

## SUREME COURT OF INDIA

Commissioner of Income-Tax, Kerala

Vs.

Thayaballi Mulla Jeevaji Kapasi (Decd.) (By His Legal Representatives)

(J.C. Shah, S Sikri and V Ramaswami JJ.)

15.03.1967

### JUDGMENT

#### SHAH, J.

1. Thayaballi Mulla Jeevaji - hereinafter called "the respondent" - was a trader in "Malabar produce", cloth, pepper and other commodities. For the assessment year 1945-46, the respondent submitted a return disclosing a net business loss of Rs. 7,960. The Income-tax Officer, Kozhikode, District Malabar, completed the assessment on March 29, 1946, and computed the total income of the respondent at Rs. 8,009 and brought it to tax. On December 4, 1953, the Income-tax Officer received information that in the name of the respondent there stood credited large sums of money in account with the Central Bank of India Ltd. at Bombay. The Income-tax Officer being of the opinion that the deposits made by the respondent represented profits of the business which had escaped assessment issued on March 18, 1954, a notice under section 34(1)(a) of the Income-tax Act, 1922, to the assessee. The notice was, it is claimed, tendered to the son of the respondent and was accepted by him. The process server was informed that the respondent was in Bombay and that "it would take a week for him to return". Being of the view that service of the notice on the respondent's son was irregular, the Income-tax Officer cancelled that notice and issued a fresh notice on March 24, 1954. This notice was affixed on March 25, 1954, to a conspicuous part of the business premises of the respondent by the process server in the presence of two persons and an endorsement was made on the notice that "At the above address on enquiry the owner (the assessee) was said to be in Bombay or in Ceylon, and, as directed by the Income-tax Officer, the notice was pasted at the premises of the company of the owner and that witnesses had also signed on the notice." On March 25, 1954, the process server swore an affidavit in support of the truth of the endorsement, in the presence of the Income-tax Officer.

2. After some correspondence the respondent on November 12, 1954, submitted a fresh return again disclosing a net loss of Rs. 7,960 in his business transactions. The Income-tax Officer completed the proceeding for reassessment under section 23(3) and section 34 of the Indian Income-tax Act, 1922, and brought to tax an additional amount of Rs. 61,036. In appeal before the Appellate Assistant Commissioner the contention of the respondent that the proceedings for reassessment was "illegal and invalid" because the notice under section 34(1)(a) was not served on him was rejected and the order of the Income-tax Officer was confirmed. But the Income-tax Appellate Tribunal set aside the

order of reassessment holding that there was no proper service of the notice under section 34.

3. At the instance of the Commissioner, the Tribunal referred the following question to the High Court of Kerala :

"Whether, on the facts and in the circumstances of the case, the reassessment for 1945-46 made on March 9, 1955, was valid ?"

4. The High Court, after calling for a supplementary statement on the question whether the respondent had waived the notice, held that a notice under section 34 of the Indian Income-tax Act was a condition precedent to the commencement of the proceeding for reassessment and since the notice was not properly served upon the respondent, the proceeding for reassessment could not be maintained. The High Court accordingly answered the question referred in the negative. With special leave the Commissioner of Income-tax has appealed to this court.

5. By section 34(1)(a) of the Indian Income-tax Act, applicable by virtue of section 31 of Act 25 of 1953 to the notice of reassessment, it was provided, in so far as it is relevant, that if the Income-tax Officer has reason to believe that by reason of omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for the year, or have been under-assessed, the Income-tax Officer may at any time serve on the assessee a notice containing all or any of the requirements which may be included in the notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains. But such a notice shall not be issued if eight years had elapsed after the expiry of the year unless the income, profits or gains chargeable to income-tax which have escaped assessment or have been under-assessed, amount to, or are likely to amount to, one lakh of rupees or more, in the aggregate. The period of eight years prescribed by the proviso to section 34(1)(a) for reassessment of the income of the respondent was expiring on March 31, 1954. Some time before that date the Income-tax Officer received information from which he had reason to believe that the respondent had failed to disclose fully and truly all material facts necessary for his assessment.

6. The notice issued by the Income-tax Officer on March 24, 1954, was served not personally but by affixing it to the business premises of the respondent in the presence of two persons and an endorsement was made in that behalf. Service of notice prescribed by section 34 of the Income-tax Act, for the purpose of commencing proceedings for reassessment, is not a mere procedural requirement : it is a condition precedent to the initiation of proceedings for assessment under section

34. If no notice is issued if the notice issued is shown to be invalid, then the proceedings taken by the Income-tax Officer, without a notice or in pursuance of an invalid notice, would be illegal and void : see *Narayana Chetty v. Income-tax Officer, Nellore*. The notice had, at the material time, by the express command of section 34, as amended by the Income-tax and Business Profits Tax (Amendment) Act, 1948, to be served within the period prescribed by sub-section (1). If no notice was served within the period, the Income-tax Officer was incompetent to commence proceedings for reassessment. The sole question which fell to be determined on the reference was whether there was due service of the notice upon the respondent within the prescribed period of eight years. Service of the notice under section 34(1) (a) within the period of limitation being a condition precedent to the exercise of jurisdiction, if the Income-tax Officer was unable to prove that the notice was duly served upon the respondent within the prescribed period, any return filed by the respondent after the expiry

of the period of eight years will not invest the Income-tax Officer with authority to reassess the income of the respondent pursuant to such return.

7. Section 63 of the Indian Income-tax Act, 1922, prescribes the procedure of service of notice or requisition. The first sub-section of section 63 provided that :

"A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a court, under the Code of Civil Procedure, 1908 (V of 1908)."

8. Sub-section (1) is intended to assimilate the provisions of the Code of Civil Procedure relating to service of summons, to service of notice or requisition under the Act. By Order V, rules 17 and 19 of the Code of Civil Procedure, a summons may be deemed to be duly served if the serving officer in the prescribed conditions affixes a copy of the summons on the outer door or some other conspicuous part of the house in which the person to be served ordinarily resides carried on business or personally works for gain. Order V, rule 17, provides:

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of summons on his behalf, not 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 served of notice or defendant ordinarily resides the original 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 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."

9. Rule 19 provides :

"Where a summons is returned under rule 17, the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, or cause him to be so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings and may such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

10. There is clear evidence on the record that the process-server affixed on March 25, 1954, on a conspicuous part of the business premises of the respondent the notice issued by the Income-tax Officer. But it is urged that by affixing the notice the respondent could not be deemed to be duly served, and to that contention attention must be directed. On March 18, 1954, the process-server had made inquiry about the whereabouts of the respondent, and he was informed that the respondent was not then in Calicut and was likely to return "within a week." The notice was, it appears, handed over to a person who, the process-server believed, was the son of the respondent. But the service of that notice was defective, and the notice was cancelled. The second notice dated March 24, 1954, was affixed on a conspicuous part of the business premises of the respondent and the process-server made the requisite endorsement. Before the Income-tax Officer a sworn statement of the process-server was recorded and the Income-tax Officer declared the service valid.

11. The Tribunal and the High Court regarded the service as improper. In our view the Tribunal and the High Court were in error in so holding. It is true that Order V, rule 17, of the Code of Civil Procedure, prescribes certain conditions on the existence of which alone a summons served by which the defendant ordinarily resides or carries on business or personally works for gain may be deemed to be duly served. There is no dispute in the present case that the notice was affixed on a conspicuous part of the business premises of the respondent. The process-server had, it is clear from his reports, made inquiries on March 18, 1954, and March 25, 1954, about the presence of the respondent in Calicut. The process-server was informed on the first occasion that the respondent was in Bombay and that it was expected that he would return to Calicut within a week. On the second occasion also it was found that the respondent was not in Calicut and the process-server was informed that the respondent was "in Bombay or in Ceylon". The Income-tax Officer was apparently satisfied on a sworn statement made before him about the correctness of the recitals made in the endorsement made by the process-server and he declared the summons duly served.

12. That attempts were made to personally serve the respondent with the notice cannot, on the materials placed before the court, be denied. Whether the steps taken in a particular case amount to using all due and reasonable diligence must depend upon the circumstances of each case. The respondent was on March 25, 1954, not in Calicut. That is not denied. The only information which the process-server received on March 25, 1954, was that the respondent was "in Bombay or in Ceylon". It was thereafter that the process-server affixed the notice on the business premises of the respondent. Thereby, prima facie, the statutory requirements were satisfied.

13. The Tribunal has observed in its order that counsel for the respondent had stated that he gave the Bombay address of the respondent on March 8, 1954. Evidently, this statement was never made before the Income-tax Officer or the Appellate Assistant Commissioner, and no record appears to have been maintained of the statement. Again the statement is obscure : it is not stated whether it was made orally or in writing and even it does not state whether it was made to or given to the Income-tax Officer. Counsel for the respondent suggested that the date, March 8, 1954, was incorrectly recorded, it should be March 18, 1954, and that presumably it was process-server who was informed about the "Bombay address" of the respondent. If the Tribunal desired to rely upon that statement, it should have formally called upon counsel for the respondent to record the statement in writing so as to enable the Income-tax Officer to meet that case. Counsel for the respondent urged that in any event the Income-tax Officer was otherwise aware of the place of residence of the respondent in Bombay, but of that there is no evidence.

14. Counsel for the respondent contended that in failing to follow up the information that the respondent was "in Bombay or in Ceylon" the Income-tax officer was guilty of negligence, and, therefore, service by affixing cannot be regarded as duly made. Counsel relied upon the decision of the Madras High Court in *Myitkyina Trading Depot v. Deputy Tahsildar, Paramkundi*, and the decision of the Calcutta High Court in *Gopi Ram Agarwalla v. First Income-tax Officer*. In *Myitkyina Trading Depot's* case, an unregistered firm which had its business mainly in Rangoon and had a branch office in Madras was assessed for the assessment year 1939-40. Proceedings for reassessment were commenced against the firm after the partners had left for Burma and notice was served after the business was closed by affixing it on the house in which the respective wives of the partners resided, and proceedings for reassessment were completed ex parte. Assessments for the subsequent years 1940-41 and 1941-42 were also completed in their absence. On these facts the Madras High Court held that there was no proper or due service of the notice under section 34 on the assessee and the substituted service by affixing did not constitute due service. The court pointed

out that at the material time the two partners of the respondent firm were resident in a country occupied by Japan which was at war with India and postal communications between India and Burma were severed. In the circumstances, the court held that service by affixing the notice at the known residence of the partners, where their respective wives resided, could not be regarded as due service. In Gopi Ram Agarwalla's case, it was held that the mere fact that the "serving officer did not find the party to be served with the notice at his address" is not sufficient to establish that he 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 was that the party is not found, then and then only can it be said that he cannot be found. The principle laid down in that case is unexceptionable, but in our judgment, no application in this case.

15. In the present case attempts were made to serve the notice upon the respondent at his place of business. He was then in Calicut. No definite information could be secured in spite of inquiries as to the whereabouts of the respondent, and only thereafter, the notice was served by affixing. The Income-tax Officer held the necessary inquiry and declared the notice duly served. In the circumstances, we do not think that there was any irregularity in the service of the notice under Order V, rule 17, of the Code of Civil Procedure, read with section 63 of the Income-tax Act.

16. Counsel for the respondent said that before the Income-tax Officer a request was made that the two persons in whose presence the notice was affixed may be examined, but the Income-tax Officer did not examine them. That, however, cannot, in our judgment, affect the validity of the service.

17. The answer recorded by the High Court to the question submitted by the Tribunal will be discharged and an answer in the affirmative will be recorded.

18. The appeal is allowed. The appellant will be entitled to his costs in this court and in the High Court.

19. Appeal allowed.