(1981) 09 OHC CK 0007

In the Orissa High Court

Case No : S.J.C. No''s. 210 and 211 of 1976

Santosh Singh APPELLANT

Vs

State of Orissa RESPONDENT

Date of Decision : 18-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17
Orissa Sales Tax Act, 1947 — Section 24(2)(b)

Citation : (1982) 53 CLT 219 : (1982) 50 STC 373

Hon'ble Judges : R.N. Misra, C.J;R.C. Patnaik, J

Bench : Division Bench

Advocate : R.B. Roy and D.K. Mohapatra, for the Appellant; Standing Counsel (S.T), for the Respondent

Judgement

R.N. Misra, C.J.—On the application of the assessee, this Court u/s 24(2)(b) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the "Act"), directed the following question to be referred to this Court for its opinion :

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that there had been appropriate service of the orders of assessment on the assessee as provided under Rule 84(1) of the Orissa Sales Tax Rules ?

2. The short facts are :

The assessee preferred an appeal against the original assessment. The first appellate authority dismissed the appeal on the ground of limitation by saying that the appeal had not been filed within the statutory period from the date of service of the order of assessment. The assessee had contended that there was no service at all of the order of assessment and the first appellate authority had disposed of this aspect by saying :

3. It is now to be considered whether the appeal under the provisions of the Act can be admitted after the prescribed period. It is contended by the learned

Advocate that the appellant is not aware of the service of the assessment order and demand notices on 20th January, 1973. He was, therefore, shown the endorsement of the process peon wherein it is reported that as the appellant refused to sign the A. D. the same was served in the presence of two witnesses, on 20th January, 1973. As this service is a valid service under the provisions of the Civil Procedure Code, the date of service of the notice is taken as 20th January, 1973." According to the statutory provisions the appeal should have been filed by 19th February, 1973, at the latest. But instead, the appeal has been filed on 27th December, 1974. Since it is beyond my power to condone the delay, the appeal petition is summarily rejected as being barred by limitation and hence not maintainable under the law.

3. The Tribunal in second appeal accepted the fact that there was service.

4. Rule 84(1) of the Orissa Sales Tax Rules provides:

A notice or requisition under the Act or the Rules may be served on the person therein named either by registered post or as if it were a summons issued by a court under the Code of Civil Procedure, 1908 (5 of 1908)....

5. Admittedly, the procedure adopted for serving the order of assessment here was the second one and not through registered post. The question for consideration is whether the bare report of the employee in the department who was entrusted with the duty of serving the order of assessment can be taken as compliance with the requirements in the Code of Civil Procedure. The relevant rules are Rules 17 and 19 of Order 5 of the Code and they provide :

Rule 17.-Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Rule 19.-Where a summons is returned under Rule 17, the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

6. Admittedly, no steps have been taken by the Sales Tax Officer to comply with the procedure indicated in Rules 17 and 19 of Order 5 of the Code, in the instant case. The position, therefore, is whether the report of the serving officer shall be taken as gospel truth when the assessee denies that there was any offer of the order of assessment to him. Since the mandatory provision in Order 5 of the Code which applied has not been complied with, we are inclined to agree with the assessee''s submission that there was no valid service of the order of assessment, and therefore, the first appellate authority was not correct in dismissing the appeal as barred by limitation on the ground that it had not been presented within 30 days from the date of service of the order of assessment. The Tribunal went wrong in adopting the same reasonings to hold that the dismissal was proper.

6. We accordingly answer the question in favour of the assessee by saying that there had been no valid service as provided under Rule 84(1) of the Orissa Sales Tax Rules so far as the orders of assessment are concerned. The assessee shall have his costs. Hearing fee is assessed at Rs. 100 (one hundred).

R.C. Patnaik, J.

7. I agree.