
(1971) 08 CAL CK 0016
In the Calcutta High Court
Case No : Matter No. 176 of 1968

Rameswar Sirkar

APPELLANT

Vs

Income Tax Officer, "A" Ward and Others

RESPONDENT

Date of Decision : 06-08-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 25A
Income Tax Act, 1961 — Section 148, 170, 171, 177, 187

Citation : (1973) 88 ITR 374

Hon'ble Judges : Sabyasachi Mukherji, J

Bench : Single Bench

Advocate : Pronab Pal and M. Seal, for the Appellant; Ajit Sen Gupta, for the Respondent

Judgement

Sabyasachi Mukherji, J.—The petitioner carries on business under the name and style of Messrs. P. B. Sirkar & Sons, at 89, Chowringhee Road, Calcutta. The petitioner stated that the business styled as Messrs. P. B. Sirkar & Sons, at 89, Chowringhee Road, Calcutta, was started as a proprietary concern by one Gour Mohan Sirkar, who, it is further stated, met with a tragic death as a result of gun shot wounds in the year 1957. After the death of Gour Mohan Sirkar serious differences and disputes arose according to the petitioner amongst the members of the family consisting of the heirs of the said Gour Mohan Sirkar, namely, Sm. Chhabi Rani Sirkar and others, Jagatjyoti Sirkar, Ratanlal Sirkar, Kanchanlal Sirkar, Rameswar Sirkar and the youngest brother and also their mother, Smt. Sarashi Bala Sirkar. Rameswar Sirkar is the petitioner in this case. Smt. Sarashi Bala Sirkar, it is stated, filed a partition suit as a result of the said dispute in this court in February, 1957, being Partition Suit No. 532 of 1957. In course of the said suit an arbitrator was appointed by an order of this court and in order to avoid the disputes the business at 89, Chowringhee Road, Calcutta, was treated according to the petitioner as part of the joint family property. Thereafter, all the parties to the said suit effected a settlement to which all of them agreed. Such a

mutual and amicable settlement of the properties including the business was decreed by this court in the said partition suit and the business styled as Messrs. P. B. Sirkar & Sons, at 89, Chowringhee Road, Calcutta, was allotted to the petitioner and the petitioner was given possession in June, 1958, by the receiver appointed by the High Court and since then he had become the sole proprietor of the concern. According to the petitioner the said joint family affairs used to be controlled from 131/B, Bowbazar Street, Calcutta, which was also the family residence where Smt. Sarashi Bala Sirkar, his mother, used to reside. It has been stated that Smt. Sarashi Bala Sirkar died in or about February, 1966. It was further stated in the petition that it was the case of the Income Tax department that a notice u/s 148 of the Income Tax Act, 1961, was served in respect of the said joint family on the 31st March, 1964, by affixation. In the affidavit on behalf of the Revenue it was stated that it was served on the petitioner by affixation. That unfortunately is an incorrect statement about which I would refer later in detail. It appears to have been served by affixation at the address of Bepin Behary Ganguly Street. The petitioner, it is stated, received another notice dated the 13th February, 1968, u/s 142(1) of the Income Tax Act, 1961, asking the petitioner to appear. In this application under Article 226 of the Constitution the initiation" of the proceedings by the service of the notice u/s 148 of the Income Tax Act, 1961, on the said joint family has been challenged. The assessment year is 1955-56. The partition suit was filed in February, 1957, and in June, 1958, the receiver in the said partition suit handed over the said properties to the petitioner. Smt. Sarashi Bala Sirkar died in 1966. The notice u/s 148 of the Income Tax Act, 1961, was served by affixation on the 31st March, 1964. It has to be stated that the said Hindu undivided family was never assessed to tax before. It has further to be borne in mind that this Hindu undivided family is governed by the Dayabhaga system of Hindu law.

2. In this application under Article 226 of the Constitution it was challenged that there was no reason for re-opening the said assessment. I am unable to accept this contention. It is not disputed by the petitioner in the petition that the Hindu undivided family of which family the petitioner was a member at the relevant time did have taxable income. It has also not been stated that any return of the said Hindu undivided family was filed for the relevant assessment year. Therefore, it cannot be disputed that for the failure of the assessee, that is to say, the Hindu undivided family, to file the return and to disclose fully and truly all materials and relevant facts, there has been escapement of income and there were materials for the Income Tax Officer to issue the notice u/s 148 of the Income Tax Act, 1961. This point though taken in the petition was not seriously urged in this application. Counsel for the petitioner then urged that the Hindu undivided family after its dissolution could not be taxed. It was further urged that after a suit for partition had been filed, the Hindu undivided family had been dissolved. Counsel for the Revenue, on the other hand, contended that in the case of families governed by the Dayabhaga system of Hindu law the dissolution of the Hindu undivided family did not take place merely on the institution of a

suit for partition or declaration of shares of the parties. In order to effectuate a severance of a Hindu undivided family under the Dayabhaga School of law, something more was required, it was urged. In the context of the facts of this case this broad contention is not necessary to be decided. In the instant case the assessment was sought to be re-opened in respect of a Hindu undivided family which had been admittedly a joint family. Counsel for the petitioner drew my attention to the Division Bench judgment in the case of Shri Srilal Bagri Vs. Commissioner of Wealth Tax, to which I was a party. That was a case u/s 20 of the Wealth-tax Act. That was also a case where assessment was sought to be made in respect of the assessment year in which a Hindu undivided family had disrupted. In the instant case, the assessment sought to be re-opened was in respect of a year when undoubtedly there was a joint undivided family. Disruption is claimed to have taken place after the institution of the partition suit in 1957, that is to say, subsequent to the relevant accounting year for which the proceedings for re-opening have been taken. In the premises it is not necessary for me to consider the aforesaid decision in detail. It is not a case of attempting to assess a Hindu undivided family after disruption in respect of a year in which it had disrupted. The instant case is a case where it is sought to assess admittedly a family in respect of a year when it was joint but at the time when the proceedings for assessment have been taken up, it had disrupted. In this instant case there was a suit for partition of properties in respect of which a receiver was appointed and, furthermore, partition had taken place and the receiver had handed over to the petitioner the business which was separated from the joint family. Therefore, the question whether in the case of Hindu undivided family, governed by the Dayabhaga School of Hindu law, something more than a mere declaration of shares was necessary to cause the disruption of the Hindu undivided family, is not necessary to be decided in this case. Counsel for the Revenue drew my attention to the decision in the case of Bijoy Kumar Burman Vs. Income Tax Officer, "E" Ward and Others, . That again was a case where facts were different. That was also an attempt to tax the income of a year in which disruption had taken place. That was also a case of a family governed by Mitakshara School of Hindu law. But the fundamental question that requires consideration in this application is whether a Hindu undivided family which had never been assessed before under the Indian Income Tax Act, 1922, or the Income Tax Act, 1961, can be assessed as such after the partition of the said Hindu undivided family. Incidentally it calls for decision as to whether the individual members of the Hindu undivided family can be made liable for the alleged income, if any, of the Hindu undivided family during the period when the Hindu undivided family was in existence if that Hindu undivided family had never been taxed before. This is the main contention that was urged in respect of this application. Counsel for the petitioner states that there is no machinery or method by which such assessment can be made.

3. Section 297, Clause (d)(ii) of the Income Tax Act, 1961, provides that in respect of any income chargeable to tax which had escaped assessment within

the meaning of that expression in Section 147 and no proceedings u/s 34 of the repealed Act in respect of any such income are pending at the commencement of the said Act, a notice u/s 148 may, subject to the provisions contained in Section 149 or Section 150, be issued with respect to that assessment year and all the provisions of said Act shall apply accordingly. Therefore, in respect of the relevant assessment year the Act of 1961 has to be applied. In this connection reference may be made to Section 171 of the Income Tax Act, 1961. The relevant portion of Section 171 provides as follows:

"171. Assessment after partition of a Hindu undivided family.--(1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) Where, at the time of making an assessment under Section 43 or Section 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the Income Tax Officer shall make an inquiry therein to after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the Income Tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

(4) Where a finding of total or partial partition has been recorded by the Income Tax Officer under this section, and the partition took place during the previous year,--

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in Clause (2) of Section 10, be jointly and severally liable for the tax on the income so assessed.

(5) Where a finding of total or partial partition has been recorded by the Income Tax Officer under this section, and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and the provisions of Clause (b) of Sub-section (4) shall, so far as may be, apply to the case.

(6). Notwithstanding anything contained in this section if the Income Tax Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the Income Tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and

severally liable for the tax on the income so assessed.

(7) For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

(8) The provisions of this section shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of the partition, whether total or partial, of a Hindu undivided family as they apply in relation to the levy and collection of tax in respect of any such period."

4. This section is a machinery section and not a charging section and it has been so held in numerous decisions. It is not necessary for me to refer to the same. This section corresponds to Section 25A of the Indian Income Tax Act, 1922, with certain amount of variation. It is also not material for me to note the variation, except the variations in Sub-section (6) of Section 171, which is a new introduction. As mentioned hereinbefore, u/s 171(2), in case of an assessment made u/s 148 of the Income Tax Act, 1961, the provisions of Section 139 are attracted and it would be an assessment, therefore, made u/s 143 or Section 144 of the Income Tax Act, 1961. Reference may be made to the decision in the case of *Lakshminarain Bhadani v. Commissioner of Income Tax*, [1951] 20 ITR 59 (S.C.). There the Supreme Court was concerned with the case of reassessment proceedings u/s 34 of the Indian Income Tax Act, 1922, read with Section 25A of the said Act, There Kania C.J. observed as follows at page 596 of the report:

" It does not appear necessary, when proceedings are initiated u/s 34 read with Section 22 of the Income Tax Act, to issue notice to every member of the family. The position is as if the Income Tax Officer was proceeding to assess the income of the Hindu undivided family as in 1939-40. In our opinion, therefore, that contention must be rejected. "

5. The Supreme Court further held that on construction of Section 25A(1) it must be held that the Income Tax Officer had to make an assessment of the total income as if no partition had taken place. The Supreme Court further held that in a re-opening proceeding u/s 34 it was not necessary to serve notice to every member of a Hindu undivided family. It has to be however observed that in the case before the Supreme Court the Hindu undivided family that was sought to be assessed was in fact assessed to tax under the Act prior to the said relevant assessment year. In the case of *Commissioner of Income Tax v. K.K.M.N. Swaminathan Chettier* [1947] 15 I.T.R, 430 (Mad.) the Madras High Court also had the occasion to consider the question. Patanjali Sastri J., as his Lordship then was, held that the concluding words " " the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section" in Section 34(1) of the Indian Income Tax Act attracted the provisions of Section 25A to assessments made u/s 34. Consequently if several years after a

joint Hindu family had come to an end, any portion of its income was found to have escaped assessment and such income was sought to be assessed under the special provisions of Section 34, the fiction of continued existence of the family imported by Section 25A was available to the income tax authorities in making such supplementary assessment. "

6. In the case before the Madras High Court also the said Hindu family was assessed to tax prior to the relevant assessment year in question. It has to be noted that Sub-section (2) of Section 171 deals with the cases of assessments u/s 143 or Section 144 when it is claimed by any member of a Hindu family "assessed as undivided ". Therefore, in order to attract the provisions of Sub-section (2) of Section 171, it is necessary for a Hindu undivided family to have been assessed under the Act prior thereto. Sub-section (3) of Section 171 deals with the enquiry mentioned in subsection (2). Sub-section (4) also deals with similar enquiry and subsection (5) also deals with the said enquiry. Sub-section (6) of Section 171 provides:

"Notwithstanding anything contained in this section, if the Income Tax Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the Income Tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition and every such person shall be jointly and severally liable for the tax on the income so assessed. "

7. In this case, as mentioned hereinbefore, no assessment has been made. In this case also, this Hindu undivided family had never been assessed before. Sub-section (7) and Sub-section (8) of Section 171 deal with the collection and imposition of liability of the members assessed. Therefore, in order to attract the machinery or the method provided by Section 171, it has to be a family which prior to the relevant claim for partition was assessed to tax. In this connection reference may also be made to Sub-section (4) of Section 170 which is in the following terms:

" (4) Where any business or profession carried on by a Hindu undivided family is succeeded to, and simultaneously with the succession or after the succession there has been a partition of the joint family property between the members or groups of members, the tax due in respect of the income of the business or profession succeeded to up to the date of succession, shall be assessed and recovered in the manner provided in Section 171, but without prejudice to the provisions of this section. "

8. In the facts of the instant case the provisions of Sub-section (4) of Section 170 cannot also be applied.

9. In the case of Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others, the Supreme Court had occasion to consider Section 34 read with Section 25A of the Indian Income Tax Act, 1922. There the Supreme Court held that the liability of the undivided family arose not later than the close of each

accounting year relevant to the assessment to be made on the Hindu undivided family after disruption u/s 25A. There also the family had been assessed to tax before. In the case of *Roshan Di Hatti v. Commissioner of Income Tax* [1968] 60 ITR 177 (S.C) the Supreme Court had the occasion to construe the expression "hitherto assessed as undivided" in Section 25A of the Indian Income Tax Act, 1922. The Supreme Court did not express any opinion as it was a case of an appeal from the High Court refusing to direct the Tribunal to refer a question. The Supreme Court, however, observed that when the claim made was that the joint status of the Hindu undivided family had dissolved before any order of assessment was made by the Income Tax Officer, the decision of the Supreme Court in the case of *Kalwa Devadattam* would have no application. The Supreme Court in that case was not called upon to interpret the expression "hitherto assessed as undivided family in Sub-sections(i) and (3) read with Section 25A of the Indian Income Tax Act, 1922" and the Supreme Court further observed that the Supreme Court had not laid down that a family not previously assessed to tax might be assessed after partition in the status of the family until an order u/s 25A(1) was passed by the Income Tax Officer. In the context of the position, therefore, that apart from Section 171 of the Income Tax Act, 1961, and perhaps to a certain extent, Sub-section (4) of Section 170 of the Income Tax Act, 1961, there is no machinery to assess a Hindu undivided family which had disrupted and the said machinery provides only in the case of "families hitherto assessed as undivided", it is difficult to find any machinery to assess a Hindu undivided family which had never been assessed before, after it had disrupted. A Hindu undivided family is a taxable entity and is a juristic person. It can only be proceeded against in the manner provided in the Act or under the general principles of the Hindu law after the disruption of the family. The general law does not provide for any machinery to determine the liability of the individual members of the undivided family before disruption. The Income Tax Act, 1961, and the Indian Income Tax Act of 1922 do not also provide that machinery. The position in my opinion would become clear if reference is made to some other sections. u/s 2(31), the definition of the person includes a Hindu undivided family. Section 282 provides for service of notice in the case of proceedings against the Hindu undivided family. It has been stated that in the case of a Hindu undivided family notice may be forwarded to any member of the family or the manager or an adult member of the family. Except to the limited extent of the machinery provided u/s 171 after the disruption of the family, it cannot be said that any person is a member of that family nor can any person be described as manager of the Hindu undivided family. In the case of firms or association of persons the Income Tax Act has made ample provisions in Sections 170, 177 and 187 and Section 188 of the Act. Unfortunately, the machinery provisions of Section 171 and the corresponding provisions in Section 25A are limited in scope to tax only the Hindu undivided family, which has been "hitherto assessed". Undoubtedly, after 1958, this Hindu undivided family had disrupted and in view of the fact that proceedings were taken in 1964, it must be held, therefore, that the proceedings were irregular and without jurisdiction. The notice u/s 148 on

the undivided Hindu family must, therefore, be quashed.

10. The next contention of counsel for the petitioner was that there was no proper service of notice u/s 148 of the Income Tax Act, 1961. In paragraph 4 of the petition, it has been stated that notice u/s 34 of the Indian Income Tax Act, 1922, had been served by affixation but the petitioner did not receive such notice. In the affidavit on behalf of the Revenue, filed by one Sudhanya Kumar Bhakta, affirmed on 21st April, 1970, it was stated in paragraph 3 that the said notice was served on the petitioner by affixation on 31st March, 1954. Counsel for the Revenue placed before me the report of service in respect of the said notice. The question is, has there been service in compliance with provision of the law ? Service of notice u/s 148 of the Income Tax Act is a condition precedent for re-opening, Shri Promode Ch. Paul, notice-server of the Income Tax office, went to serve notice on Smt. Sarashi Bala Sirkar on 23rd March, 1964, between the hours 1-30 p.m. but he could not serve the notice. The process-server has used the language "he" in relation to Smt. Sirkar. I will not make much of the transformation of the gender of Smt. Sarashi Bala Sirkar. But for the assessment year 1958-59 the process-server stated that he made attempts to find out Smt. Sarashi Bala Sirkar on 30th March, 1966, but could not find her and as such the notice was affixed. Smt. Sirkar had died prior thereto. Unfortunately for the department, the department has not been given the power to make a dead person alive to receive a notice of the department. Leaving aside this aspect of the matter, the question is, was there any reasonable attempt to serve the notice ? u/s 282 of the Income Tax Act service has to be in the manner as provided in the Code of Civil Procedure. Under the Code, the service can be made by affixation but either after reasonable attempts had been made to find the assessee but could not be found or after the assessee had refused to accept service. What is reasonable attempt must of course be determined on the facts and circumstances of each case. Counsel for the petitioner drew my attention to the decision in the case of Commissioner of Income Tax, Kerala Vs. Thayaballi Mulla Jeevaji Kapasi (Decd.) (by his Legal representatives), where the Supreme Court observed that the service of notice prescribed by Section 34 of the Indian Income Tax Act, 1922, for the purpose of commencing proceedings in reassessment was not a mere procedural requirement ; it was a condition precedent to the initiation of proceedings for assessment u/s 34. If no notice was issued or if the notice issued was*shown to be invalid, then the proceedings taken by the Income Tax Officer would be illegal or void. The Supreme Court in that case affirmed the principles laid down by the Division Bench judgment of this court in the case of Gopiram Agarwalla v. First Addl. Income Tax Officer [1959] 37 ITR 493 (Cal.). There the Supreme Court observed that the mere fact that the serving officer did not find the assessee to be served with the notice at his address was not sufficient to establish that he could not be found. It must be shown not only that the serving officer went to that place at a reasonable time when the assessee was expected to be present but also that if he was not found proper and reason able attempts had been made to find him either at that

address or elsewhere. If after such reasonable attempts, if any, made, the position still was that the party was not found, then and then only could it be said that he could not be found. The question is, therefore, from the service returns even if these are accepted to be correct can it be said that reasonable attempts had been made to find the assessee. The process-server in his statement states that he went to serve between a particular period; but he mentions one period only. He further stated that having failed in his attempt to serve the notice he served the notice by affixation. He does not state how he made his attempts and if there was any prospect to find out the person in some other place or on some other date. In that light it must be held that no reasonable attempts had been made to serve the assessee. Counselor the Revenue contended that whether the assessee had reasonable opportunity or not was a question of fact better suited to be decided in the Income Tax proceeding itself. He drew my attention to the decision of the Supreme Court in the case of Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, . There the Supreme Court had occasion to consider whether reasonable opportunity had been given to the assessee to make representation against an order u/s 33B of the Indian income tax Act, 1922. The Supreme Court observed that the notice was affixed at two places of which the addresses were furnished by the assessee in his returns, and it was not suggested that the assessee was not carrying on his business at those two places. It was held that there was a proper service of notice. The Supreme Court further observed that if the assessee had any grievance about the sufficiency of the opportunity given to him to make his representations, his obvious remedy was to appeal against the order u/s 33B of the 1922 Act. The service of the notice u/s 33B of 1922 Act is not mandatory. What is mandatory is that the assessee should be given reasonable opportunity. How that reasonable opportunity should be afforded to the assessee would depend upon the facts and circumstances of each case and as to whether reasonable opportunity has been granted or not to a particular assessee in a particular case the Supreme Court observed that the Income Tax Act provided the machinery, resort to which must be made in the first instance. Here, the service of the notice u/s 148 is mandatory and is a condition precedent to the initiation of the proceeding. Here also if there was any dispute about the statement made by Promode Pal, the process-server, it might have been urged that the writ jurisdiction was not the proper forum to: agitate the dispute. But accepting the statements of the said process-server it is manifest that no reasonable attempts had been made to find out the assessee. Upon that finding it cannot be said that there was any disputed question of fact to be gone into. In the premises, in view of the peculiar nature of this case, it must be held that there was no proper service of the notice. There is a ring of similarity with the method of service of notice for 1955-56, 1956-57, 1957-58 and 1958-59. For these two subsequent years notices were alleged to have been served in March, 1966. On those dates again Smt. Surashi Bala Sirkar was dead. This also would indicate what kind of attempt, if any, which is very doubtful the process-server made to find out Smt. Surashi Bala Sirkar because he mentions nothing about

the same. Counsel for the revenue also drew my attention to the case of Lilloah Steel and Wire Co. Ltd. Vs. Income Tax Officer, "B" Ward, where I held that on the question of service if there were disputed questions of facts the proper remedy for the assessee was to take proceedings under the Income Tax Act. In view of the facts of this case I do not think it necessary to discuss the aforesaid decision in greater detail.

11. In the view I have taken this application must succeed and the notices must be quashed. Notice u/s 148 of the Income Tax Act to the disrupted Hindu undivided family was without jurisdiction and it was not properly served. The said notice for the assessment year 1955-56 is hereby quashed and consequently the notice u/s 142(1) of the Income Tax Act, 1961, is also hereby quashed and set aside. The rule is made absolute to the extent indicated above. The respondents are restrained from giving any further effect to the said notices. Let writs in the nature of mandamus and certiorari issue accordingly. There will be no order as to costs.

12. There will be a stay of operation of this order for three weeks after the ensuing long vacation and during the period of stay the interim order will continue. If pursuant to the liberty granted by this court assessment has been made in pursuance of the impugned notices the said assessment order is also set aside and quashed and the respondents are restrained from giving effect to the same.