
(1976) 02 AHC CK 0012

In the Allahabad High Court

Case No : S.T.R. No. 686, 687 and 688 of 1973

M/S. RAM PRAKASH KAMLESH KUMAR

APPELLANT

Vs

THE COMMISSIONER OF SALES-TAX.

RESPONDENT

Date of Decision : 10-02-1976

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11

Citation : (1976) 5 CTR 140

Hon'ble Judges : Asthana, C.J

Bench : Division Bench

Judgement

Asthana, C.J. - These are three Reference at the instance of the assessee in all of which a similar question of law has been referred for opinion to this Court u/s 11 of the U.P. Sales Tax Act, hereinafter referred to as the "Act". On 28-2-1966 the Sales Tax Officer passed ex-parte orders against the assessee for the years 1962-63, 1963-64 and 1964-65. In respect of these assessments the assessee took two remedies permitted to him by law. He filed three applications u/s 30 of the Act for setting aside the exparte assessment orders. He filed three appeals also u/s 9 of the Act before the Assistant Commissioner (Judicial). The Sales Tax Officer dismissed all the three applications u/s 30 of the Act holding them to be time barred. The Assistant Commissioner (Judicial) however, in the appeals rejected the preliminary objection raised on behalf of the Department and held that the appeals were not time barred as they were filed within the prescribed limit from the date of service of the notice and the copy of the assessment orders on the assessee. On merits, the order of the Sales Tax Officer in respect of all the three years was modified and the turnover was substantially reduced in respect of each year. The Department then went up in revision before the Revising Authority u/s 10 of the Act against the orders of the Appellate Authority in all the three appeals. The main controversy in the revisions centred round the question of limitation. It was contended on behalf of the Department that the notice of the assessment orders and the copies thereof having been served on the assessee on 26-3-1966, the appeals filed on 13-5-1966 were time barred

and the Appellate Authority was in error in holding them as not barred by time. The case of the assessee was that the requisite notice and the copies of the assessment orders were served on him on 15-4-1966, hence the appeals filed on the observations made by the Sales Tax Officer, while dismissing the applications u/s 30 of the Act and observing that the assessee for his own advantage had done away with the original record, held that the requisite service of notice and supply of the copies was affected on 26-3-1966. In the result, he held the appeals time barred, allowed the revisions and set aside the appellate order in respect of all the three years. The assessee then moved the Revising Authority in all the three revisions to send up a reference to the High Court u/s 11 of the Act on the question of limitation. This the Revising Authority refused. The assessee then moved this Court and a reference was called from the Revising Authority in respect of all the three years on the following question :-

"Whether on the facts and in the circumstances of the case the Judge (Revisions) was right in holding that the appeal filed by the assessee was barred by time ?"

In pursuance of the order of this Court, the learned Judge (Revisions) has submitted the statements of the case in all the three references. Since all the three references involved consideration of the same question, they are being disposed of by this common judgment.

2. The main question to be considered is whether there was material on the record before the Revising Authority on the basis of which he could have arrived at a finding that the notice of assessment and the copies of the assessment orders were served on the assessee on 26-3-1966. In the memorandum of appeals before the appellate Authority, the assessee had given 15-4-1966 as the date of service. The Office of the Appellate Authority prima-facie held the memorandum of appeals to have been filed within the prescribed time. The Department filed objection on the ground that the service of the notice of the assessment order and the copy thereof was effected on the assessee on 26-3-1966, hence the appeals filed on 13-5-1966 became time barred, being beyond the 30 days prescribed limit. Before the Appellate Authority no affidavit was filed in support of the objection. The process server was never examined. No affidavit of the process server was even filed nor the Register of the process Server for the years in question was produced. The acknowledgment slips were also not produced. However, the Department relied on the order passed by the Sales Tax Officer while dismissing the applications u/s 30 of the Act. The order is being reproduced below :

"In spite of demands the ledger keeper had not produced the acknowledgment slip. As per entries in the process Server register, the order was served personally on 26-3-1966. The dealer has nothing to say in this connection. His application has not been received within 30 days of the service of order. It is beyond time and is accordingly rejected."

3. The learned Judge (Revisions) on the basis of the observations made by the

Sales Tax Officer that as per entries in the process servers Register, the order was served personally on 26-3-66 and that the memorandum of appeal was prepared much earlier than 15-4-1966, recorded a finding that the assessee has knowledge of the assessment orders much earlier than 15-4-1966 and then proceeded to hold that the service was effected on 26-3-66, explaining away the absence of the primary evidence of service of which the record could furnish the proof by conjecturing that the assessee had done away with the material papers in the original record. The learned counsel for the assessee contended that there was no material on the record which could furnish the legal proof or the proper foundation for recording the finding that the service in accordance with the Rules was effected on the assessee on 26-3-1966. The learned counsel submitted that the burden was on the Department to prove by cogent material on the record that service in accordance with the Rules was effected on the assessee on 26-3-1966 and the Department being in possession of the material document, having failed to produce them, the Revising Authority should have drawn an adverse inference against it instead of putting the blame on the assessee on a mere conjecture that the assessee had done some mischief purloining the record in possession of the Department. The learned Standing Counsel for the Department contended that the observations made by the Sales Tax Officer in his order rejecting the applications u/s 30 of the Act furnishes sufficient material justifying the finding recorded by the Judge (Revisions). His contention was that u/s 10 of the Act while exercising the revisional jurisdiction, the Judge (Revisions) peruses the whole record and the proceedings u/s 30 of the Act, being a part of the record, and the finding recorded in those proceedings, even if not binding, would furnish evidence for basing the finding as recorded by the Judge (Revisions). It was also contended on behalf of the Department that the original burden to show that the appeal were filed within time was on the assessee who was the appellant and he had to furnish the preliminary evidence thereof that the service was effected on 15-4-1966, which he had not done, hence in this view of the matter the finding recorded by the Judge (Revisions) would be justified.

4. We are concerned here with the question whether on the facts and in the circumstances of the case the finding that 26-3-1966 was the date on which the service was effected in accordance with the Rules could legally be arrived at for that would be the crux of the matter. The Rule says that an appellant has to mention the date of service in the memorandum of appeal. As already observed above, the assessee mentioned 15-4-1966 as the date of service of the notice in the memorandum of appeal. We have not referred to any other Rule casting any further burden on the appellant to furnish material in support of the date of the service as given in the memorandum of appeal. The limitation would be calculated by the office of the Appellate Authority on the basis of a date mentioned by the appellant. It is obvious that under the scheme of the Rules on who challenges that the appeal was time barred, having been filed beyond the prescribed time or the date of service, the burden lies on him to establish it. In

the instant case the Department asserted that the service was effected in accordance with the Rules on 26-3-66. It was for the Department then to establish that that was the date of service under the Rules.

5. We have been referred to Rule 77 of the Rule under the Act which deals with the matter of effecting service of notice and the orders under the Act. We are concerned here with clause(a) of Rule 77 as it stood prior to 1974. It envisages that the service of any notice, summons or order under the Act or the Rules may be effected by the giving or issuing a copy thereof to the dealer, or licensee, or his Manager or Agent. We have been referred to any Rule in force at the relevant time which required Register of service to be maintained by the Sales Tax Officer. We are told at the bar that it was the Department practice to maintain a Register of service of notices, summonses and orders by the Sales Tax Officer. Since the maintenance of Register of service was not a matter of law and the Rules, any entry therein would not be legal proof unless it was proved like any other document by the production of the Sales Tax Officer or process Server, who made the entry. No legal presumption would follow from any entry in the said Register. The mode of service as noticed above under Rule 77 was by giving or tendering a copy thereof to the dealer, or licensee, or his manager or Agent. A bare reading of the observations of the Sales Tax Officer, while dismissing the application, u/s 30 quoted above, leaves one guessing as to in what manner the personal service was effected or what was meant by personal service. Moreover, it appears from the insistence of the Sales Tax Officer to have the acknowledgment slips produced that it was the Departmental practice then prevailing that personal service was effected by the process Server and the assessee or his agent had to sign an acknowledgment slip. What happened to the acknowledgment slip, if personal service was effected, has not been explained in a satisfactory manner. The appellate Authority, in our opinion, was right in holding that there was no good and sufficient material furnished by the Department in support of its case that the service in accordance with Rule 77(a) was effected on 26-3-1966. It was always open to the Department to produce the process server himself as a witness who would have been in a position to furnish primary evidence of the fact. Even an affidavit from the process server has not been filed. It would be noticed that the applications u/s 30 of the Act were filed by the assessee on 13-5-1966. Besides this intrinsic weakness pointed out by us in the order of the Sales Tax Officer on the applications u/s 30 of the Act, we have difficulty in holding that this order could be a legal evidence for proving the allegation of the Department in the appeals. However, we leave the matter at that as it is not necessary to go into this legal question, as we having found that even if the said order was admissible as evidence, it does not prove the fact that the service was effected on the assessee on 26-3-1966. We have further no hesitation in holding that the Judge (Revisions) had no warrant to put the blame on the assessee that he had tampered with the official record or had done away with the material record of the case. It is too serious an allegation to be flung which, with respect to the learned Judge (Revisions), he has done cavalierly. His finding is vitiated on

this ground also as he has unnecessarily prejudiced his mind against the assessee without any material on the record.

6. For the reasons given above, we answer the question referred in favour of the assessee and against the Department. Now the Judge (Revisions) will hear the revisions on merits. The assessee will be entitled to his which we assess at Rs. 100/-.