
(1987) 03 AHC CK 0074

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 977 of 1986

Prem Nath Khanna

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 25-03-1987

Acts Referred:

Constitution of India, 1950 — Article 226
Gold (Control) Act, 1968 — Section 113, 113B, 79
Uttar Pradesh Sales Tax Rules, 1948 — Rule 77

Citation : (1990) 26 ECC 306 : (1987) 29 ELT 9

Hon'ble Judges : Ravi S. Dhavan, J;A.N. Varma, J

Bench : Division Bench

Advocate : Ravi Kant, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A.N. Varma, J.—The short question which arises for consideration is whether the petitioner, a licensed gold dealer, was served with the impugned notice u/s 79 of the Gold (Control) Act, 1968 (the "Act" in short) within six months of the seizure of the gold ornaments in question from his possession. The petitioner claims the return of the gold ornaments seized from him on 22.4. 1 986 on the ground that no notice u/s 79 of the Act was given to him within six months of the date of the seizure of the gold ornaments.

2. That the gold ornaments were seized from the petitioner on 22.4.1986 is not disputed. The only dispute is whether the notice u/s 79 of the Act calling upon the petitioner to show cause why the seized ornaments be not confiscated was served on him on or before October 21, 1986. The said notice is stated to have been served by refusal by one Subodh Khanna, the brother as well as an employee of the petitioner concern as well as by affixation on the notice board of the Gold (Control) Officer.

3. The case of the petitioner is that in the first place Subodh Khanna had not refused to accept the notice and secondly, service of notice on Subodh Khanna

could not be treated as valid service on the petitioner, Subodh Khanna being neither the agent of the petitioner nor having been authorised to accept the notice on his behalf.

4. For a proper appreciation of the contention raised the parties, it will be convenient to extract here the relevant provisions, namely, Section 79 and 113 of the Act :-

"79. GIVING OF AN OPPORTUNITY TO THE OWNER OF GOLD ETC. - No order of adjudication of confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing :-

(i) informing him of the ground on which it is proposed to confiscate such good, conveyance or animal or to impose a penalty;

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and, if he so desires, of being heard in the matter:

Provided that the notice and the representation referred to in this section may, at the request of the owner or other person concerned, be oral :-

Provided further that where no such notice is given within a period of six months from the date of the seizure of the gold, conveyance or animal or such further period as the Collector of Central Excise or of Customs may allow, such gold, conveyance or animal shall be returned after the expiry of that period to the person from whose possession it was seized.

EXPLANATION : Where any fresh adjudication is ordered under this Act, the period of six months specified in the second proviso shall be computed from the date on which such order for fresh adjudication is made."

113. Service of Order, decision etc. - Any order or decision passed or any summons or notice issued under this Act, shall be served :

(a) by tendering the order, decision, summons or notice, or sending it by registered post, to the person for whom it is intended or to his agent; or

(b) if the order, decision, summons, or notice cannot be served in the manner provided in Clause (a) by affixing it on the notice Board of the Office of the Gold Control Officer."

5. It is apparent that the statute requires that the notice must be given within a period of six months from the date of the seizure of the gold or such further period as the Collector of Central Excise or if Customs may allow and if no such notice is given within six months or the extension granted by the Collector, the Gold Control Officer is bound to return the ornaments to the person from whose possession they were seized.

6. Learned Standing Counsel appearing for the respondents did not dispute the fact that the Collector had not extended the time in the present case. That being so, the notice u/s 79 had to be given latest by 21.10.1986. It is significant that the statute requires that the notice must be given within six months which clearly implies that the notice u/s 79 has to be delivered within six months and not merely despatched within six months. In *Jewel Palace v. The Collector of Central Excise, Allahabad* Writ Petition No. 1587 of 1976 a Division Bench on this Court by its Judgment dated 6.3.1979 held relying on the *Assistant Collector of Customs Vs. Charan Das Malhotra*, that giving of the notice contemplated u/s 79 means that the notice must be received by the person from whose possession the good is seized within six months. With respect we entirely agree with this decision. The date on which the notice in question was delivered to the petitioner thus becomes all important in this case.

7. We shall first examine the stand taken by the respondents in their counter-affidavit on this issue. In paragraph 23 of the counter-affidavit it is alleged that the show cause notice u/s 79 was sent to the petitioner by registered post on 20.10.1986. Simultaneously, an attempt is stated to have been made to tender the show cause notice to the petitioner personally by the Central Excise Officers on 20.10.1986 by delivery of the show cause notice at his shop. Not finding the petitioner at his shop, the notice was sought to be tendered to his brother Subodh Khanna who looks after the shop in petitioner's absence and is also an employee of the petitioner. Subodh Khanna, however, refused to accept the notice whereupon the show cause notice was pasted at the petitioner's shop in the presence of two independent witnesses who recorded the fact of non-acceptance of the show cause notice by Subodh Khanna. Consequently, as provided u/s 113(B) of the Act, the show cause notice was affixed on the notice board of the Collector of Central Excise/Customs on 20.10.1986. Thus the notice was served on the petitioner within the stipulated period of six months.

8. The petitioner, on the other hand, asserts that no notice was either served or tendered either to him or even his brother Subodh Khanna on 20.10.86. Indeed, the petitioner was away in Bombay on that date. The notice was served on him by registered post only on 24.10.1986. Further, even if it be assumed that Subodh Khanna refused to accept the notice, such a tender of notice could not be regarded as valid service on the petitioner inasmuch as Subodh Khanna was neither an agent nor authorised to receive notices on behalf of the petitioner.

9. Having heard the learned counsel for the parties and given the matter a careful consideration, we are of the opinion that the petitioner was not served with the notice u/s 79 within six months of the date of the seizure of the ornaments. The first thing which strikes us is that the notice was sought to be served on the petitioner for the first time on the very last but one day, i.e., on 20.10.1986. The six months' period was expiring on 21.10.1986. Two modes of services are alleged:-one, by registered post and the other by tender to the brother of the petitioner. The notice sent by registered post was admittedly

delivered to the petitioner only on 24.10.1986. So, it failed to achieve its purpose, namely service within six months. Further, a notice sent by registered post on 20.10.1986 could not be seriously believed to reach the addressee on 21.10.1986, postal efficiency being what it is.

10. The question is whether the other mode namely, tender to the brother of the petitioner is established or proved successful so as to be deemed sufficient compliance with Section 79. In paragraph 15(c) of the rejoinder affidavit, it is emphatically denied that Subodh Khanna had refused to accept the notice. The fact that the refusal by Subodh Khanna was witnessed by two individuals has also been strongly refuted as totally false and concocted (vide paragraph 15(g) of the rejoinder affidavit). Indra Sen Kesarwani, one of the two witnesses alleged to have been present at the petitioner's shop at the time of the said refusal has filed his affidavit denying having visited the petitioner's shop on 20.10.86, much less witnessed the refusal. He says the Assistant Collector, came to his shop and coerced him into signing some papers under the threat of punitive action. Being a licenced gold dealer he gave in. The petitioner further states that the names of the witnesses not having been disclosed in the counter affidavit, the petitioner could not have the version of the other supposed witness.

11. The respondents have not cared to meet these very categorical assertions made by the petitioner in the rejoinder affidavit even though the court had invited them to do so if they so desired.

12. In this state of the record service by refusal by the petitioner's brother has not been proved to our satisfaction.

13. However, even assuming that the notice was tendered to Subodh Khanna and that he declined to accept the same, in our opinion, such a tender could not, in the facts of the present case, be regarded as a valid service on the petitioner. The petitioner's categorical assertion that Subodh Khanna is not his agent nor authorised to accept notice on his behalf has remained uncontroverted. All that the respondents have alleged in the counter affidavit is that he is an employee in the petitioner's shop and was looking after it in his absence. This by itself cannot validly justify the conclusion that Subodh Khanna was an agent of the petitioner authorised to accept notice on the latter's behalf.

14. In the case of Jewel Palace (Supra) the Division Bench examined the facts of that case and came to the conclusion that the tender of the notice to the petitioner's employee could not be deemed a valid tender to the petitioner. The Division Bench placed reliance on another Division Bench decision of this Court in the case of Mahabir Prasad Amrit Lal v. Commissioner Sales Tax U.P. 1976 U.P.T.C. 328 and quoted the following passage from that decision with approval:

"There is distinction between an agent and "servant". A servant acts under the direct control and supervision of his- master and is bound to conform to all reasonable orders given to him in the course of his work, while an agent, though bound to exercise his authority in accordance with all lawful instructions which

may be given to him from time to time by his principal is not subject in its exercise to the direct control or supervision of the principal. As such an agent is not a servant but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant.... In the absence of a finding that one "J" the servant had been authorised by the dealer to receive notice on his behalf or that he was agent of the dealer for this purpose. The mere fact that "J" was the servant of the dealer would not entitle him to accept the notice. As such the service of notice on the servant was not sufficient compliance with Rule 77, of the U.P. Sales Tax Rules."

(Emphasis added)

15. It is true that agency can be express or implied. Agency can also be inferred from the relevant facts and circumstances which may go to establish that the employee looking after the business of a dealer was acting as his agent and was authorised to receive notices on behalf of the dealer. Each case will, therefore, have to be examined on its facts. In the present case, however, as mentioned above, apart from the fact that Subodh Khanna is an employee of the petitioner and was looking after the shop in the absence of the petitioner according to the respondents, nothing else has been brought on the record which might sustain the plea that he was an agent of the petitioner authorised to receive notices on his behalf. That being so, the alleged tender of the notice to Subodh Khanna could not be regarded as service on the petitioner.

16. It must be borne in mind that a seizure effected under the Gold Control Act has serious implications in that it deprives the dealer, even if temporarily, the use of the ornaments and the right to transact any business in respect thereof. The power of seizure founded on a mere reasonable belief is undeniably an extraordinary power. The precipitation of a period of limitation under the second proviso to Section 79, therefore, in the context conveys an anxiety on the part of the Legislature that the seizure should not last beyond reasonable limits which the Legislature has put at six months from the date of the seizure. It is for this reason that the power of extension of time has been vested in the Collector, an officer superior in rank and also an appellate authority. Viewed in this legislative background the duty to give notice to the dealer u/s 79 must be construed strictly. The notice must be given to the dealer himself or to someone who may be authorised, either expressly or by necessary implication, to receive notice on behalf of the dealer. Applying this approach to the present case we are not satisfied that the petitioner was given the notice u/s 79 within the prescribed period of limitation.

17. This brings us to the question whether affixation of notice in the office of the Collector of Central Excise may be treated as an effective service u/s 79. From a perusal of Section 113 it seems clear to us that the alternative course prescribed thereunder can be resorted to only if the notice can not be served in the manner provided under clause (a) of Section 113. The words "cannot be served" seem to imply that the recourse may be had to the alternative mode of service under

clause (b) only if it is not feasible or practicable to serve notice by tendering it or by sending it by registered post to the person concerned. Recourse to clause (b) is not prescribed as an alternative mode to that prescribed under clause (a). It is only if the notice cannot be served under clause (a) that the authorities can take resort to the alternative mode under clause (b).

18. In the present case the authorities waited till the very last day before despatching the notice by registered post. The attempt to effect personal service was also made only on 20.10.86, that is, just one day before the period of six months was expiring. Admittedly, no previous attempt was made to serve the petitioner indeed, the notice itself is dated 20.10.86. That being so, affixation of the notice on the notice board of the office of the Gold Control Officer on 21.10.86 was of no avail to the respondents. It cannot be said that the notice could not be served under clause (a).

19. The result of the aforesaid discussion, therefore, is that the petitioner has clearly become entitled to the return of the seized ornaments in terms of the second proviso of Section 79 of the Act.

20. Learned counsel for the petitioner made an attempt to take us through the merits of the ground on which the notice u/s 79 has been issued to the petitioner. We, however, refrain from expressing any opinion on the merits of these grounds as the petitioner has already filed his objections and the same are pending consideration before the Gold Control Officer. Further the petitioner has a right of appeal against the ultimate order of confiscation if and when the same is passed.

21. Lastly, the learned counsel submitted that if no notice is given u/s 79 within six months of the date of seizure the authorities cannot legally proceed with the case even in regard to the matter of confiscation. The second proviso to Section 79 merely entitles a person from whose possession the gold is seized to the return of the ornaments. The language of Section 79 or the scheme of the Act does not justify the conclusion that if the notice is not served within six months the proceedings for confiscation ipso facto or automatically lapse. We, however, do not wish to pronounce finally on the validity of this argument at this stage. If and when an order of confiscation is eventually passed against the petitioner, it would be open to him to take this plea by way of appeal and failing that by way of a petition in this court under Article 226 of the Constitution.

22. In the result, the petition succeeds and is allowed. The respondents are directed to return the ornaments seized from the petitioner's possession on 22.4.1986 forthwith. The petitioner shall be entitled to their costs.