

PUNJAB AND HARYANA HIGH COURT

Jhabar Mal Chokhani

Vs

Commissioner of Income Tax

(D Falshaw, C.J. Tek Chand, J.)

20.03.1963

JUDGMENT

Tek Chand, J.

1. This is an income-tax reference in which the following question of law has been referred to us:--

"Was the service of-the notice of demand, validiy made on 29th March, 1957?".

The facts as contained in the statement drawn up by the Tribunal are as under: The case refers to the assessment year 1947-48 (previous year ending on 31st of March, 1947). The assessee is an individual who resides at No. 8, Toddarmal Road, New Delhi. The assessment had been completed and the assessee requested the Income-tax Officer to reopen the case tinder Section 27 of the Income-tax Act, but this request was not granted. The following chronological resume was given by the Tribunal:--

"23-3-1956:

Notice under Section 34 Issued.

28-3-1956:

Notice under Section 34 not served In ordinary course, but by affixture in the presence of Inspector.

31-1-1957:

Notice under Section 22(4) issued for 21-1-57.

15-1-1957:

Notice under Section 22(4) not served In ordinary course, But by; affixture on 15-14957 In the

presence of Inspector;

31-1-1957:

Assessment completed under Section 23(4).

27-3-1957:

Demand notice sent by registered acknowledgment due post received back with the postal remarks 'Left'.

29-3-1957:

Demand notice served by affixture in the presence of Inspector.

27-10-1958:

Application under Section 27 filed by the assessee.

10-12-1958:

Application under Section 27 rejected.

16-1-1959:

Order under Section 27 served, by affixture in the presence of Inspector."

On 20th of August, 1958, the counsel for the assessee addressed a letter to the Income-tax Officer, District A-1, New Delhi (Exhibit 'A') that no notice of demand has been received by the assessee and regular notice of demand should be issued to him now and a copy of the assessment order should also be supplied. The assessee received reply dated 21st of August, 1958, from the Income-tax Officer (Exhibit A(i)) Informing him that the demand notice and a copy of the assessment order were served by affixture on 29th of March, 1957, as the assessee was out of station as per remarks of the postal authorities on the registered letter.

2. The assessee filed an application before the income-tax Officer on 27th of October, 1958, praying that the assessment which had already been completed under Section 23, Sub-section (4) of the Income-tax Act might be reopened. His application was rejected as time barred, it was also stated that proceedings under Section 34 were intimated with the approval of the Commissioner of income-tax and a notice under Section 34 was served by affixture on 28th of March 1956. Later on, notices under Section 22(4) were served by affixture but nobody attended. The application under Section 27 was consequently rejected.

3. An appeal was filed against this order of the Income-tax Officer but the Appellate Assistant

Commissioner declined to interfere in appeal holding that the application under Section 27 was barred (Vide Exhibit 'C').

4. The assessee then appealed to the Tribunal where it was contended that the service of the demand notice on 29th of March, 1957, was defective and further that the notice of demand itself was invalid because it was not accompanied with the necessary forms. The Tribunal, while dismissing the appeal, expressed the view that the assessee was an habitual defaulter and has been keeping himself away to evade service. On facts the Tribunal found that the notice of demand was issued by a registered, post duly stamped and addressed on 19th of March, 1957, but it was returned by the post-office with the remark left. It was after that that the income-tax Officer made an order that the notice of demand be served by affixation which was done on 29th of March, 1957, by affixing the notice on the outer door of the assessee's residence. This service is stated to have been witnessed by Jaidka, Inspector of Income-tax. The tribunal held that the notice of demand was duly and validly served under Order V, Rule 20 of the Code of Civil Procedure on 29th of March, 1957 (Vide Exhibit 'D') One of the arguments urged before the Tribunal was that a copy of the notice was not posted on the notice board and, therefor, the service was not effective.

This contention was rejected as it was considered to be without substance; Reliance was placed upon *Haji Adhremman v. Haji Suleman*, AIR 1955 Sau 28. The Tribunal viewed that the service of the notice under Order V, Rule 20 of the Code of Civil Procedure has been validly made. The tribunal held that as a valid service had been effected on 29th of March, 1957, and the application under Section 27 filed on 27th of October, 1958, was beyond the period allowed and, therefore, the appellate Assistant Commissioner was justified to refuse to reopen the case.

5. The short question before us is whether the provisions of order V Rule 20 of the Code of Civil Procedure have been complied with in this case. We cannot go into the question whether the decision to serve notice under that provision was rightly arrived at or not. Order V Rule 20 runs as under:--

"(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require."

After the Court satisfies itself and that it is a case for substituted service, it shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house. This requirement has not been shown to have been complied with. It is further required that a copy has also to be affixed upon some conspicuous part of the house in which the defendant is known to have last resided, or in such other manner as the Court thinks fit substituted service has the same effect as personal service. The argument of the learned counsel for the Department is that in this case notice was affixed upon conspicuous part of the assessee's house and that alone was sufficient compliance with Rule 20. According to the learned counsel, the words 'or in such other manner as the Court thinks fit', occurring in Rule 20, Sub-rule (1) give sufficient discretion to the Court not to comply with the first condition as to affixing of summons upon some conspicuous place in the court-house. This, to my mind, is not a correct reading of Rule 20. What it means is that the summons must be affixed in the court-house. In addition to that, it should be affixed either at the residence of the person sought to be served or in such other manner as the court thinks fit. The last requirement is substitute of the penultimate requirement but is supplemental to the provision requiring the affixation of the summons at the Court-house.

A decision reported in *Deccan Co-operative Bank Ltd. v. Parsaram Tolaram*, AIR 1942 Sind 96, is in point. That was a case under Order XXI, Rule 46, Sub-rule (2), which is in part materia. There, in the case of an attachment, a copy of the order is required to be affixed upon some conspicuous part of the Court-house and another copy is to be sent to the debtor etc. It was held by Weston J. that in order to make an effective attachment all the directions in Order XXI, Rule 46 appropriate to the particular attachment must be complied with and failure to affix the order to some conspicuous part of the Court-house renders the attachment invalid. Attachment is not good in law if only some of the provisions of Clause (2) of Rule 46 are complied with. This argument equally holds good in the instant case. The language of Order XXI, Rule 54, Sub-rule (2) is somewhat similar requiring affixation both upon a conspicuous part of the property and of the court-house.

A Division Bench of the Patna High Court in *Narendra Prasad Sinha v. Maharani Janki Kuer*, AIR 1947 Pat 385, also expressed the view that the provisions of Order XXI, Rule 46(2) being mandatory, the failure to comply with any one requirement thereof nullifies the whole proceeding. It cannot be seriously contended in this case that the requirements of Order XXI, Rule 54 are directory and not mandatory. There has not been proper compliance with the requirements of Order V, Rule 20 and the substituted service was bad in law. Therefore, the question "Was the service or the notice of demand validly made on 29th March, 1957" must be answered in the negative.

D. Falshaw, C.J.

6. I agree.