

(1965) 12 CAL CK 0007
In the Calcutta High Court
Case No : A.F.O.O. No. 56 of 1965

Commissioner of Income Tax and Others	APPELLANT
Vs	
Sm. Kiran Devi Singhee	RESPONDENT

Date of Decision : 24-12-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17
Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 33B, 34, 63(1)

Citation : AIR 1967 Cal 359 : 70 CWN 414 : (1967) 1 ILR (Cal) 50 : (1967) 65 ITR 501

Hon'ble Judges : H.K. Bose, C.J.;B.C. Mitra, J

Bench : Division Bench

Advocate : A.C. Bhabra and N.K. Khaitan, for the Appellant;E. Meyer and S. Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

B.C. Mitra, J.—The short point involved in this appeal is whether reasonable opportunity or being heard was given to the respondent by the appellant No. 1., who issued a notice in writing in connection with a proceeding u/s 33-B of the Income Tax Act, 1922, (hereinafter referred to as the Act). One of the notices issued by the appellant No. 1, in the circumstances hereinafter stated, was received by the respondent at Bldasar, District Churu, Rajasthan, on May 8, 1963. By this notice the respondent was informed that the date of hearing was fixed for May 9, 1963.

2. The respondent, having her residence at Basirhat in the district of 24-Parganas, used to be assessed to income tax by the Income Tax Officer, B-Ward, Dist. 24 Parganas. The appellant No. 1 served a notice on the respondent informing her that on examination of the assessment records for the years 1953-54 to 1961-62 and other connected records, he considered that the orders of assessment passed by the said Income Tax Officer on June 14, 1961, were

erroneous as they were prejudicial to the interest of revenue. In this notice various grounds for reopening the assessment orders for the above mentioned assessment years were set out. In the returns filed by the respondent for the said years, she mentioned Basirhat address as her residence. The appellant No. 1, however, appears to have known that the respondent did not reside at the address disclosed by her, but actually resided at 20, Mullick Street, Calcutta. To make sure that the respondent received the notice, the appellant No. 1 sent the notices to both the addresses namely, Basirhat as well as No. 20 Mullick Street, Calcutta. The notice was served on the respondent by registered post as well as in accordance with the procedure prescribed by the Code of Civil Procedure.

3. On May 1, 1963, a notice was served on the respondent at 20, Mullick Street, Calcutta, and on May 2, 1963, the notice was served at the Basirhat address by affixing copies thereof. The notice sent to the respondent by registered post at the Basirhat address came back undelivered, but the notice sent to the Mullick Street address by registered post, was redirected and sent to Bidasar, Churu, Rajasthan, and was there served on the respondent on May, 8, 1963. On May 10, 1963 the respondent lent a written reply to the said notice. In this reply she contended that due to the short time allowed by the notice, it was not physically possible to produce the necessary evidence. She also alleged that she had a troublesome and complicated delivery and that the doctors were advising a major operation. She concluded by requesting at least four weeks time for representing her case before the appellant. She also asked for the substance of the enquiries made by the appellant No. 1 to enable her to rebut the materials collected against her.

4. On the date fixed for hearing, namely, May 9, 1963, nobody appeared before the appellant No. 1 on behalf of the respondent and an order was made cancelling the assessment orders and directing the Income Tax Officer to make fresh assessment. Aggrieved by this order the respondent moved a writ petition before this Court and obtained the rule nisi. This rule was made absolute by Banerjee, J., by his judgment and order dated July 8, 1964, and the order made by the appellant No. 1 on May 9, 1963, was quashed. This appeal is directed against the said judgment and order of Banerjee, J., dated July 8, 1964.

5. In the petition, the respondent, besides taking the ground that rules of natural justice had been violated as adequate opportunity of being heard was not given to her, had taken other grounds, namely, that as Section 33-B of the Act was repealed on April 1, 1962. the appellant in making the impugned order had acted without jurisdiction and without the authority of law. The next ground was that the appellant No. 1 had relied on conjectures, surmise and suspicion in making the impugned order. The next ground was that the appellant No. 1 had no evidence upon which he could come to the conclusion that the assessment orders made by the Income Tax Officer on June 14, 1961, were erroneous in so far as they were prejudicial to the interest of revenue. These points, however, were not pressed before us as they are covered by the judgment of this Bench, in. A. F. O.

O. No. 281 of 1963 (Cal), Kalawati Devi Harlalka v. Commr. of Income Tax. The question of violation of the rules of natural justice was also considered by this Bench in the judgment in A. F. O. O. No. 264 of 1963 (Cal), Rampyari Devi Saraogi v. Commr, of Income Tax. But the facts in this appeal being somewhat different I shall proceed to examine the rival contentions of the learned counsel for the parties.

6. Mr. G. Mitter, learned counsel for the appellants, contended that Banerjee, J., was wrong in upholding the respondent's contention that rules of natural justice had been violated, as adequate opportunity was not given to the respondent to make representations contemplated by Section 33-B of the Act. He argued that the notice issued by the appellant No. 1 u/s 33-B(1) of the Act was served on the respondent as required by law. Section 63 of the Income Tax Act, 1922, and Section 282 of the Income Tax Act, 1961, provided that the notice might be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure. It was argued that the address declared by the respondent in the return was the Basirhat address and the appellant No. 1 would have been perfectly justified in effecting service of the notice at that address only. But in order that no grievance might be made by the respondent with regard to the service of the notice, it was also served at another address, namely, 20, Mullick Street, Calcutta, which though not disclosed or declared by the respondent, was known to the appellant No. 1 to be the address of the respondent's residence. It was next argued that the appellant No. 1 had further taken the additional precaution of sending notices at both the said addresses by registered post, though it would have been enough if service was effected as prescribed by the Code of Civil Procedure. Mr. Mitter further argued that the original notice was served by affixing at the last known address of the respondent at 20 Mullick Street, Calcutta, and also at Basirhat, 24-Parganas, on May 2, 1963, and May 3, 1963, respectively. This service by affixing, Mr. Mitter argued, was a perfectly good service, as it was done in accordance with the provisions of the Code of Civil Procedure. But additional precaution was taken, Mr. Mitter argued, that by sending copies of the notices by registered post to 20 Mullick Street, and also to Basirhat. The notice sent by registered post to the Basirhat address came back undelivered, but the one sent to 20, Mullick Street, Calcutta, appears to have been redirected to the Bidasar address and was received by the respondent on May 8, 1963. It was argued that the Bidasar address was not the address disclosed or declared by the respondent in the returns filed by her. Whatever grievance the respondent might make, it was argued, with regard to her receiving the notice only on May 8, 1963, a day previous to the date fixed for the hearing of the matter, no complaint or grievance could be made with regard to the service of the notice by affixing at Basirhat and also at 20, Mullick Street, Calcutta. The notice was served by affixing at 20, Mullick Street, on May 2, 1963, and at the Basirhat address on May 3, 1963. The hearing being fixed for May 9, 1963, the respondent had ample time, Mr. Mitter argued, to make, whatever representations she desired to make,

with regard to the action proposed to be taken u/s 33B of the Act.

7. Mr. Mitter next argued that service of the notice by affixing was not challenged by the respondent in the petition. He argued the only grievance made by the respondent regarding the notice was that time allowed to her for making representations was inadequate. This grievance has been made in ground No. (ii) under paragraph 5 of the petition. It was argued that it was true that in the said ground (ii) the respondent alleged that in passing the impugned order, the appellant No. 1 violated the principles of natural justice and no opportunity or no adequate opportunity was given to the respondent of being heard. This, Mr. Mitter argued, was entirely different from alleging that service of the notice by affixing was invalid for not being according to law. Mr. Mitter further argued that since the respondent's case was that the said notice was not lawfully served upon her it was for her to make out the case that the service of notice by affixing the same was bad. No such case, it was argued, had been made out by the respondent in the petition.

8. Mr. Mitter next contended that the trial court was wrong in holding that the service of notice at Basirhat did not amount to service under Order V, Rule 17 of the Code of Civil Procedure. It was argued that the trial court was also wrong in not taking into consideration the service of the notice at the Mullick Street address. The trial court, it was argued, proceeded on the basis as if the notice was served only at Basirhat, Mr. Mitter further argued that though the trial court noted that on May 1, 1963, the notice was sought to be served at No. 20, Mullick Street, in considering the validity or sufficiency of the service, the trial Court proceeded on the footing that the notice was served by affixing only at the Basirhat address.

9. The next contention of Mr. Mitter was that the Calcutta amendment of Order V, Rule 17 of the CPC did not require the serving officer to use diligence in finding the persons sought to be served. Under the Calcutta amendment all that is required is that service can be made by affixing the notice if the defendant is absent from his residence at the time when service is sought to be effected, and there is no likelihood of his being found there within a reasonable time. It was argued that Banerjee, J. set out Order V, Rule 17 of the CPC with the Calcutta amendment, but in the criticism of the service the learned Judge failed to take note of the Calcutta amendment, but criticised the conduct of the serving officer as he did not say whether the respondent was available at Basirhat address and refused to come out before him. and if the respondent was not at the Basirhat address the serving officer did not make any effort to contact the respondent elsewhere. This criticism of the service, was based on the terms of the Rule 17 as it stands without the Calcutta amendment. All that Order V, Rule 17 of the Code as amended required for a valid service by affixing, Mr. Mitter argued, was that the persons sought to be served should be absent from his residence at the time when service is attempted and there should be no likelihood of his being found there within a reasonable time. There was no question, Mr. Mitter argued, of

using due and reasonable diligence before effecting service by affixing as that was required under the Rule as it stands without the Calcutta amendment. So far as this court is concerned. Mr. Mitter argued, the Calcutta amendment should be applied, and applying the rule as amended, the service of the notice on the respondent by affixing must be held to be a valid and good service.

10. Mr. Mitter next contended that the observations of Dasgupta, C. J. in *Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others*, on which reliance was placed by the trial court, had no application to the facts of this case. He argued that although the Calcutta amendment of Rule 17, Order V of the Code was taken note of, Dasgupta, C. J. did not give effect to or apply the amendment in *Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others*, . It was argued that so far as this court is concerned, the validity of a service of summons under Order V, Rule 17 of the Code must be tested and judged according to terms of the amended Rule and not the Rule as it stands without the amendment. It was also argued that in *Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others*, reliance was placed on a decision of the Bombay High Court reported in ILR 1906 Bom 623 and also a decision of the Madras High Court re ported in ILR 1898 Mad 419. Both these cases were decided upon the terms of Rule 17 Order V of the Code as it stands without the Calcutta amendment. It is not open to this court, Mr. Mitter argued, to condemn the service of a notice on the ground that the terms of R. 17 as it stands without the Calcutta amendment have not been complied with. There is a good deal of force in this contention of the learned counsel for the appellant. The Calcutta amendment has been effected to meet the conditions of service of summons at places within the jurisdiction of this Court. So far as this court is concerned, the terms of the amendment cannot be ignored in testing the validity of service of summons by affixing.

11. There is however a larger question involved namely whether Section 33B of the Act requires a statutory notice to be served as in Section 3 of the Act which in terms provides for the issue and service of a notice. I shall refer to this question later in this judgment, but before passing I should mention that in *Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others*, the Division Bench of this Court was considering the validity of a notice served u/s 34 of the Act. In my opinion, apart from the question that the Calcutta amendment to Rule 17 of Order V of the Code should be given effect to by this court, it is to be noticed mat the observations of Dasgupta C. J. in *Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others*, would be of no assistance in judging the validity of a notice issued u/s 33B of the Act. Mr. Mukherjee next referred to a Bench Decision of this Court in Income Tax Ref. No. 181 of 1981 (Cal). *Anandinath Chakravarty v. Commr. of Income Tax*, (unreported). That was a reference u/s 66(1) of the Act. But the order which the court considered was made u/s 34 of the Act. In that case an attempt was made to serve a notice by registered post which did not reach the assessee and thereafter two attempts were made to serve the notice by a process server of the department, and finally

the notice was served by affixing. This service by affixing was challenged by the assessee and it was held by G.K. Mitter, J. that as it was not suggested that the address of the assessee to which notice was sent was not his address nor that he had any agent who had been instructed to receive the notice, on the assessee's behalf, service of the notice by affixing was a good service and that reasonable diligence had been used to find the assessee and also that the circumstances justified the service of notice by affixing. In this case it is to be noticed the Division Bench was considering the validity of the statutory notice u/s 34 of the Act and even in the case of such notice, it was held that service by affixing, after two unsuccessful attempts should be regarded as valid service after exercise of reasonable diligence. We are in agreement with the views expressed by G.K. Mitter, J. but we must notice, however, that the question of the Calcutta amendment was neither raised nor discussed in that case.

12. Mr. A.C. Bhabra learned counsel for the respondent contended that the service of the notice on the respondent by affixing at Basirhat and also at the Mullick Street address must be held to be bad, as such service was not in compliance with the terms of Order V, Rule 17 of the Code. He argued that the proceeding on the basis of the service of the notice at Bidasar, Rajasthan must be held to be bad as such service gave only one day's time to the respondent to make her representations and therefore it must be held that so far as service at Bidasar was concerned, no opportunity of being heard was given to the respondent.

13. Regarding the service at Basirhat Mr. Bhabra argued, the return of the service, as set out by Banerjee, J. in his judgment, showed that two attempts were made to contact the respondent on May 2, 1963 and May 3, 1963, and these attempts having failed, service was made by affixing on the latter date. There is nothing in the return submitted by the serving officer, it was argued, to show that due and reasonable diligence was used by the serving officer. It was argued that Order V, Rule 17 of the Code must be applied without reference to the Calcutta amendment. Mr. Bhabra strenuously argued that the Calcutta amendment could not be applied to the service of the notice in this case. The Income Tax department has its offices throughout the Union of India, and therefore, it was argued, the mode of service and the standard to be applied in testing the validity of such service, must be uniform throughout the Union of India. Local amendment made to Rule 17 of Order V could not be applied in considering the validity of the service of the notice under the Act. It was further argued that quite obviously the serving officer had not exercised any diligence in serving the notice. Mr. Bhabra next referred to the affidavit-in-reply affirmed by Sumermal Bachwat on August 23, 1963 and contended that the postal peon and the serving officer were informed that the respondent was at Bidasar (Churu), therefore it was argued, it was the duty of the Income Tax department to cause a notice to be served at Bidasar. The department, Mr. Bhabra argued, knew that the respondent was at the time when service of the notice was sought to be effected, at Rajasthan and in spite of such knowledge, service of the notice was

sought to be made by affixing the same, without any attempt being made to serve the respondent at her Bidasar address. On these facts, the service of the notice by affixing, it was argued, could not be treated to be a valid service.

14. In support of the contention that u/s 63 (1) of the Act the notice served on the respondent must be served according to provisions in the Code of Civil Procedure and therefore the service of the notice must be according to the terms of Order V, Rule 17 of the Code, without the local amendment, Mr. Bhabra relied upon the decision in *In re, Barker*, (1881) 17 Ch D 241 and also *In re, Wood's Estate*, (1886) 31 Ch D 807. Relying upon these two decisions Mr. Bhabra argued that the Income Tax Act, 1922 was a Central Act which required the notice to be served according to Code of Civil Procedure, and therefore the terms of Order V, Rule 17 of the Code should be read into Section 63 (1) of the Act without the local amendment. Mr. Bhabra next referred to a decision of the Supreme Court *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, . In that case the question was if the amendment of Arts. 158 and 178 of the Limitation Act (1908) could have the effect of altering the meaning which Art. 181 of the Limitation Act (1908) had acquired by reason of long series of decisions, To my mind this decision is of no assistance to Mr. Bhabra as it throws no light on the question with which we are concerned in this appeal, namely, whether the local amendment to the CPC should be given effect to when some act is required to be performed under the terms of the Code by a different statute, namely income-tax Act, 1922.

15. The next case relied upon by Mr. Bhabra is a decision of this Court in *Tripura Modern Bank Ltd. v. Bansem and Co.*, AIR 1932 Cal 781 in which Sinha, J. considered the effect of the Calcutta Amendment to Rule 17 of Order V of the Code and held that a mere statement that the process server when on three occasions to the residence of the defendant and not having found him there or any authorised agent served the Summons on the third occasion by affixing, was not sufficient to justify service by affixing. This decision again does not assist Mr. Bhabra because it was held that if the defendant was absent from his residence and there was no likelihood of his being found there within a reasonable time and if there was no authorised agent to receive the service, the service could be effected by affixing. In this case the test laid down by Sinha, J. was satisfied as the process server and the peon were informed that the respondent was at Bidasar and there was no authorised agent to receive the service nor were the process server and the postal peon informed about any possibility of the respondent's return to her Calcutta address within a reasonable time. The decision of Sinha, J. therefore is entirely against the contention of Mr. Bhabra.

16. The next case relied on by Mr. Bhabra is a decision of the Kerala High Court reported in *M. O. THOMAS Vs. COMMISSIONER OF Income Tax, KERALA.*, . In that case the validity of the service of a notice under 8. 34 of the Act was considered. The notice was served at two different places, namely, Trichur and Kozhikode by affixing and it was held that both the notices were improperly

served as Rule 17 of Order V of the Code had been violated by the serving officer who did not use due and reasonable diligence for finding out the assessee and for ascertaining whether there was any agent empowered to accept the service or in finding out whether there was any third person on whom the service could be effected. Reliance was also placed on another decision of the Kerala High Court reported in the same report, namely, *Commr. of Income Tax v. T.M.J. Kapasi*, (1988) 47 ITR 184 . That was also a case of service of a notice u/s 34 of the Act. It was held that service of notice upon the son of the assessee was not a valid service when the place of residence of the assessee had been intimated to the Income Tax Officer. In my opinion these two decisions of the Kerala High Court are of no assistance to Mr. Bhabra, firstly because in both these cases the notices were served in connection with proceedings u/s 34 of the Act, and it is now well settled that service of notice is a condition precedent to the validity of the proceedings under that section. Secondly, the Court was considering the question of validity of service of notice under the terms of Rule 17 of Order V without the Calcutta Amendment. Thirdly, the facts in these two cases are entirely different from the facts in the instant case now before us. In *M. O. THOMAS Vs. COMMISSIONER OF Income Tax, KERALA.*, the service by affixing at Trichur was made after only one attempt as the assessee was not available and not even a second attempt was made to find the assessee at Trichur and, the service at Kozhikode by affixing was made on the ground stated in the process Server's report that the assessee was permanently residing at Trichur. In the second case namely *COMMISSIONER OF Income Tax, KERALA Vs. THAYABALLI MULLA JEEVAJI KAPASI.*, , the notice was served firstly on the son of the assessee and thereafter another notice was issued which was served by affixing at me business premises of the assessee as he was away at Bombay or Ceylon. In this case also the Court considered the validity of service of the notice under Rule 17 of Order V without the amendment. Finally, in both the cases it was held that service of the notice u/s 34 of the Act was a condition precedent to the proceeding under that section and the assessment proceeding was held to be bad as the condition precedent was not fulfilled. It is to be noticed that the Court did not consider the effect of the amendment to Rule 17 of Order V of the Act with which we are concerned in this appeal.

17. Mr. Bhabra next contended that service of notice was necessary even though Section 33B did not require such notice to be served as in the case of Section 34. In support of this contention he relied upon the decision of the Supreme Court in *East India Commercial Co. Ltd. v. Collector of Customs*, AIR 1982 SC 1893, in which while considering proceedings u/s 167 of the Sea Customs Act read with Section 3 (2) of the same Act, it was held that whether the statute required or not notice must be served on the party sought to be charged. Discussing the circumstances under which proceedings were sought to be initiated against the party it was held that any such proceedings taken without such notice would be against the principles of natural justice. This decision again is of no assistance to Mr. Bhabra because the notice contemplated by the Supreme Court was a notice

regarding the charges against a party who was sought to be penalised. The question before the Supreme Court was one of violation of rules of natural Justice and not of the mode or sufficiency of the service of the notice. In the instant case now before as Section 33B of the Act in terms requires that an opportunity of being heard should be given to the assessee. The question before us is not whether such an opportunity should be given, because apart from the statutory requirement rules of natural justice must necessarily be observed, but the question before us is if the mode of service of the notice namely by affixing at the declared address of the assessee was a good service.

18. Mr. Bhabra next argued that it was not open to the appellant to contend that the service of the notice by affixing could not be challenged by the respondent as such service had not been challenged in the petition. It was argued that even though there was no allegation in the petition that the service of the notice by affixing was bad, the parties well understood that the validity of the service was challenged by the respondent and that was the only issue before the trial court.

19. Mr. Bhabra argued that as the entire argument of the appellant before the trial court proceeded on the footing that the service of the notice by affixing was good service, it was not open to the learned counsel for the appellant to contend at this stage that the question of validity or sufficiency of the service of the notice could not be gone into before us. In support of this contention Mr. Bhabra relied upon two decisions of the Supreme Court namely *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, and *Kunju Kesavan Vs. M.M. Philip I.C.S. and Others*, . In our opinion this contention of Mr. Bhabra is well rounded. Even though there was no challenge to the validity of the service of the notice in the petition, the argument before the trial court proceeded entirely on the sufficiency or validity of the service of the notice and indeed that was the only matter that was canvassed before the trial court. That being so we cannot accept Mr. Mukherjee's contention that it was not open to the respondent to challenge the validity of the notice because no such challenge was laid in the petition.

20. Mr. Mitter sought to repel Mr. Bhabra's contention that the Calcutta amendment to Rule 17 of Order V of the Code could not be given effect to and should be ignored in considering the validity of the service by relying upon Section 8(1) of the General Clauses Act, 1897 which is as follows:

"8(1) Where this Act or any Central Act or Regulation made after the commencing of this modification any provision of former enactment then reference in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be considered as references to the provisions so reenacted".

21. It was argued that the above provisions make it quite clear that the Calcutta amendment to Rule 17 of Order V of the Code must be regarded as the provision which is being referred to in Section 63(1) of the Income Tax Act 1922. It was further argued that having regard to the terms of Section 8 (1) of the General

Clauses Act 1897, there was no substance in Mr. Bhabra's contention that the reference to the CPC in Section 63 (1) of the Income Tax Act, 1922 should be held to be a reference to the terms of Rule 17 of Order V of the Code as it stands without the Calcutta amendment. In support of this contention Mr. Mitter relied upon a decision of the Supreme Court in *Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others*, in which it was held that when a subsequent Act amends an earlier one in such way as to incorporate itself or apart of itself into the earlier, then the earlier must thereafter be read and considered in such a way that there was no need to refer to the amending Act at all. Mr. Mukherjee also relied upon a Bench decision of this Court in *Bhagat Ram Baika Vs. Prabirendra Mohan Tagore and Others*, . In that case a person held a plot of land which was part of Khatiah No. 168 of Mouza Dhakuria. The owner's contention was that the land, originally let for agricultural purposes, was later used as building site. The owner applied under the West Bengal Non-Agricultural Tenancy Act, 1949, for conversion of the land into a tenancy under the Act. This application was dismissed on the ground that the land was situated within the limits of Calcutta which was excluded from the operation of the said Act. The land in question was not within the Calcutta as defined by the Calcutta Municipal Act, 1923. The land was situated within the limits of Municipality of Tollygunge and by notification dated March 31, 1953 under the Calcutta Municipal Act, 1951, the State Government directed that the area comprised within the Municipality of Tollygunge was to be included within Calcutta. The result of this notification was that the land in question became part of Calcutta as defined in Section 5(11) of the Calcutta Municipal Act 1951. The application under the Bengal Non-agricultural Tenancy Act 1949 was not made till September 18, 1953, but on that date the land had already become a part of Calcutta by reason of the notification mentioned above. Relying upon section 8 of the Central General Clauses Act and Section 10 of the Bengal General Clauses Act Chakravarty, C. J. held that as the Calcutta Municipal Act 1923 had been repealed and re-enacted as the Calcutta Municipal Act, 1951, reference to the definition of "Calcutta" given in Section 1 (2) (a) of the West Bengal Non-Agricultural Tenancy Act in terms of the definition given in the Calcutta Municipal Act, 1923, must be considered as a definition in terms of that given by the Calcutta Municipal Act, 1951. Mr. Mitter also relied upon a decision of the Supreme Court in *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, . In that case the question was whether the repeal of Section 108 of the Government of India Act 1915 and the re-enactment of the same provisions in section 223 of the Government of India Act 1935 and later on in Article 225 of the Constitution of India, the power conferred on the High Court u/s 108 of the Government of India Act 1915, which has been referred to in Clause 15 of the Letters Patent, should be held to have become extinct, as Clause 15 referred to Section 108 of the Government of India Act 1915 and there was no reference to section 223 of Government of India Act 1935, or Article 225 of the Constitution of India. It was held that power conferred on the High Court by Section 108 of the 1915 Act still subsisted and it had not been affected in any manner whatever, either by the Act

of 1935 or by the Constitution. This power was kept alive and the High Court therefore still enjoyed the same unfettered power as it enjoyed u/s 108 of the 1915 Act, of making rules and of providing whether an appeal should be heard by one Judge or more Judges or by Division Court consisting of two or more Judges of the High Court.

22. In our opinion, the contention of Mr. Mitter that the reference to the CPC in Section 63 (1) of the Income Tax Act, 1922, must be held to be a reference to the Code as amended, is well founded. So far as this court is concerned, the validity of a service of a summons or a notice, under Rule 17 of Order V of the Code, must be tested on the terms of the rule as amended and cannot and should not be tested according to terms of the said rule without such amendment. To hold otherwise would be a violation of the statutory provisions introduced by the amendment to Rule 17 of Order V of the Code. We therefore, hold that the validity of the service of the notice u/s 33B of the Act "must be judged according to terms of Rule 17 Order V as amended.

23. It is next to be considered if the service of the notice issued by the appellant No. 1, and served on the respondent by affixing, is a valid service on the basis of the Calcutta amendment to Rule 17 of Order V of the Code. Rule 17 of the Code, as it stands without the amendment, requires that the serving officer, should use due and reasonable diligence, and if thereafter he cannot find the defendant and there is no agent empowered to accept service of the summons, nor any other person on whom it can be served, the serving officer shall affix a copy of the summons. The Calcutta amendment has done away with the use of due and reasonable diligence, and provides that when the defendant is absent from his residence at the time when service is sought to be effected and there is no likelihood of his being found at his address within a reasonable time, and there is no agent empowered to accept service nor any other person on whom service can be effected, the serving officer shall affix a copy of the summons. Therefore the service of the notice on the respondent by affixing can be upheld, if she was absent from her residence and the serving officer was satisfied that there was no likelihood of her being found at the residence within a reasonable time. So far as service at Basirhat is concerned the serving officer attempted to contact the respondent at that address on May 2, 1963 between 1 and 3 P. M. and not having found her there, he had gone to that same address on May 3, 1963 between the hours 10 A. M. and 2 P. M., and having for the second time failed to serve the notice personally, the service at Basirhat was made by affixing on May 3, 1963. So far as the service at No. 20, Mullick Street, Calcutta is concerned, it appears from the affidavit-in-opposition affirmed by Summermal Bachhawat on August 23, 1963, that a postal peon brought a registered cover for the respondent sometime in the first week of May 1963, and a representative of the Income Tax Department also brought a similar cover addressed to the respondent, and both of them were informed that the respondent was not at that time residing at 20, Mullick Street but was at Bidasar, Rajasthan. It is therefore clear that the respondent admittedly was absent from her residence at 20 Mullick

Street at the time when the service was sought to be effected on her, and further that the postal peon and the serving officer were not informed about any possibility of her return at that address within a reasonable time. In our opinion, the requirement of Rule 17 of Order V of the Code was amply satisfied in the facts relating to the service at No. 20 Mullick Street, and that being so the service of the notice on the respondent at that address by affixing must be held to be a valid service.

24. Learned Counsel for the respondent, however, contended that enquiry should have been made about the whereabouts of the respondent, even though she could not be found at her declared address. It was argued that service by affixing could not be justified merely because the respondent could not be found at her residence. In support of this contention Mr. Bhabra relied on a Bench decision of this court in *Kassim Ebrahim Saleji v. Jahurmull Khemka*, ILR 43 Cal 447: (AIR 1916 Cal 181 (2)). In that case the serving officer went to the place of business of the defendant's firm on three occasions under the erroneous belief that that was the defendant's place of residence and not finding him there affixed a copy of the summons on the outer door of the premises. It was held that this service was not sufficient, and proper enquiries and substantial effort should have been made to find out when and where the defendant was likely to be found. Mr. Bhabra also relied upon another decision of this court in *Baldeodas Lohia Vs. Subkarandas Goenka*, . In that case a peon called at the house and office of the defendant on three days and having failed to serve the defendant personally, affixed the summons on the outer door, without making enquiry about the whereabouts of the defendants and without making any further efforts to find them out. Both the decisions, however, considered the validity of the service on the basis of Rule 17 as it stands without the Calcutta amendment which was effected in 1928. The observations in these two decisions, therefore, are of no assistance to Mr. Bhabra, as we have already held that the amendment to Rule 17 must be considered in judging the validity of the service of the notice. Mr. Bhabra also relied upon a decision of the Madras High Court reported in *Myitkyina Trading Depot Vs. Dy. Tahsildar, Paramakudi, Ramnad Dist. and Others*, , in which a notice was issued in proceedings u/s 34 of the Act. This notice was served by affixing as it was returned from the Madras office which was closed and it could not be served at the residence of the partners of the firm as they were at Rangoon. It was held that service was not valid. This decision again is of no assistance to Mr. Bhabra as it was a proceeding under S. 34 of the Act and secondly the court did not consider the validity of the service in the light of the Calcutta amendment to Rule 17 of Order V of the Code.

25. Mr. Bhabra contended, though somewhat feebly, that the service at No. 20 Mullick Street, was bad as that was not the residence of the respondent. He argued that the residence of the respondent was at Basirhat and therefore the service of the notice at 20 Mullick, Street could not in any event be held to be a good service. We are not impressed by this contention of Mr. Bhabra. There was ample material on the records for sending the notice to 20 Mullick Street

Calcutta. In the first place, in the letter from the respondent's advocate dated June 4, 1963 which is annexure E to the petition, the respondent is described as "of 20, Mullick Street, Calcutta, at present residing at Bidasar Churu, Rajasthan". Quite plainly this indicates that 20, Mullick Street is the residence of the respondent who was for the time being residing at Bidasar. Then again in the Cause Title of the petition itself, the respondent has described herself as "wife of Sri Mahalchand Singhee of No. 20 Mullick Street, Calcutta, at present residing at Bidasar in Churu district of Rajasthan." Mr. Bhabra contended that the address mentioned in the Cause Title of the petition is not the address of the respondent but that of her husband. We cannot accept this contention. The petitioner in a petition under Article 226 of the Constitution is required to give her address in the Cause Title and there was no point in furnishing the husband's address and remaining silent about her own. However the words "at present residing at Bidasar. ..." quite plainly indicate that her usual Or permanent residence is 20, Mullick Street, Calcutta. Then again it is to be noticed that in the affidavits-in-reply of Bachhraj Giria and Sumermal Bachhawat, both affirmed on August 23 1963, it is nowhere stated that No. 20, Mullick Street is not the address of the respondent, although in paragraph 6 of the affidavit-in-opposition affirmed by Banipati Sanyal on July 23, 1963, it was clearly stated that No. 20, Mullick Street was one of the two last known addresses of the respondent. For these reasons Mr. Bhabra's contention that the service by affixing the notice at No. 20, Mullick Street was invalid, as that was not the residence of the respondent, cannot be accepted.

26. There can be no doubt that every endeavour was made by the Income Tax Department to serve the notice on the respondent. Copies of notices were sent to her to different address namely Basirhat and No. 20, Mullick Street, Calcutta by registered post. Steps were also taken to serve the notice personally by the department's representative. Two attempts were made to find the defendant and serve the notice on her personally at each of the two different addresses. The respondent was found to be absent from both the addresses and further the postal peon and the department's representative were informed that she was staying at Rajasthan. They were not told of any possibility of her return within a reasonable time. In these circumstances the notice was served by affixing, and such service cannot be challenged, having regard to the Calcutta amendment to Rule 17 of Order V of the Code.

27. There is however, in my opinion a larger question involved in the matter of service of notice u/s 33B of the Act. That section does not require a notice to be issued and served on an assessee, as is required by Section 34 of the Act. All that Section 33B requires is that the assessee should be given an opportunity of being heard. That requirement in our view, is entirely different from the requirement of a notice u/s 34 of the Act which has been held to be a condition precedent to the jurisdiction of the Income Tax Officer to reopen an assessment order already made. The notice contemplated by Section 34 of the Act is the foundation of the jurisdiction of the Income Tax Officer. It is a Statutory notice,

on the service of which alone, the Income Tax Officer can assume jurisdiction to reopen an assessment order already made. Section 63 (1) of the Act requires that a notice under the Act is to be served by post or as if it were a summons issued by a court under the Code of Civil Procedure. Therefore, the notice contemplated by Section 63 (1) of the Act, is a notice under the Act. In other words, this section requires a notice to be served according to the rule laid down in the Code, only when the Act requires such a notice to be issued and served. Section 34 of the Act is one of the sections which requires such a notice to be issued, and, therefore, in the case of a notice u/s 34 the service must be according to the provision in Order V of the Code of Civil Procedure. There is no provision in Section 33B of the Act, however, for the issue of a notice to the assessee. As I have noticed earlier, all that Section 33B requires is that opportunity of being heard should be given to the assessee. Mr. Bhabra conceded, and I think rightly, that notice of a contemplated proceeding u/s 33B might be given to the assessee orally or by any other means. Such an oral notice would be sufficient for the purpose of Section 33-B, provided however the grounds for the revision of the assessment are communicated to the assessee and an opportunity of being heard is given to him.

28. All the decisions on which Mr. Bhabra relied regarding service of notice under the Income Tax Act are decisions regarding proceedings u/s 34 of the Act. And the principles discussed in these decisions cannot be applied to a proceeding u/s 33B of the Act. In my opinion, so long as an assessee is informed of the grounds on which a revision of the assessment is sought to be made and an opportunity of being heard is given to him, the question of service of a notice is entirely immaterial. It is open to the Income Tax Department to inform an assessee even by word of mouth, of the intention to re open and revise an assessment order u/s 33-B of the Act provided the grounds are communicated to the assessee and he is given an opportunity of being heard. To hold that in a proceeding u/s 33B a notice in writing must be served as provided in Section 63 (1) of the Act, would be reading into section 33B something which is not there at all. The stringent requirement of the service of a notice u/s 34 of the Act cannot be applied to a proceeding u/s 33B of the Act.

29. The next contention of the learned counsel for the appellant was that the Income Tax Act 1922 was a comprehensive code which provided an alternative remedy to the respondent. Such remedy was available to the respondent, and would have been more appropriate, because questions of fact regarding the service of the notice were involved, and such question could have been gone into in appropriate proceeding under the Act, which should have been pursued. It was argued that Subsection (3) of Section 33B of the Act provided for an appeal to the Tribunal, if the assessee objected to an order passed by the Commissioner u/s 33B(1). No reasons had been furnished by the respondent as to why this alternative remedy had not been pursued. Mr. Mitter argued that such an alternative remedy being available to the appellant, the discretionary relief in the special jurisdiction of the Court under Article 226 of the Constitution should not

be granted to the respondent. In support of this contention Mr. Mitter relied upon the decision of the Supreme Court in *Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another*, in which the question of alternative remedy provided by the Income Tax Act was discussed as follows:

"it is however necessary once more to observe, as we did in *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, that the Income Tax Act provides a complete machinery for assessment of tax and for relief in respect of improper or erroneous orders made by the revenue authorities. It is for the Revenue authorities to ascertain the facts applicable to particular situation and to grant appropriate relief in the matter of assessment of tax. Resort to High Court in exercise of its extraordinary jurisdiction conferred or recognised by the Constitution in matters relating to assessment, levy and collection of Income Tax may be permitted only when questions of infringement of fundamental rights arise or where on undisputed facts the Taxing Authorities are shown to have assumed jurisdiction which they did not possess. In attempting to by-pass the provisions of the Income Tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction of the revenue authorities, the party approaching Court has often to ask the Court to make assumptions of facts which remain to be investigated by the revenue authorities."

Mr. Mitter also relied Upon the decision of the Supreme Court in *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, in which similar observations were made regarding the exercise by the High Court of the jurisdiction under Article 226 of the Constitution, in cases, where there were adequate remedies open to a petitioner by appeal to a Tribunal. Reliance was next placed upon another decision of the Supreme Court in the *Union of India (UOI) Vs. T.R. Varma*, in which it was held as follows:

"It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ, but as observed by this Court in *Rashid Ahmed Vs. The Municipal Board, Kairana*, . The existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. Vide also *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, . And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 unless there are good grounds therefor."

30. Relying upon these decisions Mr. Mitter argued that the respondent was not entitled to any relief in the writ petition as she had an adequate alternative remedy under the statute. This alternative remedy, it was argued would have been more appropriate, having regard to the nature of the grievance made by the respondent in her petition.

31. Mr. Bhabra on the other hand contended that the mere fact that his client had an alternative remedy did not debar her from seeking the remedy available to her under the writ jurisdiction of this Court, nor did such alternative remedy take away the jurisdiction of this court to issue appropriate writs or orders if, grounds existed for the same.

32. In our opinion Mr. Mitter's contentions on this aspect of the case are well founded. It is now well settled that if a person has an alternative remedy, although such remedy does not take away the jurisdiction of the Court to issue appropriate writs, the Court should decline to interfere with the order of a Tribunal unless the particular facts of the case justify such interference.

It is to be noticed that no explanation or reason has been set forth by the respondent in the petition, nor has any reason been advanced by her counsel to justify the recourse to the special jurisdiction of the Court under Article 226 of the Constitution. The facts of the case are not such as to justify writs or orders being issued under Article 226 of the Constitution to afford relief to the respondent which she could and should have pursued as provided in the statute. In our opinion in the facts of this case no writ or order should be issued for giving relief to the respondent.

33. It remains only to deal with the other contention of the learned counsel for the appellant, namely, that the mode of service provided in Section 63(1) of the Act was not exhaustive and it was permissible to have the notice serve* in a manner other than the two modes prescribe by Section 63(1) of the Act. Mr. Mitter raises this contention to uphold the service of the notice by affixing the same and in support of this contention he relied upon a decision of the Bombay High Court in K.C. Tiwari and Sons Vs. Commissioner of Income Tax, Bombay, . As we have held that the service of the notice by affixing the same in this case is valid, it is not necessary for us to deal with this contention of Mr. Mitter and we accordingly refrain from doing so.

34. Before concluding I should mention that Mr. Bhabra submitted that his client had taken another point namely that Section 33-B of the Act was repealed on and from April 1, 1962 and the proceedings under that section were initiated on May 1, 1963 and that by reason of the said repeal the appellant No. 1 had no jurisdiction to initiate the proceedings u/s 33B of the Act. Mr. Bhabra submitted that it should be recorded that his client was not pressing this point before us, as it was covered by the judgment of this Bench in A. F. O. O. No. 231 of 1963 (Cal), Kalawati Devi Harlalka v. Commr. of Income Tax but that he was not abandoning this contention.

35. For the reasons mentioned above this appeal is allowed. The judgment and order of Banerjee J. dated July 8, 1964 are set aside and the Rule is discharged. The respondent to pay the costs of the appellants both of this and of the trial Court.

36. Certified for two counsel so far as the costs of this Court are concerned.

Bose, C.J.

37. I agree.