

(1955) 07 KAR CK 0001
In the Karnataka High Court
Case No : Criminal Appeal No. 36 of 1954

Public Prosecutor

APPELLANT

Vs

Mullangi Soolappa

RESPONDENT

Date of Decision : 22-07-1955

Acts Referred:

Madras General Sales Tax Rules, 1939 — Rule 28, 28B

Citation : AIR 1955 Kar 151 : (1955) CriLJ 1614 : (1956) 7 STC 22

Hon'ble Judges : Sreenivasa Rau, J; Hombe Gowda, J

Bench : Division Bench

Advocate : Advocate General, for the Appellant; V. Krishnamurthi, for the Respondent

Judgement

1. This is an appeal preferred by the Public Prosecutor on behalf of the State of Madras in the High Court of Madras against the judgment dated 14-2-1953 in C. A. 31/53 on the file of the Sessions Judge, Bellary, acquitting the accused in reversal of the decision of the Additional District Munsiff cum First Class Magistrate, Bellary, in C.C. No. 97/52 convicting the respondent of offences punishable under S. 15(b) of the Madras General Sales Tax Act, 1939, as he failed to pay sales tax of Rs. 3,264-0-6 under the final assessment for the year 1950-51 and also sales tax of Rs. 3,531/- under the provisional assessment for the year 1951-52 on or before the specified date.

In pursuance of Section 41(2) of the Andhra State Act, 1953, the Chief Justice of Madras transferred the appeal to the High Court of Mysore.

2. In the trial Court, the accused contended that he had not been duly served with copies of the notices in respect of the final and provisional assessments in question in accordance with the provisions of Rule 28, Madras General Sales Tax Rules, and that the accused having been provisionally assessed to sales tax for the year 1951-52 as late as 12-2-1954 when the year was virtually nearing its end and called upon to pay the tax on or before 21 days from the date of service of the demand notice which was served on him on 3-3-1952, he was deprived of

the benefit provided under the Act for payment of the provisional tax in instalments and that the prosecution was therefore vitiated by the said two vital defects.

Neither of these contentions found favour with the learned trial Magistrate who convicted the accused as mentioned above and sentenced him to pay a consolidated fine of Rs. 350/- and in default to undergo simple imprisonment for two months and two weeks apart from the payment of the final tax and the provisional tax which were to be recovered as fine.

3. The accused preferred an appeal to the Court of Sessions, Bellary Division. Before that Court he also urged that the assessment was "ultra vires" of the Act. The appellate Court rejected the second contention on the ground that it had not been raised before the trial Court, refusing to accede to the argument that the said contention was covered by a memo dated 14-11-1952 filed on behalf of the accused.

As regards the first contention, the learned Judge held that the service of the notices in question was not in conformity with Rule 28, Madras General Sales Tax Rules, and this defect exonerated the accused from the operation of Section 15 (b) of the Act since, in the absence of a valid service of the notices, no question of failure to pay within the time allowed could arise.

He, therefore, set aside the conviction and acquitted the accused. The State of Madras appealed against this decision challenging the correctness of the appellate Court's view in regard to the validity of the service of the notices in question.

4. Rule 28, Madras General Sales Tax Rules, is as follows:

"The service on a dealer or licensee of any notice, summons or order under the Act or the Rules made thereunder 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 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."

5. In the present case the notices purport to have been served on the assessee by tendering them to one Maranna, the clerk of the accused. The prosecution has sought to prove this fact by examining P.W. 4, a peon under the Assistant

Commercial Tax Officer. He says in the course of his evidence that he served the assessment orders and notices on the two occasions on Maranna, a clerk of the accused. In the course of the cross-examination he says that he did not see the accused and that the clerk said that he had authority to receive the notices. P. W. 4 admits that he did not ask the clerk whether such authority was in writing. Exhibits P-3 and P-4 have been produced by the prosecution as acknowledgments in respect of the two notices. Ex. P-3 contains writing which purports to be the signature of Maranna, the clerk of the accused.

There is no specific indication as to what the signature is intended for. This acknowledgment is stated to be in relation to the final assessment for 1950-51. Ex. P-5 also contains writing purporting to be the signature of Maranna, clerk of the accused. This signature, however, is below the printed statement reading "received the above A-2 notice from the Deputy Commercial Tax Officer, Bellary-1."

This acknowledgment is stated to be in respect of provisional assessment for 1951-52. As the evidence of P.W. 4 is uncontroverted, it may be taken as proved that the notices intimating to the accused the two assessments as also the time for payment were served on Maranna, a clerk of the accused.

6. The point for consideration is whether such service fulfils the requirements of Rule 28 quoted above. Rule 28 (a) enables service of the notice on the assessee or his manager or agent. Rule 28 (b) enables service" of the notice by leaving it at the assessee's place of business or residence or by tendering it to an adult member of the assessee's family only after the assessee or his manager or agent is not found.

Sub-clauses (c) and (d) of Rule 28 do not arise for consideration in this case. There is no evidence that the assessee was not found. All that P.W. 4 says is that he did not see the accused. He does not say that he asked for the accused or that he tried to find him and being unable to do so, left it at the accused's shop. Hence Rule 28 (b) also does not apply to the case.

Rule 28 (a) would apply if the clerk Maranna could be regarded as the assessee's manager or agent. It is quite possible that a clerk may also function as the manager or agent of his employer, but this has to be established by evidence. P.W. 4 has no doubt stated that Maranna said that he had authority to receive the notices. Maranna has not been examined and what he told P. W. 4 is not admissible evidence. There is no other evidence bearing on the point.

In the absence of any such evidence, the clerk's functions must necessarily be regarded as being confined to the purpose of his employment, i.e., to do clerical work, namely, to keep records or accounts or to have charge of correspondence. The position of manager or agent necessarily implies much greater responsibility and it is on this account that the rule advisedly invests such a functionary with a representative character for the purpose of tendering notice.

It is hardly necessary to say that to treat every employee as the manager or agent of the employer irrespective of the scope of employment would lead to untoward consequences, particularly in a matter involving taxation and the penal enforcement of its levy. It must, therefore, be held that the tendering of the notices to the assessee's clerk cannot be regarded as proper service under Rule 28.

It is urged by the appellant that this plea was not raised by the accused in answer to the question put to him. But it will be seen from what is mentioned above that the evidence adduced by the prosecution itself does not establish proper service and it was quite in order for the accused to put forward the contention in question on the basis of the prosecution case put forward by them.

7. It is also urged that the assessee had accepted the service as sufficient and had preferred all appeal from the order of assessment. There is no material to show that there was any such acceptance by the assessee, nor can it be inferred from his preferring an appeal from the assessment order. In preferring an appeal he was only availing himself of a remedy which was open to him and that step could not imply his acceptance of the service of notice.

8. Proper service of the notices under Rule 28 not having been effected in this case and such service being the foundation for any penal action u/s 15(b) of the Act, it follows that the prosecution has to fail.

9. The decision of the learned Sessions Judge must, therefore, be upheld. This appeal is accordingly dismissed.

10. Appeal dismissed.