1954 SC 340, ***Rane Break Lining*** (supra) and ***Nanalal Tribhovandas and Anr.*** (supra).

15. Ms. Sonia Mathur, learned counsel for the revenue, in impugnation of the aforesaid submissions, has advanced the following submissions:

(a) The tribunal while passing the earlier order had taken note of the fact that the assessee had asked the assessing officer to regularise the return which was filed on the basis of issuance of notice under Section 148 of the Act and, thereafter, had participated in the assessment and, hence, the service of notice under Section 148 was not available.

(b) The assumption of jurisdiction by the CIT(A) on the second occasion is totally uncalled for since the issue pertaining to service of notice under Section 148 had attained finality at the level of the tribunal.

(c) Service of notice on the assessee is a question of fact which had been put to rest by the tribunal and it could not have been delved into by the CIT(A) as if the same related to the sphere of inherent jurisdiction. To bolster the aforesaid submissions, the learned counsel for the revenue has placed reliance on ***Bhupinder Singh Bharti v. Commissioner of Gift-tax***, (2001) 117 TAXMAN 234 (Delhi).

16. At the very outset, it is obligatory on our part to state that though the appeal was admitted on the three substantial questions of law, yet basically it relates to one singular question, i.e., whether the CIT(A), after the remand by the tribunal to the assessing officer to adjudicate in a particular manner in a limited compass, could have dwelled upon the issue relating to non-service of a notice under Section 148 of the Act on the ground that such non-service makes the original order of assessment which has already travelled to the tribunal a nullity.

17. Mr. Kapur, as indicated hereinabove, has commended us to many a decision on the concept of nullity. We think it appropriate to refer to the decisions to understand the factual matrix and the principle rendered therein. In ***Mohammad Noah*** (supra), the State of Uttar Pradesh had filed an appeal after obtaining the certificate of fitness granted by the High

Court of Allahabad against the judgment and order of the High Court in a writ petition quashing the departmental proceeding against the respondent who was a Constable in the Uttar Pradesh Police force. It was contended before the Apex Court that the High Court had erroneously exercised the writ jurisdiction. In that context, their Lordships have held thus:

> "On the authorities referred to above it appears to us that there may conceivably be cases - and the instant case is in point - where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned."

18. In ***Kiran Singh and Ors. v. Chaman Paswan and Ors.*** AIR 1954 SC 340, the Apex Court, while discussing about the principle of nullity, held thus:

> "The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and

> what the effect of section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was 'coram non-judice', and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position."

19. It is worth noting that in the said decision, their Lordships took note of Section 11 of the Suits Valuation Act and held that it is a self-contained provision and no objection to jurisdiction based on over-valuation or under-valuation can be raised otherwise in accordance with it. Their Lordships with regard to territorial jurisdiction took note of Section 21 of the Code of Civil Procedure and opined that the objection relating to the place of suing should not be entertained by an appellate Court or revisional Court unless there was a consequent failure of justice and eventually held the objection to jurisdiction, both territorial and pecuniary, as technical.

20. In ***Baradakanta Mishra*** (supra), the Supreme Court held as follows:

> "The High Court within the power and control vested under Article 235 could hold disciplinary proceedings against the appellant and could recommend the imposition of punishment of reduction in rank on the appellant. The actual power of imposition of one of the major punishments, viz., reduction in rank is exercisable by the Governor who is the appointing authority. The order passed by the High Court on 8 December, 1972 reducing the appellant in rank is unconstitutional and is quashed.
>
> The two orders of dismissal dated 3 December, 1973 are based on the order of 8 December, 1972. The substratum of the orders of dismissal being unconstitutional the orders of dismissal cannot have any legal force. Further, the contention of the High Court that the orders of dismissal passed by the High Court merged in the orders passed by the Governor cannot be accepted. If the order of the initial authority is void an order of the appellate authority cannot make it valid. The order of the Governor used the word "confirm". The appellant filed appeals to the Government. The appeals were dismissed. The confirmation by the Governor cannot have any legal effect because that which is valid can be confirmed and not that which is void."

21. On a perusal of the aforesaid paragraph, it is noticeable that their Lordships have held that the High Court lacks inherent jurisdiction to impose the punishment and hence, the order was void and, therefore, the same could not have been affirmed by the appellate authority, and in those circumstances, the doctrine of merger would not apply. It is worth noting that in the said case, the exercise of power was not dependent on any determination of fact but the assail pertained to the power vested with the High Court under the rules.

22. In ***Y. Narayana Chetty and Anr.*** (supra), the Apex Court was considering the exercise of jurisdiction under Article 226 where the assail pertained to the order of illegal assessment and in that context, it was held that the service of requisite notice on the assessee is a condition precedent to the validity of any re-assessment and if valid notice is not issued, as required, the proceedings taken by the Income Tax Officer in pursuance of an invalid notice and the consequent order of re-assessment passed by him would be void and inoperative. While laying down the principle, their Lordships have expressed thus:

> "It is then urged that the Income-tax Officer was bound to issue notices to individual partners of the firms because at the material time all the firms had been dissolved. Mr. Sastri concedes that under section 63(2) a notice or requisition under the Act may in the case of a firm be addressed to any member of the firm but his contention is that this applies to a firm in existence and not to a firm dissolved. If the appellants' case is that as a result of dissolution of the firms the firms had discontinued their business as from the respective dates of dissolution they ought to have given notices of such discontinuance of their business under section 25(2) of the Act. Besides, in the present case, the main appellant has in fact been served personally and the other partners who may not have been served have made no grievance in the matter. We are, therefore, satisfied that it is not open to the appellants to contend that the proceedings taken by the Income-tax Officer under section 34(1)(a) are invalid in that notices of these proceedings have not been served on the other alleged partners of the firms. Incidentally it may be pointed out that the finding of the Income-tax Officer in respect of all the three firms is that the only persons who had interest in the

> business carried on by the said firms were B. Audeyya and C. Pitchayya. It is remarkable that B. Audeyya has not cared to challenge the proceedings or to question the validity of the fresh assessment orders passed by the Income-tax Officer in the present proceedings."

23. From the aforesaid, it is evident that their Lordships took note of the fact that one of the partners who was served with notice by the assessing officer had not cared to challenge the proceedings or to question the validity of the said assessment orders passed by the Income Tax Officer. We have reproduced the said paragraph as in the present factual backdrop, the said decision is not attracted inasmuch as the finding of fact relating to service of notice was dealt with by the CIT(A) on the first occasion and the said finding was affirmed by the tribunal on the earlier occasion.

24. In ***Jindal Photo Films Ltd.*** (supra), this Court had held thus:

> "It is also equally well settled that if a notice under S. 148 has been issued without the jurisdictional foundation under Section 147 being available to the assessing officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this Court. If 'reason to believe' be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the assessing officer to initiate the proceedings under Section 147/148."

25. There can be no cavil about the said proposition of law. It is a well settled principle of law that absence of jurisdiction would vitiate the proceedings and, accordingly, the proceeding was quashed as the condition precedent was not satisfied.

26. In ***Hotline International Pvt. Ltd.*** (supra), this Court came to hold that when there is no proper service of notice on the assessee, the reassessment proceeding is bad in law.

27. In ***Shitalal Prasad Kharag Prasad*** (supra), the High Court of Allahabad was dealing with service of notice on the assessee. On behalf of the department, a contention was advanced that if no notice is issued or if the notice is invalid or is not in accordance with law or is not served on the proper person in accordance with law, the assessment could be illegal and without jurisdiction. It was opined by the Court that a notice contemplated under Section 148 of the Act is a jurisdictional notice for initiating proceedings for making an assessment under Section 147 of the Act and any defect in that notice cannot be cured by anything done by the assessing officer subsequently. The Bench opined that the vagueness cannot be removed by reference to the other documents on the record. In the said case, the notice under Section 148 of the Act was not served on all the adult members of the partitioned HUF as required under Section 283(1) of the Act and, hence, the same was invalid.

28. In ***Sh. Ashok Kumar Bharti*** (supra), a notice was issued to three members who formed an AOP. The assessing officer completed the assessment on the AOP comprising of two persons. On an appeal being filed, the CIT(A) noted that the notice was issued under Section 148 to an AOP of three persons while the assessment was framed on AOP of two persons and cancelled the assessment. The revenue went in appeal before the tribunal which upheld the order of the CIT(A). On a reference being made, the Bench opined that there was no valid notice to the assessee against whom the assessment order was passed. Being of this view, the Court dismissed the appeal.

29. On a perusal of the aforesaid decision, it is clear as crystal that the facts are quite different and in fact, the Bench was addressing itself with regard to the status of the parties, validity of notice and the nature of order of reassessment. Therefore, the said decision is not applicable to the facts of the present case.

30. Mr. Kapur, learned counsel for the assessee, has drawn immense strength from the decisions in ***Nanalal Tribhovandas and Anr.***, (supra) and ***P.V. Doshi*** (supra) to highlight that the said two authorities were rendered in the identical factual backdrop. Regard being had to the inspired submissions of the learned counsel for the appellant in this regard, we think it appropriate to x-ray the facts and proceed to understand the ratio.

31. In ***Nanalal Tribhovandas and Anr.***, (supra), in the course of assessment proceeding for 1949-50, the assessing officer after obtaining certain information entertained the belief that there was escapement of income for the preceding three years. He issued notice to the assessee requiring him to file returns which were filed before the assessing officer. No contention was urged regarding the validity of notices under Section 34 of the Income Tax Act, 1922. After the assessment was framed, the assessee went in appeal and the appellate authority annulled the reassessment orders. Against the said order, the revenue took the matter in appeal before the tribunal and the tribunal set aside the order of the first appellate authority and remanded the matter to the first appellate authority. After the remand, the first appellate authority set aside the orders passed by the income tax officer in reassessment proceedings on the ground that they were bad in law and the assessing officer was directed to make fresh reassessment. One of the contentions that was canvassed before the first appellate authority was that the notice under Section 34 was illegal and invalid inasmuch as the income tax officer had not got relevant material before him and had not considered the explanation proferred by the assessee before he came to issue notice under Section 34 of the Act. The appellate authority opined that the action under Section 34 was fully justified and was quite legal and proper on the basis of facts before the assessing officer. After remand, it was contended that the notices issued under Section 34 were invalid because the time

given for filing the returns in each of the three cases fell short of the statutory period of 30 days. The assessing officer rejected the plea on the ground that the said issue along with the several points which were urged before him in the hearing after the remand by the appellate authority were not raised at the time of the original reassessment proceedings. It is further held by the assessing officer that the assessment has been set aside by the first appellate authority on a specific point and, therefore, the assessee could not raise the above contention at that particular stage and, accordingly, proceeded to deal with the matter on merits. The matter was taken up in appeal and the appellate authority came to hold that the issue of notice of 30 days is a condition precedent for exercise of jurisdiction by the income tax officer and as the said condition precedent was not satisfied, the orders of reassessment were illegal and void. Being dissatisfied, the revenue went up in appeal before the tribunal and it came to the conclusion that whether the notices were valid or not was a pure question of law for adjudication for which no further facts need be found and as the tribunal opined that there was no valid notice under Section 34 of the Act it accordingly, held the assessment to be bad in law.

32. At the instance of the revenue, the matter was referred to the High Court. The Bench took note of the contention that when there is a question of jurisdiction to entertain any proceeding under Section 34 of the Act, the mere technicality that in earlier proceedings before the appellate authority the particular contention regarding the validity of the

notices under Section 34 was not urged is totally besides the point. In fact, it held that if the income tax officer has no jurisdiction to initiate reassessment proceeding or to pass any order in reassessment proceeding, then the fact that the particular contention was not urged at an earlier stage is beside the point. It eventually came to hold that the appellate authority could not confer jurisdiction on the income tax officer to decide the question on merits. It is worth noting that the Division Bench has reproduced the order passed by the first appellate authority. The first appellate authority held thus:

> "In the instant case, as pointed out above, the Income-tax Officer came into possession of certain material regarding increase of the assets some time in 1953 and the same information led him to a reasonable and honest belief that this was due to the assessee not disclosing fully and truly all material facts at the time of the original assessment. As pointed out by the Income-tax Appellate Tribunal in its order dated January 16, 1958, it was not necessary that the assessee should have been given an opportunity of being heard before initiating action under section 34. In my opinion, the action under section 34 was fully justified and was quite legal and proper on the basis of facts before the Income-tax Officer. The notices under section 34 issued by him were, therefore, perfectly legal and valid. The contention in respect of the legality and the validity of the notices is, therefore, rejected."

33. On a reading of the said paragraph of the first appellate authority and the view expressed by the Bench, it is crystal clear that the Bench opined that a contention was not raised with regard to the period of limitation and further the same being a jurisdictional fact could have been

left to the assessing officer. The submission of Mr. Kapur is that the said decision gets squarely attracted to the case at hand inasmuch as the CIT(A) had found that there was no service of notice. The subtle distinction in the Gujarat case and the present one is that the issue that was urged before the CIT(A) on an earlier occasion who had addressed itself to a great extent and further the same was raised before the tribunal, which finally concluded that the notices were served. It is not a case of contention not being raised with regard to jurisdiction and further it was not a case that the first appellate authority conferred jurisdiction on the assessing officer which exclusively vests with him. Thus, in our considered opinion, the said decision is not applicable.

34. In ***P.V. Doshi*** (supra), the Division Bench was dealing with the issue whether on the facts and in the circumstances of the case, the tribunal was right in holding that once it had passed an order, the matter became final with regard to the point which was settled by the appellate assistant commissioner and could not be agitated before the tribunal unless it was taken upto the High Court. In the said case, a proceeding for reassessment under Section 147 was initiated in response to which the assessee filed its return. The assessee raised objections about the validity of the notice and his contentions were not accepted. In appeal before the appellate authority, the contention about the validity of notice was abandoned and the appeal stood dismissed. Before the tribunal, the only controversy raised pertained to the acceptance of the evidence of one

Vora and the tribunal found that the department was not given an opportunity to cross-examine the said Vora and his affidavit could not have been accepted and, accordingly, it restored the case to the file of the assessing officer with a direction to cross-examine the said deponent. After the remit, the assessing officer framed an order of assessment which came to be assailed in appeal wherein the reopening of the assessment was challenged on the foundation that no reasons had been recorded by the income tax officer before issuing notice for reassessment. It was urged that merely on the basis of change of opinion, the assessing officer could not have reopened the assessment. The first appellate authority came to hold that the subsequent reopening was bad in law. The revenue went up in appeal before the tribunal and contended that the said question could not be reopened by the first appellate authority. The tribunal agreed that this was a pure legal question that went to the root of jurisdiction and it was open to the assessee to raise this point at any stage and his right could not be curtailed because he had once raised this question and given up the same before the first appellate authority on earlier occasion and the tribunal though had not dealt with this aspect in the first round of litigation yet the matter had become final as it was settled by the first appellate authority and not agitated before the tribunal and it was not carried to the High Court. After noting the facts, the Bench scanned the anatomy of Sections 147 to 149 of the Act and placed reliance on the passage in ***Ashutosh Sikdar v. Bihari Lal Kirtania***, [1907] ILR 35 Cal 61

and took note of the facts. Thereafter, the Bench referred to a passage wherein Justice Coleridge has stated thus:

> "10. Thereafter, their Lordships pointed out that whether a provision fell under one category or the other was not easy of discernment, as in the ultimate analysis, it depended upon the nature, scope and object of the particular provision. Their Lordships in terms approved a workable test laid down by Justice Coleridge in Holmes v. Russel [1841] 9 Dowl 487 as under:
>
> "It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

35. After so holding, the Bench came to hold as follows:

> "17. …In fact,no question of any bar of res judicata even at the subsequent stage of the same proceeding could arise in the present case for the simple reason that the original order is said to be without jurisdiction. The first condition in invoking any bar of res judicata is the condition about the competence of the court. Similarly, the provision of finality in this relevant provision in section 254(4) could also not be attracted in such a case, where the question admittedly, went to the root of the jurisdiction and if that contention was upheld, it would have made all the proceedings of reassessment totally void and without jurisdiction. As per the aforesaid settled legal position such a point could not be waived and there can be no question of the earlier remand order operating as a final order, because if such a jurisdictional point could not be waived, even the fact of passing of the remand order by the Tribunal could not confer jurisdiction on

> the Income-tax Officer, if the conditions to found his jurisdiction were absent.
>
> 18. Therefore, if this settled position was borne in mind, the Tribunals view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to this court at that stage. The Tribunals view was also incorrect that in restoring the case to the file of the Income-tax Officer by the earlier order, the only point left open was in respect of addition of Rs. 19,421 on merits and that the legal or jurisdictional aspect whether the reassessment proceedings were legally initiated was not kept open. Even on the third question the Tribunals view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the Appellate Assistant Commissioner, it could be waived and it could not be reagitated..."

36. On a careful perusal of the aforesaid decision, it is perceivable that the facts in the said case and the factual matrix in the present one are quite different. There the question was abandoned and it related to conferment of jurisdiction. The Bench opined that the doctrine of waiver would not be applicable as it was a pure question of law. In the case at hand, the issue was raised on an earlier occasion before the CIT(A) who after scanning the factual matrix in detail, expressed the view that the notice was served on the assessee. The said finding was affirmed by the tribunal. Service of notice or non-service of notice is in the realm of facts

and as a matter of fact it was put to rest. Thus, it does not give rise to a total pure question of law. Thus, the said decision is distinguishable.

37. In this context, we may refer with profit to a three-Judge Bench decision of the Apex Court in ***Mathura Prasad Sarjoo Jaiswal and others v. Dossibai N. B. Jeejeebhoy***, AIR 1971 SC 2355 wherein their Lordships have expressed thus:-

> *"*9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C.J., observed in Tarini Charan Bhattacharjee's case, ILR 56 Cal 723 = (AIR 1928 Cal 777).
>
> > "The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."
>
> 12. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

13. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in S. 11 Code of Civil Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

14. In the present case the decision of the Civil Judge, Junior Division, Borivli, that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous, see (1962) 3 SCR 928 = (AIR 1966 SC 1939). If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature."

[Emphasis supplied]

38. In ***Mahila Bajrangi v. Badribai*, (2003) 2 SCC 464**, the Apex Court has opined that the principle of res judicata would be applicable when an issue arose directly and substantially in an earlier suit but a finding regarding an incident or collateral question reached for the purpose of arriving at the final decision would not constitute res judicata.

39. In **Union of India v. Pramod Gupta**, **(2005) 12 SCC 1**, it has been held thus:-

> "29[28]. The principle of res judicata would apply only when the lis was inter partes and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a court having no jurisdiction therefor, and/or in a case involving a pure question of law. It will also have no application in a case where the judgment is not a speaking one."
>
> [Emphasis Added]

40. In ***Bishwanath Prasad Singh v. Rajendra Prasad and another***, (2006) 4 SCC 432, it has been held thus:-

> "43. The question of determination of (sic) being a pure question of law, the principles of res judicata shall have no application. Therefore, the High Court, in our opinion, committed a manifest error in interfering with the judgment and decree passed by the trial court as also the appellate court in exercise of its jurisdiction under Section 100 of the Civil Procedure Code."

41. In this context, we may profitably refer to the decision in ***Chief Justice of A.P. v. L.V.A. Dixitulu***,(1979) 2 SCC 34 wherein it has been held:

"23[24]. As against the above, Shri Vepa Sarathy appearing for the respective first respondent in C.A. 2826 of 1977, and in C.A. 278 of 1978 submitted that when his client filed a writ petition (No. 58908 of 1976) under Article 226 of the Constitution in the High Court for impugning the order of his compulsory retirement passed by the Chief Justice, he had served, in accordance with Rule 5 of the Andhra Pradesh High Court (Original Side) Rules, notice on the Chief Justice and the Government Pleader, and, in consequence, at the preliminary hearing of the writ petition before the Division Bench, the Government Pleader appeared on behalf of all the respondents including the Chief Justice, and raised a preliminary objection that the writ petition was not maintainable in view of Clause 6 of the Andhra Pradesh Administrative Tribunal Order made by the President under Article 371-D which had taken away that jurisdiction of the High Court and vested the same in Administrative Tribunal. This objection was accepted by the High Court, and as a result, the writ petition was dismissed in limine. In these circumstances - proceeds the argument - the appellant is now precluded on principles of res judicata and estoppel from taking up the position, that the Tribunal's order is without jurisdiction. But, when Shri Sarathi's attention was invited to the fact that no notice was actually served on the Chief Justice and that the Government Pleader who had raised this objection had not been instructed by the Chief Justice or the High Court to put in appearance on their behalf, the counsel did not pursue this contention further. Moreover, this is a pure question of law depending upon the interpretation of Article 371-D. <u>If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in the case</u>."

[Underlining is ours]

42. In ***Dwarka Prasad Agarwal v. B.D. Agarwal***, (2003) 6 SCC 230, it has been held thus:

> "37. It is now well settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such."
>
> [Emphasis Added]

43. In the case at hand, neither the CIT(A) nor the tribunal lacked inherent jurisdiction to deal with the controversy with regard to service of the notice. It was a question of fact and assuming it is a jurisdictional fact by which the assessing officer could assume jurisdiction as the condition precedent was required to be satisfied so that the assessing officer could get jurisdiction but once a finding was arrived at that the notice was served on the parties, the same would bind the parties. In this context, we may fruitfully refer to the decision rendered in ***Kali Prasad & Ors. v. Deputy Director of Consolidation & Ors***, (2000) 6 SCC 640, wherein the Apex Court has held thus:

> "12. …Section 331 read with Schedule II bars jurisdiction of the civil court only in respect of such

> reliefs which are mentioned in Schedule II and for their adjudication another authority has been prescribed thereunder. The suits were filed by Ram Dulare (father of respondents 3 and 4) for the reliefs of declaration of bhumidari rights and for ejectment of the persons in possession including the appellants. The relief of ejectment of asamis which bars the jurisdiction of the civil court, is mentioned at Sl. Nos. 19, 20 and 21 of Schedule II. Further, it is not every suit of declaration that is barred under Section 331; the categories of declaration which cannot be granted by a civil court are those mentioned against Sl. No. 34 and they are of the types specified in Sections 229, 229-B and 229-C. We have perused those provisions. The suit filed by Bal Karan (*sic* Ram Dulare*)* does not fall under any of the aforementioned Sections. The only ground on which the suit was held to be barred was that the appellants were asamis and their ejectment could not be granted by the civil court. A finding recorded by the civil court on the question of jurisdictional fact is binding on the parties to the suit."
>
> [Emphasis Supplied]

44. On a perusal of the aforesaid passage, it is clear as noon day that if a finding is recorded relating to jurisdiction by a court which lacks inherent jurisdiction, the same would stand on a different compartment than a controversy where the court or a forum has jurisdiction and assumes jurisdiction on certain spheres or recording of satisfaction of conditions precedent. The latter would be the determination of a jurisdictional fact and that would operate as res judicata parties inter se.

45. If the obtaining factual matrix is tested on the aforesaid enunciation of law, it is quite vivid that a pure question of law is not involved which could be agitated at any time. It relates to service of notice. As a matter

of fact, a categorical finding was recorded by the CIT(A) on an earlier occasion that the notice was served. The same was concurred with by the tribunal. When a fact finding authority had recorded as a matter of fact, as regards the service of notice, in our considered opinion, the same could not have been agitated before the first appellate authority again. There is no quarrel over the proposition that service of notice is a condition precedent but the said issue was put to rest on the previous round of litigation. Therefore, the assessee was not entitled in law to raise the said issue again.

46. The controversy can be looked into from another angle. The tribunal has dealt with the issue and directed a remand on a limited score. The said order of remand was not assailed before the superior forum. In ***K.P. Dwivedi v. State of U.P. & Ors.***, (2003) 12 SCC 572 a two-Judge Bench of the Apex Court opined that when there is a limited remand, the authority concerned cannot travel beyond the same as the earlier findings could not be disturbed.

47. In ***Paper Products Ltd. v. Commissioner of Central Excise, Mumbai***, (2007) 7 SCC 352 the Apex Court after reproducing the order passed by the Customs, Excise and Gold (Control) Appellate Tribunal (in short 'CEGAT') held that it only related to the particular plea and no new pleas could not be advanced.

48. In ***Mohan Lal v. Anandibai and others***, AIR 1971 SC 2177 a three-Judge Bench of the Apex Court expressed thus:

> "9. Lastly, counsel urged that now that the suit has been remanded to the trial Court for reconsidering the plea of res-judicata, the appellant should have been given an opportunity to amend the written statement so as to include pleadings in respect of the fraudulent nature and antedating of the gift deed Ext. P-3. These questions having been decided by the High Court could not appropriately be made the subject-matter of a fresh trial. Further, as pointed out by the High Court, any suit on such pleas is already time-barred and it would be unfair to the plaintiff-respondents to allow these pleas to be raised by amendment of the written statement at this late stage. In the order, the High Court has stated that the judgments and decrees and findings of both the lower courts were being set aside and the case was being remanded to the trial Court for a fresh decision on merits with advertence to the remarks in the judgment of the High Court. It was argued by learned Counsel that, in making this order, the High Court has set aside all findings recorded on all issues by the trial Court and the first appellate Court. This is not a correct interpretation of the order. Obviously, in directing that findings of both courts are set aside, the High Court was referring to the points which the High Court considered and on which the High Court differed from the lower courts. Findings on other issues, which the High Court was not called upon to consider, cannot be deemed to be set aside by this order. Similarly, in permitting amendments, the High Court has given liberty to the present appellant to amend his written statement by setting out all the requisite particulars and details of his plea of res judicata, and has added that the trial Court may also consider his prayer for allowing any other amendments. On the face of it, those other amendments, which could be allowed, must relate to this very plea of res judicata. It cannot be interpreted

> as giving liberty to the appellant to raise any new pleas altogether which were not raised at the initial stage. The other amendments have to be those which are consequential to the amendment in respect of the plea of res judicata."

49. We have quoted in extenso only to highlight that an order passed by the superior court has to be understood in a proper perspective and when the appellate court directs a remand with a direction to consider a particular plea, a new plea cannot be raised.

50. In view of the aforesaid enunciation of law, the CIT(A) could not have ventured to address itself with regard to service of notice as if the matter was in the realm of total open remand. In fact, such reopening of issue was totally unwarranted.

51. We will be failing in our duty if we do not note a submission of the learned counsel for the revenue. Learned counsel has urged that if the CIT(A) would traverse beyond the orders passed by the tribunal that would bring in chaos and destroy the basic hierarchical principles in the administration of justice. In this regard, we may refer with profit to the following observations made by their Lordships in ***Bishnu Ram Borah and another v. Parag Saikia and others***, AIR 1984 SC 898:

> "12. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High Court under Art. 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Art. 142 of the Constitution,

> so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Arts. 226 and 227 of the Constitution. We cannot but deprecate the action of the Board of Revenue in refusing to carry out the directions of the High Court. In Bhopal Sugar Industries Limited v. Income-tax Officer Bhopal (1961) 1 SCR 474 : (AIR 1961 SC 182) , the Income-tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income-tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him. The Court held that such refusal was in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on the hierarchy of courts."

52. We have reproduced the aforesaid passage only to highlight that the CIT(A) has really flouted the norms pertaining to administration of justice based on hierarchy of courts which is totally impermissible.

53. In view of our aforesaid premised reasons, we do not perceive any merit in these appeals and, accordingly, they are dismissed without any order as to costs.

CHIEF JUSTICE

MANMOHAN, J.

AUGUST 25, 2010
dk/nm/vk