

(1969) 08 AHC CK 0003
In the Allahabad High Court
Case No : S.T.R. No. 475 of 1964

Gopal Das Uttam Chand

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 06-08-1969

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11

Citation : (1970) 25 STC 229

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Advocate : V.N. Khare and G.O. Nagalia, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

R.L. Gulati, J.—The Judge (Revisions) Sales Tax, Meerut, has submitted this reference u/s 11 of the U.P. Sales Tax Act (hereinafter referred to as the "Act") for the opinion of this court on the following two questions of law :

(1) Whether on the facts and circumstances of the case the affixation of notice was proper and valid under Clause (d) of Rule 77 of the U.P. Sales Tax Rules without having recourse to the modes prescribed in Sub-clause (a), (b) or (c) ?

(2) If the answer to the above is in the negative, whether the service of notice could be treated as falling under Clause (b) of Rule 77 of the U.P. Sales Tax Rules ?

2. The assessee is a dealer in cloth at Tehri Garhwal. The assessment year involved is 1955-56, The assessee was assessed to sales tax for that year on 31st January, 1957. Later on, however, information was received by the Sales Tax Officer that the assessee had imported cloth worth much more than what he had shown in the course of the original assessment proceedings. The Sales Tax Officer being of the opinion that a part of the turnover of the assessee had escaped assessment, reopened the assessee's case u/s 21 of the Act. The notice

u/s 21 of the Act is stated to have been served on 1st March, 1960, requiring compliance on 4th March, 1960. As no compliance was made, the Sales Tax Officer made an ex parte assessment estimating the escaped turnover at Rs. 80,000.

3. Against the revised assessment the assessee went up in appeal and one of the questions raised in the appeal related to the validity of the service of the notice u/s 21 of the Act. Admittedly the service was effected by affixation. The assessee's contention was that the service could not be effected through affixation without exhausting the other modes of service enumerated in Rule 77. This contention of the assessee was not accepted by the Judge (Appeals) nor by the Judge (Revisions) before whom the assessee went up in revision.

4. Rule 77, which deals with the service of notices under the Act, is in the following terms :-

77. Modes of service.-The service of any notice, summons or order under the Act or the rules may be effected in any of the following ways, namely :

(a) by giving or tendering a copy thereof to the dealer or licensee, or his manager or agent; or

(b) if such dealer or licensee or his manager or agent cannot easily be found, by leaving a copy thereof at his last known place of business or residence, or by giving or tendering it to some adult member of his family; or

(c) if the address of such dealer or licensee is known to the Sales Tax Officer, by sending a copy thereof to him by registered post; or

(d) if none of the modes aforesaid is practicable, by affixing a copy thereof in some conspicuous place at his last known place of business or residence.

5. A plain reading of this rule shows that four alternative modes of service mentioned in clauses (a) to (d) have been provided. Clause (d), however, provides that the service by affixation can be resorted to only if none of the other modes is practicable. It follows, therefore, that whenever recourse is desired to be taken to the mode of service mentioned in Clause (d), the other modes should be tried first, unless it is shown that none of the other modes was practicable.

6. Out of the two questions referred to us, question No. (1) proceeds on the assumption that the modes mentioned in clauses (a) to (c) were not resorted to. That strictly is not correct, because it appears that the notice was taken by the process-server to the assessee for personal service as contemplated by Clause (a). The assessee's shop was found closed and the process-server was unable to ascertain the whereabouts of the assessee. Thereupon he affixed the notice on the shop of the assessee. Admittedly, the remaining two modes mentioned in clauses (b) and (c) were not tried and there is nothing in the assessment order to show as to why that was not done. There is, of course, the following recital in the assessment order :

This notice was served through affixation because the service was not possible through any other mode.

7. But the Sales Tax Officer has not elaborated as to why the other modes were not possible. The mode of personal service under Clause (a) could have been tried again if the assessee's shop was closed temporarily. Likewise the service could have been effected through registered post, because it has not been mentioned by the Sales Tax Officer that the postal address of the assessee was not known to him. However, the Judge (Appeals) has tried to elaborate this point by saying that the assessee's place of business was far away from the headquarters of the Sales Tax Officer and service by registered post was likely to be evaded by the assessee. The Judge (Revisions) has endorsed the reasoning of the judge (Appeals) and has further expressed the opinion that the affixation of the notice could be regarded to be a service contemplated by Clause (b).

8. Now, whether a particular mode is practicable or not is a matter to be decided by the Sales Tax Officer and if the Sales Tax Officer after applying his mind to the facts of the case expressed the opinion that service by other modes was not practicable, it was legitimate for him to have ordered the service to be effected through affixation. But that has not been done in the instant case. What appears to have happened is, as is evident from the order of the appellate authority, that the process-server was instructed by the Sales Tax Officer that in case the latter was not able to effect personal service upon the assessee, he could resort to service by affixation. We are of opinion that such a procedure is not warranted by law. Rule 77 casts a duty upon the Sales Tax Officer to effect service by such of the modes enumerated in that rule as may appear appropriate to him. The choice of the mode cannot be left to the discretion of the process-server. At any rate the question as to whether the modes enumerated in clauses (a) to (c) are practicable or not is a question which can be decided by the Sales Tax Officer alone after examining the facts obtaining in a particular case. He cannot exercise his judgment before the facts are brought to his notice. In other words, he cannot anticipate the facts and form an opinion beforehand so as to give instructions to the process-server to effect service under Clause (d) without reporting the matter to him. In the instant case it was not open to the Sales Tax Officer to have instructed the process-server to serve the notice by affixation in case his attempt to effect personal service failed.

9. Incidentally, we may mention that the service by affixation was effected on 1st March, 1960, and there was time for the Sales Tax Officer to make the assessment up to 31st March, 1960. He had, therefore, full one month at his disposal to try the modes mentioned in clauses (a) to (c). Be that as it may, the fact- remains that the service by affixation was resorted to by the process-server on his own initiative without obtaining an order from the Sales Tax Officer after reporting the result of his first attempt to him.

10. In the circumstances we find that the manner in which the service has been effected in the instant case is contrary to the provisions of Rule 77. Question No.

(1), therefore, has to be answered in the negative in favour of the assessee and against the department.

11. As regards question No. (2), the Judge (Revisions) took the view that service by affixation could be treated to be a service under Clause (b) of Rule 77. This is obviously an incorrect view. Clause (b) requires the notice to be left at the place of business of the assessee which contemplates that the business place would be accessible. Leaving a notice at the business place of the assessee means leaving it inside the business premises at a place where the assessee is likely to find it when he returns to his business place. When the business place is closed, it is not possible to leave the notice inside the business place. In such a case a notice can be left only outside the business place. Leaving a notice or affixing it outside a business place is not the same thing as leaving the notice inside the business premises. Moreover, if the reasoning of the Judge (Revisions) is accepted, Clause (b) would become redundant. We see no reason why such an interpretation should be accepted.

12. The opinion that we have expressed on the two questions is obvious from the language of Rule 77 itself and requires no authority. However, there are two direct authorities of this court in which the same view has been taken on both the questions involved in this reference. The two authorities are : Luxa Upbhogta Co-operative Society v. Sales Tax Officer, Varanasi 1964 A.L.J. 93 and C. Maharaj and Sons v. Sales Tax Officer IV, Agra [1964] 15 S.T.C. 879 (Agr).

13. For the reasons stated above we answer both the questions in the negative in favour of the assessee and against the department. The assessee is entitled to its costs which we assess at Rs. 100. The fee of the learned counsel for the department is also assessed at the same figure.