

**(1987) 12 OHC CK 0004**

**In the Orissa High Court**

**Case No : Civil Revision No. 543 of 1986**

Income Tax Officer, Ward-E

APPELLANT

Vs

Manmohanlal and Others

RESPONDENT

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**Date of Decision :** 02-12-1987

**Acts Referred:**

Income Tax Act, 1961 — Section 156, 226, 282, 282(1), 282(2)

**Citation :** (1988) 72 CTR 109 : (1988) 173 ITR 10

**Hon'ble Judges :** K.P. Mohapatra, J

**Bench :** Single Bench

**Advocate :** S.C. Roy, for the Appellant; R.C. Mohanty, for the Respondent

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## **Judgement**

K.P. Mohapatra, J.—In this revision, the petitioner has challenged the order passed by the learned Sub-Judge, First Court, Cuttack, rejecting a petition u/s 226(4) of the Income Tax Act ("the Act" for short).

2. The undisputed facts are that opposite parties Nos. 1 and 2 were partners of the firm opposite party No. 3. They were liable to pay Income Tax along with penalty and interest as follows:

Rs.

Opposite Party No. 1:

1,98,388

Opposite Party No. 2:

1,75,463

Opposite Party No. 3:

3,14,393

6,88,244

3. A sum of Rs. 3,08,533.10 was deposited to the credit of the opposite parties in the court of the learned sub-judge in Execution Case No. 181 of 1985 as compensation on account of acquisition of land. The Income Tax Officer filed an application on November 20, 1985, u/s 226(4) of the Act praying that out of the amount deposited to the credit of the opposite parties, a sum of Rs. 2,99,413.50 representing part of the arrears of tax should be paid to him. The opposite parties raised an objection on the ground that demand notices as contemplated in Section 156 of the Act were not at all served on them except for the years 1962-63 and 1963-64 in respect of Income Tax dues of Rs 97,832.25 and Rs. 1,973, respectively, payable by opposite party No. 3. But, when appeals were preferred, the demand for the year 1962-63 was reduced by Rs. 20,000 and the demand for the year 1963-64 was modified, whereafter, no fresh demand notices were served. Therefore, the petition of the Income Tax Officer was liable to be rejected and no amount deposited to their credit should be paid to him.

4. The learned sub-judge rejected the petition u/s 226(4) of the Act on the ground that demand notices were not served on the opposite parties. He further found that the demand for the year 1962-63 was reduced by Rs. 20,000 in appeal, but this fact was not taken into consideration by the Income Tax Officer. No documents were also produced to show that the opposite parties had outstanding Income Tax dues to the tune of Rs. 6,88,244.

5. The main contention of Mr. R. C. Mohanty, learned counsel appearing for the opposite parties, was that there was no service of the notices of demand u/s 156. Therefore, the arrears due cannot be recovered u/s 226(4) of the Act, Mr. S. C. Roy, learned counsel for the petitioner, contended that notices of demand were served on the opposite parties according to law. Even if the notices of demand had not been served, it was not open to the opposite parties to agitate the matter in the civil court. They could, however, appear before the Tax Recovery Officer and prefer their objections so that the latter could go into the details and give relief to them, if admissible.

6. On the main issues, this court, by its judgment dated November 13, 1986-- INCOME TAX OFFICER Vs. MANMOHANLAL AND OTHERS., , held that the civil court had no jurisdiction to investigate as to whether notices for demand u/s 156 of the Act had been served on the assessees or not. If they wanted to raise the objection that notices of demand had not been served on them, they should have agitated this matter before the Tax Recovery Officer. As this course was not adopted, the civil court could not withhold payment of the amount under demand. The opposite parties preferred Civil Appeal No. 2460 of 1987 in the Supreme Court. The learned court, by a judgment dated September 22, 1987, Manmohanlal and Others Vs. Income Tax Officer, Ward-E, City Circle, Cuttack, , held as follows (pp. 617 and 618) :

(i) Notices of demand for recovery of arrears of Income Tax dues of Rs. 97,832.25 for the year 1962-63 and Rs. 1,973 for the year 1963-64 had been served on opposite party No. 3, of which opposite parties Nos. 1 and 2 were

partners. Mr. Divan, learned counsel for the appellants, conceded that out of the amount lying in deposit in the civil court to their credit, the said amount should be paid.

7. Tax can be recovered from an assessee only when it becomes a debt due from him and it becomes a debt due (only) when a notice of demand calling for payment of the tax has been served on the assessee. If an assessee objects to the recovery proceeding taken u/s 226(4) on the ground that there has been no valid service of a notice of demand and that, therefore, no debt is due, the court must decide the objection and if it upholds the objection, it cannot permit recovery of the tax claimed.

8. Having held as above, the case was remanded to this court to decide the civil revision afresh keeping in mind the limits of its revisional jurisdiction u/s 115 of the CPC ("the Code" for short).

9. I would first take up the arrears of Income Tax dues of opposite party No. 3 for the years 1962-63 and 1963-64. The net tax due for the earlier year was Rs. 97,832.25 which was reduced by Rs. 20,000 in Appeal No. 128 of 1967-68 disposed of on April 1, 1969, by the Appellate Assistant Commissioner of Income Tax, Cuttack. The demand for the later year was modified in ITA Nos. 77 and 78 of 1970-71 by order dated May 12, 1972, of the Income Tax Appellate Tribunal, Cuttack Bench, but the net amount of tax relief to which opposite party No. 3 was entitled was not indicated. Mr. Mohanty made a feeble attempt to contend that opposite party No. 3 is not even liable for these amounts. For getting that, a solemn statement had been made before the Supreme Court by Mr. Divan appearing for opposite party No. 3 and others conceding that the amounts were due as debts and should be paid out of the amount deposited in the civil court. The contention of Mr. Mohanty cannot be accepted in view of the concession. Out of the deposit in the civil court, the net sum of Rs. 77,832.25 for the year 1962-63 and the sum of Rs. 1,973 for the year 1963-64 should be paid to the Income Tax Officer as arrears of Income Tax dues.

10. With regard to recovery of arrears of Income Tax dues from opposite parties Nos. 1 and 2 from the year 1963-64 up to the year 1966-67 and from opposite party No. 3 from the year 1964-65 up to the year 1966-67, the finding of the learned sub-judge was that there was no proof of service of notices of demand on them according to Section 156 of the Act. Mr. Mohanty, learned counsel appearing for the opposite parties, urged that the learned sub-judge arrived at the aforesaid finding after scrutiny of documents placed before him by the petitioner and as it was a pure finding of fact based on records, it is not liable to be challenged in civil revision. Mr. Roy, learned counsel appearing for the petitioner, on the other hand, contended that scrutiny of documents by the learned sub-judge was improper. He took into consideration some documents produced in the court without notice to him and without giving him a further opportunity of meeting such documents. Therefore, the finding of fact cannot be said to have been arrived at on a proper construction and consideration of the

documents. In view of the aforesaid contentions and in order to determine the legality and propriety of the finding of the learned sub-judge, I deem it appropriate to make a brief reference to the documents on record so as to satisfy myself as to whether there was proper service of notices of demand on the opposite parties in accordance with law.

11. The following documents were produced by the petitioner :

(1) Xerox copy of a notice of demand u/s 156 of the Act addressed to Manmohanlal (opposite party No. 1) c/o Allied Dealers (opposite party No. 3) dated October 14, 1968, demanding arrears of tax of Rs. 16,827 for the assessment year 1964-65.

(2) Xerox copy of a notice of demand u/s 156 of the Act addressed to Manmohanlal c/o Allied Dealers (opposite party No. 3) dated October 30, 1970, for Rs. 5,656 for the assessment year 1965-66.

(3) Xerox copy of a notice of demand u/s 156 of the Act addressed to Manmohanlal (opposite party No. 1) for the assessment year 1965-66 for Rs. 1,270 issued on August 5, 1971.

(4) Xerox copy of acknowledgement slip addressed to Manmohanlal (opposite party No. 1) relating to the assessment year 1965-66 which was received on his behalf by one Patnaik on November 12, 1970.

(5) Xerox copy of acknowledgement slip addressed to Manmohanlal (opposite party No. 1) for the assessment year 1965-66 received by some person on 24-3-(sic) from whose signature the name cannot be known.

(6) Xerox copy of a notice of demand u/s 156 of the Act addressed to Manmohanlal (opposite party No. 1), partner--Allied Dealers (opposite party No. 3), for the assessment year 1966-67 for Rs. 356 which was received on his behalf by someone from whose signature the name cannot be deciphered.

(7) Xerox copy of acknowledgement slip addressed to Manmohanlal (opposite party No. 1) for the assessment year 1966-67 received by some person for M. M. Lal on November 10, 1970, from whose signature the name cannot be known.

(8) Xerox copy of a notice of demand u/s 156 of the Act addressed to Khasav Ch. Panda (opposite party No. 2) c/o Allied Dealers (opposite party No. 3), issued on October 14, 1968, for the assessment year 1963-64 for Rs. 23,777.

(9) Xerox copy of a notice of demand u/s 156 of the Act addressed to Kheshab Ch. Panda (opposite party No. 2), partner--Allied Dealers (opposite party No. 3), issued on October 30, 1970, for the assessment year 1965-66 for Rs. 3,290.

(10) Xerox copy of acknowledgement slip addressed to Keshab Ch. Panda (opposite party No. 2), partner--Allied Dealers, for the assessment year 1965-66 which was received on his behalf by one Patnaik on November 12, 1970.

(11) Xerox copy of a notice of demand u/s 156 of the Act addressed to Kesaba

Ch. Panda (opposite party No. 2), partner--Allied Dealers, issued on October 30, 1970, for Rs. 356 for the assessment year 1966-67.

(12) Xerox copy of acknowledgement slip addressed to Keshab Ch. Panda (opposite party No. 2), partner--Allied Dealers, for the assessment year 1966-67 which was received on his behalf by one Patnaik on November 11, 1970.

(13) Copy of three typed statements signed by the Income Tax Officer showing details for the assessment years, such as the total tax demand with penalty, the dates of service of demand notices, interest which accrued in the meantime and the grand total of demands in respect of the three opposite parties.

12. The aforesaid chart discloses that there is no acknowledgement slip for receipt of the demand notice for the year 1964-65 as per serial No. 1. Serial Nos. 2 and 3 are two demand notices for the year 1965-66. There are two acknowledgement slips at serial Nos. 4 and 5 for the year 1965-66, but it appears from them that the demand notices were not received by Manmohanlal (opposite party No 1). Serial No. 4 contains the signature of one Patnaik and the person who signed serial No. 5 could not be identified from the signature. There is no material to conclude that the persons who received the demand notices and acknowledged receipt on behalf of Manmohanlal (opposite party No. 1) were adult members of his family, authorised agents or servants having authority to receive the documents. The notice of demand for the assessment year 1966-67 seems to have been received and acknowledged by the slip at serial No. 6, but the person who received the same on behalf of Manmohanlal (opposite party No. 1) could not be identified from the signature. There is no material to show that it was either received by him or the person who received on his behalf was a member of his family or an agent or a servant duly authorised to receive the document (notice). Serial No. 8 seems to be the demand notice addressed to Keshab Chandra Panda (opposite party No. 2) (his name has been wrongly spelt) for the year 1963-64. There is no acknowledgement slip to show that the demand notice was served on him. Serial Nos. 9 and 11 are two other demand notices addressed to him for the years 1965-66 and 1966-67 and the related acknowledgement slips are at serial Nos. 10 and 12 which seem to have been received by one Patnaik. There is no material on record to show that the person who received the notices was either a member of his family or an agent or a servant duly authorised to receive documents on his behalf. As a matter of fact, there is no material on record to show that opposite parties Nos. 1 and 2 received the demand notices in person or the persons who appear to have received the demand notices on their behalf were either members of their respective families or were agents or servants duly authorised to receive documents on their behalf. In this connection, Mr. Mohanty made a reference to a decision in C.N. Nataraj Vs. Fifth Income Tax Officer, City Circle II, Bangalore, , in which the point for consideration was whether service of notice u/s 148 of the Act on a servant was proper service of notice or not. It was held that service of notice on a servant-clerk in that case was neither on the agent nor was he

empowered to accept any notice. So, service of notice was held to be wholly invalid. Mr. Roy cited a decision in Commissioner of Income Tax, West Bengal, Calcutta Vs. Malchand Surana, Calcutta, , in which a Bench of the Calcutta High Court interpreted Section 63 of the old Income Tax Act (XI of 1922) as well as Section 27 of the General Clauses Act and held that a presumption could be raised that service of notice by post on the brother of the assessee, although the letter was addressed to the assessee, could be considered as sufficient service. The decision can, however, be distinguished in that the law has changed and the provisions of Section 63 of the old Act were quite different from the provisions of sections 156 and 282 of the present Act. The presumption arose in that case u/s 27 of the General Clauses Act because of the specific provision in Section 63 of the old Act. No such presumption can be raised u/s 27 of the General Clauses Act so far as Sections 156 and 282 of the present Act are concerned. In this connection, it is necessary to quote Section 282 of the Act which provides for service of notice generally :

"282. (1) 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 (5 of 1908).

(2) Any such notice or requisition may be addressed-

(a) in the case of a firm or a Hindu undivided family, to any member of the firm or to the manager or any adult member of the family;

(b) in the case of a local authority or company, to the principal officer thereof ;

(c) in the case of any other association or body of individuals, to the principal officer or any member thereof ;

(d) in the case of any other person (not being an individual), to the person who manages or controls his affairs."

13. Sub-section (1) thus contemplates two things. Firstly, a notice under the Act may be served on the person named therein either by post, or, secondly, as if it were a summons issued by a court under the Code. Subsection (2) is in the nature of an enabling proviso. So far as the present case is concerned, opposite parties Nos. 1 and 2 were named in the notices sent by post to their address. It was, therefore, necessary that the notices sent by registered post with A.D. should have been served personally on them. So far as opposite party No. 3 was concerned, Clause (a) or (b) of Sub-section (2) was applicable and the notices sent by registered post with A.D. should have been delivered either to the manager or the principal officer of the firm. The postal acknowledgement slips produced in the case, as already referred to in para. 8 above, do not disclose that the notices were delivered to the addresses or the manager or the principal officer. Sub-section (1) also mandates that the notices should be served as if it were summons issued by a court under the Code. On a reference to Order 5 of the Code, it appears that rules 9 to 19 deal with service of summons through a

process server. Rule 19A deals with simultaneous issue of summons for service by post in addition to personal service. Sub-rule (1) thereof makes provision for service of summons by registered post with A.D. simultaneously with the issue of summons for service in the manner provided in Rules 9 to 19 by a bailiff. According to Sub-rule (2), service of summons by registered post with A.D. shall be deemed to be sufficient if it is delivered either to the defendant or his agent authorised to receive the notice. In case it is refused either by the addressee or by his authorised agent, it will be presumed that the notice has been duly served. According to the proviso below Sub-rule (2), if the notice is properly addressed, prepaid and duly sent by registered post with A.D., a declaration by the postal employee that the notice was refused shall be presumed even though the acknowledgement slip has been lost or mislaid or for any other reason has not been received by the court within 30 days from the date of the issue of the notice. In the present case, none of these conditions has been satisfied. As already stated, the postal acknowledgement slips do not show that the notices were received personally by the opposite parties or their authorised agents. If the notices were delivered to someone else unconnected with the opposite parties and their business, it cannot be said that the notices of demand were duly delivered and served on them. In that case, no presumption can be drawn. No attempt was also made by the petitioner to prove by adducing evidence, either oral or documentary, that the persons who received the notices were the authorised agents of the opposite parties. This being the position, the finding of the learned subordinate judge to the effect that there was no service of notices of demand on the opposite parties cannot be displaced by invoking the revisional jurisdiction of the court u/s 115 of the Code.

14. For the reasons stated above, the civil revision shall succeed in part. The petitioner shall be entitled to recover the sums of Rs. 77,832.25 for the assessment year 1962-63 and Rs. 1,973 for the assessment year 1963-64 as modified in appeal as arrears of Income Tax dues which should be paid out of the deposit of decretal dues in the court of the learned subordinate judge. In the absence of proper service of notices of demand, the balance amount of arrears of Income Tax dues cannot be recovered from out of the said deposit. Parties shall bear their own costs.