

(1983) 01 AHC CK 0028

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 382 of 1977

Kunwar Industries and Another

APPELLANT

Vs

The Sales Tax Officer

RESPONDENT

Date of Decision : 04-01-1983

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1983) 53 STC 385

Hon'ble Judges : V.K. Mehrotra, J; R.M. Sahai, J

Bench : Division Bench

Advocate : Bharatji Agrawal, for the Appellant; The Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.M. Sahai, J.—By this petition filed under Article 226 of the Constitution of India the petitioner seeks quashing of proceedings for escaped assessment initiated u/s 21 of the U. P. Sales Tax Act for 1971-72 both for absence of any material on which any opinion as contemplated in Section could be formed and on failure to serve notice in accordance with Rule 77.

2. Originally the petitioner had challenged the recovery proceedings commenced in pursuance of ex parte assessment order only although the order itself had been challenged in appeal and an application u/s 30 for recall of the order was also filed. While this petition and appeal were pending the application u/s 30 was rejected against which the petitioner went up in appeal which was allowed. Consequently the ex parte order giving raise to this petition stood set aside. An application was filed on behalf of the respondent for dismissing the writ petition as infructuous. But before this application could be decided the Sales Tax Officer passed fresh orders u/s 21 which too were challenged by an application under Order 6, Rule 17, which was allowed by this Court. Although the order is not challenged on merits but the learned counsel for the petitioner has assailed it on the same ground, namely, lack of jurisdiction in absence of proper service of

notice issued u/s 21 and non-application of mind. Admittedly the proceedings had been reopened u/s 21 by the Sales Tax Officer as information had been received from the Director of Industries that the petitioner had import licence. According to the petitioner there was no material and the information was insufficient for the formation of reasonable ground to believe that the turnover had escaped assessment. And notice issued for verification of information was beyond the scope of Section 21. Whereas the case set up in the counter-affidavit is that the information received was that the petitioner had been granted import licence of Rs. 13,75,000 but it had disclosed total turnover of Rs. 3,47,675 and consequently the Sales Tax Officer had reason to believe that entire turnover had not been disclosed.

3. We however do not propose to go into this controversy as in our opinion the submission of the learned counsel for the petitioner that the notice issued u/s 21 was not served appears to be well-founded. It is not denied in the counter-affidavit that the firm had been closed on 31st July, 1972, and information of the closure had been received by letter dated 25th February, 1972. Nor is it denied that on 22nd March, 1976, one notice was sent by registered post and another for personal service through process-server with a direction that in case the assessee was not found or refused to accept the notice it may be served by affixation. On 23rd March, 1976, the process-server submitted a report that the firm had been closed since long and as the proprietor of the firm was not available service was effected as directed by affixation. In the counter-affidavit it has been stated that this procedure was adopted as limitation was expiring on 31st March, 1976.

4. Rule 77 prescribes service of notice by (a) giving a copy to the dealer or manager, etc., that is, personal service ; (b) by leaving it at last known place of business or residence or to some adult member of dealer's family ; (c) by registered post if address was known. Sub-clause (d) provides that if none of the modes aforesaid is practicable by affixing a copy thereof in some conspicuous place or at the last known place of business or residence of the dealer.

5. This rule had come for interpretation by this Court time and again. It has repeatedly been held that service by affixation should not be resorted to unless it is not possible to effect service in any of the manners mentioned in clauses (a) to (c). In fact the rule itself is very clear. The question however is whether the Sales Tax Officer was justified in directing the process-server to effect service by affixation if he failed to meet the dealer. In other words, could action under sub-clauses (a) and (d) be taken simultaneously. But before coming to it we may point out that another notice was sent by registered post on that very date. It has been stated in the counter-affidavit that due to postal uncertainty it was not possible to wait and time to complete the assessment was short. We appreciate the difficulty but then it was not necessary to issue notice by registered post at all. The business had been closed as far back as 1972 and a new partnership had been formed. Sending of registered notice in the circumstances was an empty

formality. It was unnecessary. If the Sales Tax Officer instead of issuing such notice would have recorded his opinion of futility of sending the registered notice and resorted to Clause (d) probably nothing could be said provided the manner of service provided under clauses (a) and (b) had been exhausted. But the application of mind on non-practicability of sending notice by registered post had to be recorded on the order sheet and not in the counter-affidavit filed in this Court.

6. We now come to the real controversy whether a joint notice under clauses (a) and (d) as was issued in this case and was served by affixation can be held to be valid. The words in Clause (d) that if "none of the aforesaid modes is practicable" is significant. It has to be decided objectively. It cannot be assumed. The officer or authority resorting to this mode of service has to form an opinion. It cannot be anticipated. We are fortified in our view by a Division Bench decision of this Court in *Gopal Das Uttam Chand Vs. Sales Tax Officer*, . As a comparison we may point out that a direction by the Sales Tax Officer in the notice for personal service to leave it at the place of business under Clause (b) might not be open to objection but the same cannot be said of clauses (a) to (c) and (d). It is not possible to comprehend a combined notice under clauses (a) or (b) and (d). In between there has to be application of mind. And this could not be done beforehand. Service by affixation is the weakest mode of service. It has to be resorted to in exceptional circumstances. That is why the rule provides for it if service by no other method is practicable.

7. We are not impressed by the explanation of the Sales Tax Officer that this course was adopted as very little time was left for completing the assessment. In this very case if after the report of the process-server on 23rd March, 1976, the Sales Tax Officer would have directed service by affixation then probably accepting his explanation in respect of registered notice we might have held service to be sufficient. To satisfy ourselves we looked into the record as well. But we could not find any material on which the notice issued for service on 22nd March, 1976, both under clauses (b) and (d) through the process-server could be held to be valid. As notice u/s 21 is jurisdictional, failure to serve it in accordance with law results in rendering the proceedings without jurisdiction. The Sales Tax Officer therefore could not have assumed jurisdiction and passed the order.

8. In the result, this petition succeeds and is allowed. Notice dated 22nd March, 1976, initiating proceedings u/s 21 is quashed. As the proceedings were without jurisdiction the assessment order u/s 22 filed as annexure 9 to amendment application is also quashed. The petitioner shall be entitled to costs.