(1964) 07 CAL CK 0013

Calcutta High Court

Case No: Matter No. 213 of 1963

Srimati Kiron Devi Singhee		APPELLANT
	Vs	
Commissioner of Income Tax, West Bengal and Others		RESPONDENT

Date of Decision: July 8, 1964

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 15, Order 5 Rule 17
- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 282, 33B, 33B(1), 63

Citation: 70 CWN 141

Hon'ble Judges: Banerjee, J

Bench: Single Bench

Advocate: A.C. Mitra, for the Appellant;Sabyasachi Mukherjee, for the Respondent

Judgement

Banerjee, J.

The point involved in this Rule is short but interesting. The petitioner, Srimati Kiron Devi Singhee, residing at Basirhat, in the District of 24 Pargannas, used to be assessed to income tax by the income tax Officer, B-Ward, District 24 Pergannas. The respondent Commissioner of income tax, decided to revise the assessments made on the petitioner for the years 1953-54 to 1961-62, in exercise of his power under sec. 33B of the income tax Act, 1922. Now, sec. 33B (1), which is material for purposes of this Rule, is couched in the following language:

The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the income tax Officer is erroneous in so far as it is prejudicial to the interests of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the

assessment, or cancelling the assessment and directing a fresh assessment.

2. Since the section requires that the assessee is to be given a reasonable opportunity of being heard, the respondent Commissioner issued the following notice to the petitioner :

1. On calling for and examining the records of your case for the assessment years 1953-54, 1954-55, 1955-56, 1953-57, 1957-58, 1958-59, 1959-60, 1960-61 and 1961-62 and other connected records I consider that the orders of assessment passed by the income tax Officer ''B'' Ward, Dist. 24 Pergannas on 14-6-61 are erroneous in so far as they are prejudicial to the interests of revenue far as they are prejudicial to the interests of revenue for the following reasons amongst others :

2. Enquiries made have revealed that you neither resided nor carried on any business from the address declared in the Returns. Also the income tax Officer was not justified in accepting the initial capital, the income from business etc. without any enquiry or evidence whatsoever.

3. I, therefore, propose to pass such orders thereon as the circumstances of the cases justify, after giving you an opportunity of being heard under the powers vested in me under sec. 33B of the income tax Act, 1922. The cases will be heard at 3.30 P.M. on 9.5.63 at my above office when you are requested to produce the necessary evidence in support of your contentions. Objection in writing accompanied by the necessary evidence, if any, received on or before the appointment for personal hearing will also be duly considered.

4. Please note that no adjournment of the hearing will be granted.

3. The address disclosed by the petitioner, in the statutory forms of return of income for the years 1953-54 to 1961-62, was her Basirhat address. This fact is admitted by Mr. Sabyasachi Mukherjee, learned Advocate for the respondent Commissioner. The respondent Commissioner, however, had information that the petitioner did reside at her declared address but had another address at No. 20, Mullick Street, Calcutta. So as not to miss the assessee, who is a lady, in the matter of service of notice, the respondent Commissioner decided to send the notice to the assessee petitioner at both the addresses, namely, at Basirhat and at No. 20, Mullick Street, Calcutta. As a matter of abundant precaution, the respondent Commissioner decided to try service on the petitioner by registered post as well as by the procedure prescribed in the Code of Civil Procedure, as he was entitled to do u/s 63 of the income tax Act, 1922, as also under the corresponding section in the new Act of 1961, namely, sec. 282.

4. It appears from paragraph 5 of the affidavit-in-opposition that the notices, sought to be served under the Code of Civil Procedure, were served upon the petitioner by affixation, on May 1, 1963, at No. 20, Mullick Street address & on May 2, 1963, at the Basirhat address. The notice sent to the petitioner at the Basirhat address by registered post, came back undelivered. The notice sent to Mullick Street address,

by registered post, was re-directed and sent to Bidasar. District Churu, in the State of Rajasthan, and was there served upon the petitioner, on May 8, 1963. The petitioner sent a written reply to the notice, on May 8, 1963. The petitioner sent a written reply to the notice, on May 10, 1963, couched in the following language:--

I received with much surprise your above notice, on 8th May, 1963, in which you say that according to what you consider, the orders of assessment passed in my case by the income tax Officer, B-Ward, 24 Pergannas, are erroneous in so far as they are prejudicial to the interests of revenue and have alleged that I neither resided nor carried on any business from the address declared in the returns meaning thereby Basirhat in 24 Parganas.

While I do not understand as to how the assessments, made in my case by the income tax Officer concerned, are regarded by you as erroneous, nobody can dispute the fact of my having resided and carried on business as declared before the income tax Officer. But in the short time allowed by you it is not physically possible to produce the necessary evidence afresh before you on 9-5-1963.

Moreover, I am held up here on account of my having had a very troublesome delivery followed by profuse bleeding which has not yet stopped. The Doctors are advising a major operation and at 11-13 moment are watching for an opportune time for my health to improve. Nobody will advise mo or my husband a movement from here. Medical certificates have already been enclosed in a similar petition addressed to you by my husband in reference to your Notice No. J. 3539 C.T./Rev. 165-173 33B/WB/63664 dated 1-5-63.

Hence I request you to kindly grant me at least four weeks'' time for representing my case before you and inform me accordingly.

Since on the date fixed, nobody appeared before the Commissioner of income tax, he made an exparte order of revision cancelling the previous assessments and directing the income tax Officer to make fresh assessments according to law.

5. Aggrieved by the order of revision of assessment, the petitioner moved this Court, under Art. 226 of the Constitution, praying for a Writ of Certiorari for the quashing of the revision order and for a mandate upon the respondents restraining them from giving effect to the order and obtained this Rule.

6. Mr. A.C. Mitra, learned Advocate for the petitioner, did not argue the other grounds, taken because those were covered by my judgment in Kalawati Debi Haralalka Vs. Commissioner of Income Tax, West Bengal, . He did not, however, give up the points and submitted that, if necessary, the petitioner would argue the points higher up. I notice the stand taken by Mr. Mitra and leave the other points as covered by my judgment in Kalawati Debi Haralalka''s case (supra).

7. The only point on which Mr. Mitra emphasised was that the petitioner receiver only one notice, which was re-directed to Bidasar address; since that notice was

received by the petitioner only on May 8, 1963 (not on May 9, 1963 as wrongly stated in the petition) and since the date of hearing was fixed for May 9, 1963, there was no reasonable opportunity of being heard given to the petitioner and the order of revision of assessment should be quashed for that reason.

8. It is now a sound proposition of law that a notice giving an unreasonably short time to an assessee to show cause against a proposal for revision does not fulfil the conditions of sec. 33B of the income tax Act, 1922. The giving of opportunity is not a matter of form but of substance. When an assessee, residing at a distant place, is required to appear and show cause on the day following the receipt of the notice, that does not amount to giving her a reasonable opportunity. The unreasonableness of such a notice, which ignores the difficulties of time and space, must be taken to be apparent on the face of the notice. Therefore, if the notice served upon the petitioner at Bidasar, in the State of Rajasthan, is to be taken into account, then because of the unreasonable shortness of the notice, the order of revision deserves to be quashed.

9. Mr. Sabyasachi Mukherjee, learned Advocate for the respondent, tried to get rid of this difficulty with the argument that the Commissioner was bound to send the notice to the address disclosed by the petitioner in her statutory returns, namely, Basirhat address. Since a copy of the notice was served at the Basirhat address by affixation, under the procedure as in Order 5, rule 17 of the Code of Civil Procedure, on May 2, 1963, the petitioner must be deemed to have been given reasonable opportunity of showing cause against the proposal for revision. In my opinion, Mr. Mukherjee is right in his contention in so far as he states that the initial duty of the Commissioner of income tax is to try to serve an assessee at the address disclosed by him or her in the returns, because that is the admitted address of the assessee. There is no duty cast upon the Commissioner to pursue an assessee, wherever he or she may be, for service of notice, excepting in so far as the rules for service of notice require. But even then, the notice must be served according to law at the admitted address. Merely by sending a notice to the admitted address and by not causing service of the same according to law, the Commissioner does not perform his duty. I have, therefore, to see if the notice at Basirhat address was duly served. The service return, to which reference was made in paragraph 6 of the affidavit-in-opposition and which was produced by Mr. Mukherjee before me, goes to show that the return of service was effected in the following manner:--

I, S.C. Paria, Inspector of the income tax Office, 24 Pergannas solemnly affirm and declare:

That on 1.5.63 I received the notice/notices under section/sections 33B issued by the C.I.T., W.B. for service on Kiron Devi Singhee. I attempted to contact the assessee for personal service on 2-5-63 between hours 1 to 3 P.M. and again on 3-5-63 between the hours 10 to 3 P.M. and having failed in these attempts I have served the notice by affixation on 3-5-63 between the hours 1 P.M. (sic.) in the presence of Sudhir Kr.

Mukherjee, Post-master, Basirhat.

On the service return there is the signature of the Sub-Post Master, Basirhat, in attestation of service. An officer of the income tax Department, before whom the return was affirmed, endorsed a gratuitous certificate on the return stating ''service is valid.''

10. Order V, rules 15 and 17 of the CPC (as amended by Calcutta High Court) read as follows:--

(Rule 15)--Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Provided * * *

Explanation:--A servant is not a member of the family within the meaning of this rule.

(Rule 17)--Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Explaining the scope and effect of the abovementioned rules in Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others, (498-99) Das Gupta, C.J., (Bachawat, J. agreeing with him) observed as follows:

The first requisite that has to be established before such service can be held to be valid service in accordance with law is that the defendant could not be found. The mere fact that the serving officer went to the address and found him absent from that address is not sufficient to establish the requirement that the defendant could not be found. It was pointed out in Sakharam v. Padmakar, ILR 30 Bom. 623 that if a serving officer goes to a defendant''s house, but does not find him there, and the defendant''s adult son, who is in the house, refuses to accept service on behalf of the father, these facts by themselves do not justify the officer in resorting to the

mode of service by affixation and that he must, before effecting such service, enquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant. In Subramania v. Subramania, ILR 21 Mad. 419 it was again observed that mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant''s house. The law as clearly settled, therefore, is that the mere fact that the serving officer does not find the defendant--or the party to be served with the notice--at the address is not tantamount to saying that the defendant cannot be found. Before it can be said that the defendant cannot be found, it must be shown not only that the serving officer went to the place at a reasonable time when he would be expected to be present, but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere. If after such reasonable attempts the position still is that the defendant is not found, then and then only it can be said that the defendant cannot be found.

In my opinion, the attempted service at Basirhat did not amount to service under Order V, r. 17 of the Code of Civil Procedure. The serving officer merely stated that he tried to contact the petitioner for personal service but having failed personally to contact her, served the notice by affixation. He does not say whether the petitioner was available at Basirhat address and refused to come out before him. If the petitioner was not at Basirhat address, he did not make any effort to contact the petitioner elsewhere. Having failed to establish personal contact with the petitioner, at the Basirhat address, the serving officer did not try or enquire whether the assessee petitioner had any agent empowered to accept service or any other person on whom the service could be effected. Because he failed to contact the petitioner assessee personally, he thought that it was his duty to serve notice by affixation. In so doing, he did not conform to the procedure prescribed by Order 5, rule 17 of the CPC and the service was not a service according to law. That being the position there was no service of the notice upon the petitioner at the Basirhat address and on the basis of that type of service of notice, the order for revision cannot be sustained. The position does not become better if one relies upon the service effected upon the petitioner at Bidasar at Rajasthan. There notice was served upon her on May 8, 1963 calling upon her to appear before the Commissioner of income tax on the very next day to show cause why her assessment for the years 1953-54 to 1961-62 should not be revised. That was too short notice for anybody to comply with.

For the reasons stated above, I have to uphold the argument of Mr. Mitra that the petitioner was not given reasonable opportunity to show cause against the proposal for revision of assessment order. I, therefore, quash the order of revision. Let a Writ of Certiorari issue. There will be no order as to costs.