

**(1974) 07 KAR CK 0015**  
**In the Karnataka High Court**  
**Case No : S.T.R.P. No's. 77 and 78 of 1973**

Manusukhlal A. Shah

APPELLANT

Vs

The State of Mysore

RESPONDENT

**Date of Decision :** 16-07-1974

**Acts Referred:**

Income Tax Act, 1961 — Section 147

Karnataka Sales Tax Act, 1957 — Section 13 (3) (b), 13 (4)

**Citation :** (1975) 35 STC 465

**Hon'ble Judges :** G.K. Govinda Bhat, C.J; M.K. Srinivasa Iyengar, J

**Bench :** Division Bench

**Advocate :** B.P. Gandhi, for the Appellant; M.P. Chandrakantaraj Urs, for the Respondent

## Judgement

Govinda Bhat, C.J.—These are two connected revision petitions preferred u/s 13(4) of the Karnataka Sales Tax Act, 1957, hereinafter called "the Act". The petitions are directed against the common order passed by the Judicial Magistrate, First Class, Bangalore City, dated 27th September, 1973, in C. Misc. Nos. 46 and 47 of 1973, by which the learned Magistrate, in proceedings for recovery of arrears of sales tax u/s 13(3)(b) of the Act, overruled the contention of the dealer, who is the petitioner in these revision petitions, on the ground that he has no jurisdiction to go into the question whether there was proper service of the notices of demand.

2. The matters arise in this way. The petitioner, one Manusukhlal A. Shah is a dealer assessed under the Act for the assessment years 1969-70 and 1970-71. Two assessment orders were passed by the Assistant Commercial Tax Officer, IV Circle, Bangalore, on 5th September, 1972, and 27th September, 1972, respectively. The notices of demand were not served personally on the dealer, but were served by affixture on 28th October, 1972. The dealer did not pay the tax and, therefore, proceedings for recovery were instituted before the Judicial Magistrate, First Class, in C. Misc, Nos. 46 and 47 of 1973. The dealer, inter alia,

contended that the notices of demand for the two assessment years were not served on him and, therefore, no tax was due, and consequently, the recovery proceedings were not maintainable. In the applications filed before the court below by the Assistant Commercial Tax Officer, it was stated that the demand notices were served on 28th October, 1972, by affixture on the door of the dealer's shop. The learned Magistrate after hearing the parties overruled the petitioner's contention on the ground that it is beyond his jurisdiction to go into the question as to the sufficiency or legality of the service of the demand notices. Aggrieved by the said order, the dealer has preferred the above revision petitions.

3. Before us, Sri B. P. Gandhi, the learned counsel for the dealer, invited our attention to rule 20 of the Rules made under the Act, which provides that after making the final assessment, the assessing authority shall examine whether any, and if so, what amount is due from the dealer towards the tax and if any amount is found to be due from him towards the final assessment, the assessing authority shall serve upon the dealer a notice in form 6, and the dealer shall pay the sum demanded within the time and in the manner specified in the notice. He next invited our attention to rule 53 of the Rules which provides the mode of service of notice under the Act. In order to appreciate his contention, it is necessary to set out the said rule. It reads :

"The service on a dealer or licensee of any notice, summons or order under the Act or these Rules may be effected in any of the following ways, namely :-

(a) by giving or tendering it to such dealer or licensee or his manager or agent; or

(b) if such dealer or licensee or his manager or agent is not found, by leaving it 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 assessing or licensing authority, by sending it to him by registered post; or

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

4. The substance of the argument of Sri Gandhi is that before resorting to the service of notice in the manner prescribed in clause (d) of rule 53 by affixing the notice in some conspicuous place at the last known place of business or residence of the dealer, all other modes of service provided in clauses (a), (b) and (c) should be exhausted; and, since, in the instant case, no notice was attempted to be served by sending it by registered post as provided in clause (c), the service of notices by affixture as stated in the application for recovery, even assuming that it has been done, is not valid in law. In support of his contention Sri Gandhi relied on two decisions of the High Court of Allahabad in *Gopal Das Uttam Chand v. Sales Tax Officer* ([1970] 25 S.T.C. 229) and *Sri Krishna Chandra v. State of Uttar Pradesh* ([1972] 29 S.T.C. 635). Both the

judgments were rendered by the same Bench consisting of R. S. Pathak and R. L. Gulati, JJ. The rule which the Allahabad High Court had to interpret was rule 77 of the Uttar Pradesh Sales Tax Rules, 1948, which is in pari materia with rule 53. Dealing with the scope of the said rule, this is what Gulati, J., who delivered the judgment in Gopal Das Uttam Chand's case ([1970] 25 S.T.C. 229), stated :

"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.....

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."

5. In Sri Krishna Chandra's case ([1972] 29 S.T.C. 635), this is what the same learned Judge stated :

"It is now settled law that a notice u/s 21 of the U.P. Sales Tax Act like a notice u/s 147 of the Income Tax Act, 1961, is a jurisdictional notice so that no assessment or reassessment in respect of any escaped turnover can be made, unless a valid notice u/s 21 is issued and served upon the assessee within the time prescribed in that behalf. Merely because the assessee had the knowledge of the proceedings u/s 21 cannot take the place of the service of a valid notice u/s 21. In the instant case on the department's own showing the notice u/s 21 had been served upon the assessee by affixation on 30th March, 1962. The question

is as to whether that notice had been validly served . Obviously the mode of service by affixation can be resorted to only if none of the other modes is practicable. In the instant case, service by affixation was resorted to in the first instance without trying the other modes. Such a service, therefore, cannot be held to be valid, being contrary to rule 77."

6. It is not very clear to our mind whether their Lordships were taking the view that before resorting to clause (d), everyone of the other modes of service, viz., service under clauses (a) to (c) should be tried and if none of them is practicable in the opinion of the assessing authority, then alone service by affixture can be ordered. It appears to us that the ratio of the decision is that before resorting to service of notice by affixture, the assessing authority should form an opinion that service in any of the modes contemplated in clauses (a) to (c) is not practicable, and before doing so, attempt should have been made to serve at least by one of the modes and, thereafter, an opinion should be formed that none of the other modes is practicable.

7. Sri Chandrakantaraj Urs, the learned counsel for the department, relied on the decision of the Madras High Court in *Sanjeevi Naidu v. Deputy Commercial Tax Officer* ([1973] 31 S.T.C. 377), where a similar rule, viz., rule 52 of the Tamil Nadu General Sales Tax Rules, 1959, came up for consideration. It is relevant to observe that the matter before the High Court of Madras arose in a writ petition filed by a dealer to quash the recovery proceedings on the ground that there was no valid service of demand notice. Similar argument, as the one advanced by Sri Gandhi, was advanced by the counsel for the petitioner in *Sanjeevi Naidu's* case ([1973] 31 S.T.C. 377), but was rejected. Their Lordships of the Madras High Court stated :

"The modes of service referred to in clauses (a) to (c) are only alternative and not cumulative and, therefore, it cannot be said that all the above three modes have to be exhausted before the service by affixture can be effected under clause (d)."

8. In the said case, service of notice by registered post was attempted, but was unsuccessful and, therefore, service was effected by affixture. In our judgment, the view taken by the High Court of Madras in *Sanjeevi Naidu's* case ([1973] 31 S.T.C. 377) lays down the correct law. The assessing authority, in the very first instance, may direct service of notice by registered post; it is not obligatory that he should first attempt to serve the notice by personal delivery, and if that attempt fails, by the other processes like leaving the notice at the place of the dealer's business or residence, and if that also fails, then issue of the notice by registered post and, after exhausting all those modes of service, then alone service by affixture should be ordered.

9. Rule 53 of the Rules is on the lines of the provisions of rules 12, 13, 17 and 20 of Order V of the Code of Civil Procedure, though they are not exactly alike. Rule 53 is modelled on the principles of the rules contained in the CPC for service of

notice. Service of notice by affixture is substituted service under the Code of Civil Procedure. What clause (d) of rule 53 of the Rules provides is also for service of notice by substituted service. Before ordering substituted service, the assessing authority has to apply its mind and form an opinion that service in any of the modes of service as provided under clauses (a) to (c) is not practicable. Once that opinion is formed by the assessing authority, which it can do only after attempting service by one of the three modes provided earlier, it can order service of notice by substituted service. Such opinion must be formed by the assessing authority and not by a lesser authority like the Inspector of Commercial Taxes or the Bill Collector. The service of a valid demand notice entails serious consequences, as by the failure to comply with the notice by payment of the tax within the due date, the dealer incurs penalty. Therefore, before ordering the service of notice by affixture, it is the duty of the assessing authority to attempt to serve the notice either by personal delivery as contemplated in clause (a) or by sending it by registered post as contemplated in clause (c), and if none of the alternative modes is practicable after having tried it and found it to be unsuccessful, then it may order service by affixture.

10. In the instant case, the learned counsel for the department, has placed the relevant papers before us. There is not material to show that the assessing authority formed the opinion that it was not practicable to serve the notices of demand except by affixture. There was a report made by the Sales Tax Inspector to the effect that service of notices by affixture alone was practicable. What the rule requires is that the assessing authority should form the opinion that service by other modes is not practicable. No such power is conferred on the Inspector. Therefore, we are of the opinion that there is no valid service of the notices of demand on the petitioner. Consequently, the recovery proceedings initiated by the department are premature, and cannot be allowed to proceed.

11. In the course of arguments, there was some discussion as to whether in the recovery proceedings u/s 13(3)(b) of the Act it is open to the dealer to contend that the notice served in one of the modes prescribed under rule 53 is not valid and whether the Magistrate had jurisdiction to decide that question. We do not wish to express any opinion on this matter in the circumstances of the case. Even assuming that the Magistrate had no jurisdiction, the petitioner could have approached this court under article 226 of the Constitution. Instead of driving the petitioner to file a writ petition, we consider it appropriate that relief should be granted in these petitions.

12. Accordingly, we allow these revision petitions and reverse the order of the Magistrate reserving liberty to the department to serve the notices of demand in accordance with law and thereafter proceed to recover the tax. It is ordered accordingly. No costs.

13. Petitions allowed.