
(1979) 11 P&H CK 0031
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 1775 of 1976

Kunj Behari

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 23-11-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 12, Order 5 Rule 20, Order 5 Rule 9
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 139(2), 282(1)

Citation : (1983) 139 ITR 73

Hon'ble Judges : S.S. Dewan, J; Bhupinder Singh Dhillon, J

Bench : Division Bench

Advocate : Bhagirath Dass and B.K. Gupta, for the Appellant; D.N. Awasthy and B.K. Jhingan, for the Respondent

Judgement

Bhoptnder Singh Dhillon, J.—In this petition, under Article 226 of the Constitution of India, notice dated February 18, 1974, copy of which is appended as annex. P-3 with the writ petition, is sought to be impugned. The brief facts giving rise to the issuance of the impugned notice are that petitioner, Kunj Behari, was one of the partners of the firm in the name and style of Messrs. Vijay Kumar and Company, 21-Sunder Market, Amritsar. For the assessment year 1963-64, the assessee-firm filed a return showing an income of Rs. 14,840. The assessee claimed that he did file a return for the relevant year, but according to the I.T. authorities, the said return was filed before some ITO who had no jurisdiction to proceed with the assessment, and, consequently, a notice was issued by the ITO u/s 139(2) of the I.T. Act, 1961 (hereinafter referred to as "the Act") for filing the return. According to the assessee, this notice was not served, but according to the Department the notice was duly served. Consequently, the ITO, on November 28, 1968, passed an order computing the income of the firm at Rs. 20,000 and proceeded to make an ex parte "assessment. It has been averred in the petition that from the inspection of the records by the petitioner, it transpired that the demand notice and the assessment order were served by

affixture at the address of the firm, i.e., 21-Sunder Market, Amritsar. On February 18, 1974, respondent No. 3 issued a notice for recovery of the amount of tax due which was served on K.P. Rajan and Co., which is carrying on its business in the premises formerly occupied by M/s. Vijay Kumar and Company. This notice was handed over to the petitioner on February 23, 1974, The petitioner claimed that the firm had stood dissolved on May 26, 1965. The petitioner represented to the authorities that he had not been served in accordance with law, but the authorities persisted in making the recovery of the tax in pursuance of the demand.

2. It cannot be disputed that if the assessment order and the demand notice were not served on the assessee, he could not have the knowledge of the passing of the order and thus he could not avail of the opportunity of filing an appeal against the assessment order. The crucial question to be determined in this case is whether the assessee's contention that he was never served with the assessment order and the demand notice is substantiated or not. The assessee has made a categorical averment in paras. 13(d) and 14 of the petition that the assessee was not served in accordance with law. It may be pointed out that the mode of service of a notice or requisition under the Act has been provided u/s 282(1) of the Act. A notice or requisition 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. In the present case, admittedly, there is no averment that the notice was served on the assessee through post. We have, therefore, to revert to the provisions of the Code of Civil Procedure. A reading of the provisions of Order 5, Rules 9, 12 and 20 of the CPC makes it amply clear that ordinarily the service has to be effected on the person concerned personally, but where the authority concerned is satisfied that there is reason to believe that the person concerned 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 authority can order that the summons be served by affixing a copy thereof in some conspicuous part of the house (if any) in which the person, who is to be served, is known to have last resided or carried on business. In the present case, admittedly, according to the respondents, substituted service was effected. With a view to resort to the method of substituted service, it is the duty of the department to discharge the onus by showing that the authority concerned had reason to believe that the assessee was keeping out of the way for the purpose of avoiding service or that there were other good reasons to come to the conclusion that the summons could not be served in the ordinary way. In spite of a specific averment having been made in the petition, nothing has been disclosed in the return to show that the abovementioned condition precedent was satisfied before substituted service was resorted to. The only averment made in the return is that the assessee was duly served by affixation. Nothing has been averred in the return, nor any record has been shown to us at the time of hearing to satisfy us that the authority, who ordered for the substituted service was satisfied that there was reason to believe that the assessee was keeping out of the way for the

purpose of avoiding service or there was any good reason to come to the conclusion that the assessee could not be served in the ordinary way. The importance of service of the assessment order and the demand notice on the assessee cannot be minimised as it is from the date of service that the limitation for filing an appeal and the right of the assessee to file an appeal accrues. The right of appeal is a valuable right and thus in that background the question whether a particular assessee has been served in accordance with law assumes considerable importance. In such matters, the courts usually insist that the procedure, as postulated by law, should be meticulously followed so that no injustice is done to a person whose right of appeal will come into play only if he has been served in accordance with law. In the present case, an ex parte assessment order was passed and obviously the assessee had no knowledge of the passing of the order. We, therefore, quash the demand notice, copy of which is appended as annex. P-3 to the petition, and allow the assessee to file an appeal against the assessment order within six weeks from today. However, it will be for the AAC to determine the merits of the appeal to be filed by the assessee, but the same will not be dismissed on the ground of limitation.

3. The petition is, accordingly, allowed with costs.

S.S. Dewan, J.

4. I agree.