(1965) 07 CAL CK 0010

In the Calcutta High Court

Case No : Appeal from Original Order No. 196 of 1364

Tilla Mohammad APPELLANT

Vs

Additional Member Board of Revenue RESPONDENT

Date of Decision : 14-07-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 5 Rule 19
Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 23(4), 29, 34, 45, 46

Citation : (1966) 2 ILR (Cal) 157

Hon'ble Judges : S.A. Masud, J;D.N. Sinha, J

Bench : Division Bench

Advocate : T.K. Bose, for the Appellant;Subyasachi Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Masud, J.—This is an appeal from the judgment and order of Ray, J. discharging the rule nisi obtained by the Appellant in an application under Article 226 of the Constitution. Before the trial Judge the Appellant sought to have the order of the Additional Member, Board of Revenue, dated May 30, 1961 and the order of the Commissioner, Presidency Division, dated September 7, 1960, quashed under the following circumstances:

2. The Appellant is a partner of a firm known as Messrs. Tilla Mohammad Fazal Karim, having 8 as share therein. For the assessment year 1949-50, the Appellant was assessed to income tax on his 8 as share of profit from the said registered firm of Tilla Mohammad Fazal Karim as per the allocation mentioned in the order of assessment dated March 31, 1954. By the said order his income was assessed at Rs. 36,152. After the assessment order was made, a sum of Rs. 1,500 was deposited by the Appellant towards payment of income tax of the firm for the said assessment year 1949-50. By an order dated March 29, 1955, the Certificate Officer, 24-Parganas signed a certificate stating that a sum of Rs.

8,818-3 is due from the Appellant as certificate debtor. The said certificate had been forwarded by the income tax Officer, District 11(1), Calcutta along with a requisition u/s 46(2) of the income tax Act to the Collector, Alipore. In the certificate proceedings an objection under the Public Demands Recovery Act was made by the Appellant to the effect that the said certificate was not enforceable against him inasmuch as no notice of demand u/s 29 of the income tax Act, 1922, was served upon the Appellant. The Certificate Officer and the Additional District Magistrate, Alipore, on an appeal by the department, held that the said certificate was invalid as there was no proof that the demand notice was served. The Union of India moved the Commissioner, Presidency Division, by way of revision and the said learned Commissioner by an order dated September 7, 1960, restored the said certificate. Thereafter, on a revision application by the Appellant, the Additional Member, Board of Revenue, by his order dated May 30, 1961, confirmed the order of the learned Commissioner, Presidency Division.

3. Mr. T.K. Bose, Learned Counsel for the Appellant, has contended before us that the said certificate proceedings resulting in the order of the learned Additional Member, Board of Revenue, dated May 30, 1961, should be quashed on the following grounds:

(a) No notice of demand u/s 29 of the income tax Act was in fact served upon the Appellant and as such, the Appellant cannot be deemed to be in default within the meaning of Section 45 and therefore, the certificate proceedings initiated u/s 46(2) of the Act is invalid and inoperative.

(b) In any event, the notice of demand u/s 29 has not been served in accordance with the statutory provision u/s 63(1) of the Act.

It cannot be denied that there is great force in the contention of Mr. Bose. The liability to pay income tax arises when the amount specified in the notice of demand u/s 29 has not been paid. It is only on the failure to pay the amount mentioned in the notice of demand that the Assessee shall be deemed to be in default in which contingency Section 46(2) of the Act is attracted. The certificate proceedings have been commenced at the instance of the income tax Officer u/s 46(2). If there is no notice of demand and no consequential liability to pay tax, the income tax Officer has no jurisdiction to issue and forward a certificate and cannot set in motion the certificate proceedings which has resulted in the impugned order. Although we do not question the validity of this argument, it seems to us that such proposition of law has no application to the facts and circumstances of the instant case Mr. Bose has argued on the basis that no notice of demand u/s 29 has been served on the Appellant or has ever reached the Assessee. There is no dispute that the relevant assessment order was made on March 31, 1954. It is also admitted by the Appellant in para. 6 of the petition that the assessment order, was served on him. On examination of the original records, it appears that the demand notice, challan and the assessment order were directed to be issued simultaneously to the Assessee on the same day, namely, March 31, 1954, when the assessment was completed. It is quite true that the administrative order to the effect that the demand notice be issued to the Assessee by itself does not prove that the notice has been served on the Appellant. But taking into consideration the following surrounding circumstances it seems to us that the conclusions arrived at by the Commissioner, Presidency Division and the Additional Member, Board of Revenue, to the effect that notice of demand was served on the Appellant was correct. The order of assessment dated March 31, 1954, has been admittedly served on the Assessee. It appears from para. 7 of the affidavit of Amiya Kumar Sanyal that the demand for the assessment year 1949-50 was determined at Rs. 10318-3 and was payable by April 15, 1954. In spite of reminders on September 20, 1954 and January 24, 1955, by the department for payment of the arrears, the Assessee continued to be in arrears and no payment was made. On February 8, 1955, the Appellant prayed for payments by instalments and an order was passed on February 14, 1955, granting two instalments, the first instalment of Rs. 5,000 was to be paid by April 28, 1954 and the balance being Rs. 5318-3 by April 20, 1955. Again, on June 4, 1955, at the instance of the authorised pleader of the Appellant, an order granting the Appellant seven instalments was passed and the necessary challans for the same were served on the said pleader on the July 11, 1955. Thereafter, on August 8, 1955, another order was made informing the Appellant that on the failure to pay the first instalment of Rs. 1,500 by August 19, 1955, the entire demand would be considered to be due on that date and penalty u/s 46(1) of the Indian income tax Act would be imposed without any further reference. It was only under those circumstances that the Appellant made payment of Rs. 1,500 on August 15, 1955. Again, on September 30, 1955, another reminder was made to him for further payment of the instalment and necessary challans were also issued on the basis of the above order. Further indulgence was granted to him on the November 18, 1955 and on March 27, 1956, to pay the arrears of tax. Under these extreme circumstances the recovery certificate was forwarded by the income tax Officer to the Collector of 24-Parganas. It is true that the department has not been able to prove acknowledgment receipt, postal or otherwise, to show that the demand notice was served on the Appellant. Even then it is difficult to believe that although the demand notice, the challan and the assessment order were directed to be issued simultaneously to the Appellant on the same date and the assessment order was admittedly received by the Appellant, the notice of demand did not reach him. Apart from the fact that the assessment order along with the demand notice and challan were ordinarily served simultaneously on the Assessee, it seems to us that the very fact that the Appellant by his conduct has accepted the order of assessment without any objection and has, in fact, asked for instalments on several occasions, prove that the notice of demand was also served upon him. Another extra-ordinary feature of the case is that although order of assessment was served on him on or about April, 1955 he or his pleader has not complained either in the petitions or elsewhere that notice u/s 29 has not at all been served. The objection of Mr. Bose that the department has failed to prove the service of demand notice is more of form than of substance. The Appellant''s own conduct belies his contention that notice of demand has not been served on him. For these reasons, in our opinion, the surrounding circumstances and the circumstantial evidence in this case clearly establish that alike the order of assessment, the notice of demand has also been actually served on the Appellant.

4. Further, the Commissioner, Presidency Division and the Additional Member, Board of Revenue, West Bengal, have acted as administrative tribunals in exercise of quasi-judicial functions and they, after evaluation of all the documents on record, have come to the conclusion that the notice of demand has actually been served. This finding on the part of the Commissioner or the Member of the Board of Revenue cannot be said to be based on no, evidence. An error in appreciation of documentary evidence or an error in drawing inferences cannot be said to be errors of law and can be corrected only by a Court sitting in a Court of appeal and not under Article 226. Reference may be made to Kaushalya Devi and Others Vs. Bachittar Singh and Others, , where Wanchoo, J. has stated:

We are of opinion that the Deputy Custodian General was entitled to take into account all the reports, proposals and orders appearing on the record and if on a review of these he came to the conclusion that an order of cancellation must have been passed, on May 6, 1962 though it did not appear on the record, it cannot be said that this conclusion of fact was based on no evidence or on no relevant evidence....

In the present case also we feel, with respect, that What the High Court has done is to correct what may be errors in appreciation of the documentary evidence or errors in drawing inferences. We are, therefore, of opinion that there was no error of law apparent on the face of the record in this case which would justify interference by the High Court by the order of the Deputy Custodian General, who undoubtedly had jurisdiction to deal with the matter and did not in any way exceed that jurisdiction or fail to deal with the matter in accordance with the essential requirements of law which he was authorised and required to administer.

The same principle was reiterated by the Supreme Court in Syed Yakoob Vs. K.S. Radhakrishnan and Others, . In this connection the Learned Counsel for the Appellant has urged that the service of notice of demand being a jurisdictional fact, it is competent for the writ Court to interfere if it appears on the record that such jurisdictional fact does not exist. In support of this contention, he has relied, oh some passages in Halsbury''s Laws of England (3rd Ed., vol. 11, p. 142, Paras. 268 and 270). In our opinion, principles of law set out in the said passages cannot be made applicable to the facts of this case. An inferior tribunal, in this case, has not decided any fact collateral to the actual matter; nor, as we have stated above, the inferior tribunal has come to any wrong conclusion. The only contention which was agitated by the Appellant in the certificate proceedings was that the notice of demand was not served on him. That fact was enquired into and on the basis of the available evidence on record, the inferior tribunal came to a particular conclusion. For the reasons stated above, we have already stated that the conclusion arrived at by the Commissioner and the Member, Board of Revenue, was not incorrect.

5. Reference has been made by Mr. Bose to Myitkyina Trading Depot Vs. Dy. Tahsildar, Paramakudi, Ramnad Dist. and Others, , in support of his argument that there was no proper service of the notice of demand u/s 29 inasmuch as no proper service under Order 5, Rule 17 and 19 of the Code of Civil Procedure, as required u/s 63 of the income tax Act, has been made. In this case an unregistered firm which had its business mainly in Rangoon and had a branch office in Madras was assessed for the assessment year 193940 without the income from Burma being taken into account as Burma was under enemy occupation. After the partners of the firm had left for Burma, the income tax Officer initiated re-assessment proceedings u/s 34 of the income tax, 1922. A notice for re-assessment tame back as the business premises at Madras was closed and again, when sent by post to the residences of the partners, it was returned with the information that they were in Rangoon. The notice was thereafter affixed on the door of the premises of the partners and the proceedings were completed in the absence of the partners. The assessments for the years 1940-41 and 1941-42 were also completed in their absence u/s 23(4) and the notice of demand u/s 29 was served by affixture at the residences of the partners and certificates u/s 46 were issued to the Collector as the tax levied remained unpaid. It was, inter alia, held that, as there was no compliance with requirement under Order 5, Rule 17 and 19 as provided u/s 63, there was no proper service and as such, the certificates issued u/s 46(2) were without jurisdiction. The facts of the case are distinguishable. In that case the assessment proceedings were held without the knowledge and in the absence of the partners who were in Burma under enemy occupation. Further, there was a finding that notice was served by affixation at Madras branch office when the department has knowledge or should have knowledge that they were still in Burma. In the instant case, there is no allegation that the hearing of assessment proceeding took place in the absence of the parties. On the contrary, the Appellant had full knowledge pf the order of assessment, which was duly served on him. In fact Rajagopalan, J. has stated:

What was really done in this case was to reduce the service of notice to meaningless ritual. Due service under the enabling provisions of Order 5 Rule 17 and Order 5, Rule 19 of the CPC should mean that the notice was served in such a way that the Assessee has or could obtain knowledge of the proceedings under s.34 or at least the income tax Officer could bonafide believe that the Assessee has or could have such knowledge.

As stated earlier, certificate proceedings under Public Recovery Act, initiated u/s 46(2) of the Act could only be valid if the Assessee is in default; and the Assessee cannot be deemed to be in default unless there is a proper service of the notice of demand. Service of notice u/s 29 is a sine qua non of the liability of the Assessee. But the question whether notice of demand u/s 29 has been served on the Assessee is a question of fact to be decided on the circumstances of each case; and this must be so because unless the Assessee has knowledge of the quantum of his liability, the income tax Officer or the Certificate Officer is not entitled to pursue him Section 63(1) of the income tax Act reads as follows:

A notice or requisition under the 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.

The words of this section show that the provision for service of notice u/s 63(1) is directory and procedural. Methods of service stated therein are not exhaustive. Service of notice by post or under the CPC are convenient methods by which service may be effected. There is no doubt that the department should normally comply with these statutory formalities provided in Section 63, but it does not follow that there is an absolute bar to hold a service of notice valid, if the Assessee has knowledge of his liability otherwise than by post or under the CPC and has in fact acted on such knowledge. In the instant case, we have already shown how his own conduct betrays the fact that there is sufficient evidence to come to the conclusion that notice of demand has been served on him along with the order of assessment.

6. Lastly, Mr. Mukherjee, Learned Counsel for the Respondent, has contended that the Appellant should not get any relief in this matter in view of the inordinate delay that he has made in making this application. It appears that the impugned order passed by the Additional Member, Board of Revenue, was made on May 30, 1961 and this application was moved before the Writ Court on August 10, 1962. In par 9 of the petition the Appellant has tried to explain the delay but it seems to us that the explanations are not at all satisfactory. The illness of one of his employees, non-production of any medical certificate and lack of particulars as to the nature and period of illness would not warrant us to accept the Appellant''s explanation. Relying on the Eluru Venkata Subbarao v. The District Transportation Superintendent Vijayawada Southern Rly. AIR 1958 A.P. 206, Mr. Mukherjee contends that the appeal should fail inasmuch as the application was not made within a reasonable time from the date when the impugned order was passed. In the absence of material particulars explaining the delay, we should have held that the Appellant ought not to get relief under Article 226 inasmuch as he was not diligent in challenging the said order. In this connection reference maybe made to State of Madhya Pradesh v. Bhailal Bhai AIR 1964 S.C. 1008 (1012), where Dasgupta J. has stated:

It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. this Court may consider the delay unreasonable even it is less than the period of limitation prescribed for a civil action for the remedy, but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.

We have already shown that there is no satisfactory explanation for the delay in the instant case. But in view of the aforesaid observations of Dasgupta, J., we are, however, not inclined to dismiss the appeal on the ground of delay alone.

7. No other contention having been made, the appeal is dismissed for the reasons stated above. There will be no order as to costs.

Sinha, J.

8. I agree.

