

(1978) 07 MAD CK 0015

In the Madras High Court

Case No : Tax Case No. 347 of 1974 (Reference No. 160 of 1974)

Jayanthi Talkies Distributors

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-07-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 6, Order 5 Rule 12, Order 5 Rule 15
Income Tax Act, 1961 — Section 144, 146, 147, 148, 282

Citation : (1979) ILR (Mad) 24 : (1979) 120 ITR 576

Hon'ble Judges : Ramaprasada Rao, C.J.;Ramanujam, J

Bench : Division Bench

Advocate : R. Venkataraman, for the Appellant; A.N. Rangaswami and Nalini Chidambaram, for the Respondent

Judgement

Ramanujam, J.—The following question has been referred to us u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), for our opinion at the instance of the assessee :

" Whether the notice dated March 25, 1967, issued u/s 148 was validly served on the assessee ? "

2. The assessee-firm consisting of five partners, (1) Shri P. Kandaswamy Pillai, (2) Shri C. Palani Velayutham Pillai, (3) Shri P. Alagam Perumal, (4) Shri S. Marimuthu and (5) Shri S. Somasundaram Pillai, was constituted with effect from May 25, 1957, for carrying on the business of film distribution. Clause (iv) of the partnership deed provided that Shri Kandaswami Pillai should manage the affairs of the partnership as its managing partner.

3. The firm was assessed for the first time for the assessment year 1959-60 on a total income of Rs. 73,935. As against the said assessment, the assessee preferred an appeal. In that appeal, the AAC directed the deletion of Rs. 72,500 on the ground that the said amount has to be considered as income from undisclosed sources for the assessment year 1958-59 and not for the

assessment year 1959-60.

4. As a result of the said appellate order, the ITO initiated action u/s 147(b) of the Act for the assessment year 1958-59 after obtaining the sanction of the CIT, by issuing a notice dated March 25, 1967, u/s 148 of the Act to the assessee intimating that he had reason to believe that income chargeable to tax for the said assessment year had escaped assessment and requiring the assessee to file a return of income within 30 days from the date of the receipt thereof. The said notice was served by the notice-server of the department on March 27, 1967, on one Balakrishna Pillai who acknowledged the same describing himself as the manager of the firm. On April 26, 1967, the said Balakrishna Pillai wrote to the ITO stating that the managing partner who had gone to Madras had not returned and that it would take some more weeks for him to return, and praying for time for filing the return of income till May 31, 1967. But as the return of income was not filed by the assessee by May 31, 1967, the ITO issued a notice to the assessee u/s 142(1) of the Act requiring him to produce the accounts relating to the assessment year on or before December 15, 1967. Since there was no response to this notice either, the ITO by his order dated October 14, 1968, completed the assessment u/s 144 determining the total income at Rs. 69,000 for the assessment year 1958-59.

5. Aggrieved by the said assessment, the assessee filed an appeal to the AAC contending that the assessment was illegal as the notice u/s 148 was served on a person not authorised to receive the same. The assessee also filed an application to the ITO u/s 146 praying for setting aside the assessment made u/s 144 on the ground that the notice had not been served on any person duly authorised to receive it on its behalf, that as at the material time the business carried on by the firm was being wound up, the services of Balakrishna Pillai, the manager, had been terminated, and that at the time of the service of notice u/s 148 on Balakrishna Pillai, the managing partner was bedridden and, therefore, he was unable to file the return in time. The ITO, however, rejected the application filed u/s 146 holding that the assessee has not shown any sufficient cause for not filing the return in time. The assessee filed an appeal against that order to the AAC.

6. The AAC heard both the above appeals and ultimately allowed the assessee's appeal filed against the order of the ITO passed u/s 146, on the ground that the illness of the managing partner was sufficient cause for the assessee not complying with the notice. By reason of this order the appeal preferred by the assessee against the assessment u/s 144 was held infructuous.

7. The assessee then preferred an appeal to the Tribunal against the order of the AAC holding the appeal against the assessment u/s 144 as infructuous, on the ground that the assessment order u/s 144 was invalid as the notice u/s 148 was not validly served on the assessee and, therefore, it should have been set aside. In that appeal, it was contended that there had been no proper service of notice u/s 148, that the service of such a notice being a prerequisite for initiating

proceedings u/s 147, the reassessment cannot be held to be valid. The Tribunal, however, held that the notice u/s 148 having been served on Balakrishna Pillai and acknowledged by him as the manager of the firm, the reassessment was valid and proper. Aggrieved against the decision of the Tribunal, the assessee has approached this court by way of this reference.

8. There cannot be any dispute that the ITO will have no jurisdiction to make an assessment u/s 147 unless the notice u/s 148 is validly issued to and served on the assessee. This is clear from the following decisions. In *Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others*, it has been held by the Supreme Court that the notice prescribed by Section 34 of the Indian I.T. Act, 1922, for the purpose of initiating reassessment proceedings is not a mere procedural requirement, that the service of the notice on the assessee is a condition precedent to the validity of any reassessment made under that section, and that if no notice is issued or if the notice issued is shown to be invalid, then the proceedings taken by the ITO without a notice or in pursuance of an invalid notice would be illegal and void. In *Thangam Textiles Vs. First Income Tax Officer*, this court was of the view that there is no difference between the old Act and the new Act in regard to reassessment proceedings and that the service of a valid notice u/s 148 on the assessee is the foundation for the initiation of reassessment proceedings and a condition precedent for the validity of any reassessment. Therefore, if there is no notice u/s 148 or if the notice issued is an invalid notice then any reassessment made would be clearly illegal and void.

9. In this case, a notice has been issued by the ITO u/s 148 and the notice had not been shown to be invalid or improper. The said notice has been served on the manager of the firm who, on receipt of the said notice, asked for time for filing the return on behalf of the firm. The question is whether there has been a due and proper service of the notice on the assessee.

10. Section 148 clearly contemplates service of notice on "the assessee". The assessee in this case is a firm consisting of 5 partners. Section 282 of the Act which corresponds to Section 63 of the 1922 Act says that a notice or a requisition under the Act may be served on the assessee either by post or as if it were summons issued by a court under the Civil Procedure Code. Sub-section (2) of that section says that in the case of a firm the notice may be addressed to any member of the firm. Admittedly, none of the partners of the firm had been personally served with the notice, and the service of the notice was only on the manager of the firm. As the service of notice in this case was by the notice-server of the department and not by post, the procedure contemplated by the CPC for service of summons should have been followed, as per Section 282(1).

11. In the Code of Civil Procedure, procedure for service of summons is provided in Order 5. Rule 9(1) of Order 5 is as follows :

" Where the defendant resides within the jurisdiction of the court in which the suit is instituted, or has an agent resident within that jurisdiction who is

empowered to accept the service of the summons, the summons shall, unless the court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates. "

Rule 12 of Order 5 reads :

" Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

Rule 15 of Order 5 says :

" Where in any suit the defendant is absent and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him."

12. Rule 6 of Order 3 is also relevant to find out as to who may be appointed as agents to accept service of processes and how. That provision is as follows :

"(1) Besides the recognised agents described in Rule 2 any person residing within the jurisdiction of the court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment is general, a certified copy thereof shall be filed in court."

13. These provisions make it clear that the service of notice on a person can be effected by serving the notice on his agent who has been specifically empowered or authorised to receive the notice in writing by that person. It is not in dispute in this case that there is no personal service on the partners of the firm. It is also not disputed that the manager on whom the notice has been served had no specific or written authority to receive the notice. The contention of the revenue is that the manager of the firm can be presumed to have the implied authority to receive the notice on behalf of the firm or on behalf of the partners and that such an authorisation should be implied having regard to the nature of the duties he had to perform. However, no material has been placed before us to show that the powers of the manager included acceptance of the notice or summons addressed to the firm or the partners of the firm as their agent. The provisions of the CPC referred to above indicate that there should be a specific written authority given to the agent to receive the notice on behalf of the principal. That such a specific authority was given to Balakrishna Pillai, the manager of the firm, has not been established by the revenue. The revenue merely wants us to infer an implied power to receive the notice addressed to the firm or its partners from the factum that Balakrishna Pillai was functioning as a manager of the firm. The revenue also wants to rely on the fact that subsequent to the service of notice, the manager applied for time for filing of the return and also appeared on behalf of the firm in connection with the assessments for the subsequent years. Though the assessee initially came forward with a case in his application u/s 146 that the

services of Balakrishna Pillai had been terminated long before the service of the notice, that case has not been established. On the contrary, it has been shown that Balakrishna Pillai has been acting as manager even subsequent to the reassessment. Therefore, that Balakrishna Pillai was the manager cannot at all be disputed by the assessee. According to the revenue, the service of notice on the manager should be taken to be a proper or effective service as the notice had in some way or other reached the assessee. We are not inclined to agree. When the statute provides that a notice should be served in a particular mode, it is not possible to hold that there has been a proper service of notice merely from the fact that the person to whom the notice had been addressed had received the notice through some other source or that he has become aware of the contents of the notice. It has been held in *Nagary Rasappa Setti v. Namburi Venkataratnam* [1913] MWN 1028 that where the summons has not been personally served on the party but was served on his gumastha, it must be shown that the requirements of Order 5, Rule 12 or Rule 13 have been complied with and that it cannot be assumed, without further enquiry, that service on the gumastha was sufficient. In *Rajah Papamma Rao Garu, being dead M.R. Ry. Gopisetti Narayanasami Naidu Garu, Reciever and Others Vs. Revenue Divisional Officer, , a Division Bench of this court while dealing with the manner of service contemplated by Section 45(2) of the Land Acquisition Act, which also attracts the provisions of the Code of Civil Procedure, in the matter of service of notices, expressed the view that unless a person is appointed as agent to accept service of processes by an instrument in writing signed by the principal, the service on him cannot be said to be valid. The view taken in that case was that an oral authority is not sufficient but there should be a written authority. Similar view has been taken in (1934) 2 ITR 438 , *CIT v. Dey Brothers* [1935] 3 ITR 213 and *C.N. Nataraj Vs. Fifth Income Tax Officer, City Circle II, Bangalore, .* In (1934) 2 ITR 438 it has been held that the mere fact that a person had accepted notices on behalf of the assessee on previous occasions and appeared for the assessee would not constitute him an agent on whom a notice or requisition under the Act could be validly served nor would any statement made by him bind the assessee. In *C.N. Nataraj Vs. Fifth Income Tax Officer, City Circle II, Bangalore, ,* the Mysore High Court took the view that the service of notice u/s 148 on a clerk of the assessee's father who was neither an agent of the assessee nor authorised by him to accept notices on his behalf was not valid and, therefore, the assessee could not be assessed u/s 147 in pursuance of such service of notice.*

14. The learned counsel for the revenue, however, relies on the decision of the Bombay High Court in *Ramnivas Hanumanbux Somani Vs. S. Venkataraman, Income Tax Officer, C-III Ward, Bombay and Another*, as holding that service of notice on the assessee's business premises on an agent exercising authority in respect of Income Tax matters, though not authorised in writing in that behalf, was a valid service u/s 63 of the Indian I.T. Act, 1922. The facts in that case indicate that there has been a service of notice by affixture in the business premises of the assessee as contemplated under Order 5, Rule 17 of the CPC as

the serving officer found after using all due and reasonable diligence that the assessee was absent and there was no agent to accept the service on his behalf. There the service of notice on the agent was merely incidental and the service by affixture alone has been held to be sufficient compliance with the provisions of the CPC which stood attracted by Section 63 of the old Act. That decision cannot, therefore, help the revenue.

15. We are of the view that in this case there has not been a due service of notice as contemplated by the provisions of the CPC dealing with service of notice or summons. Therefore, the service of the notice on the manager who had no written authority to receive the same cannot be held to be a proper service on the assessee. There being no proper service of notice u/s 148, the reassessment made u/s 147 cannot be held to be valid. The question is, therefore, answered in the negative and in favour of the assessee. The assessee will have his costs. Counsel's fee Rs. 250.