

(1981) 04 CAL CK 0038
In the Calcutta High Court
Case No : Matter No. 413 of 1972

Textile Machinery Corporation Ltd.

APPELLANT

Vs

Additional Member, Board of Revenue

RESPONDENT

Date of Decision : 23-04-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17
Income Tax Act, 1922 — Section 33B

Citation : 85 CWN 932 : (1981) 48 STC 426

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : R.N. Bajoria and Samir Chakraborty, for the Appellant; Sanjay Bhattacharjee and Amal Baran Chatterjee, for the Respondent

Judgement

Sabyasachi Mukharji, J.—The dealer, Textile Machinery Corporation Ltd., in this case is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941, carrying on business in various textile machinery goods.

2. While assessing the dealer for the year ending 31st December, 1960, under the said Act, the Commercial Tax Officer, Lyons Range, by his order dated 14th March, 1964, included the sale proceeds of canteen and old machinery goods, disallowed the dealer's claim for deduction u/s 5(2)(a)(ii) of the Act to the extent of Rs. 1,28,689.00 and also imposed a penalty of Rs. 3,000 u/s 11(1) of the Act. Against the assessment order the dealer filed an appeal before the Assistant Commissioner of Commercial Taxes, Chowringhee Circle, who, by his order dated 27th July, 1966, partly allowed the dealer's claim and modified the assessment order.

3. Against the aforesaid order of the Assistant Commissioner the dealer filed a revision petition before the Additional Commissioner of Commercial Taxes, West Bengal. The Additional Commissioner of Commercial Taxes, West Bengal, by his order dated 28th February, 1970, rejected the revision petition and confirmed the order dated 27th July, 1966, of the Assistant Commissioner, Commercial

Taxes.

4. Thereupon the dealer filed a revision petition before the Board of Revenue, West Bengal, against the order dated 28th February, 1970, of the Additional Commissioner, Commercial Taxes, West Bengal, u/s 20(3) of the Act. The dealer also filed a petition for condonation of delay in filing the revision petition dated 12th April, 1971, before the Board of Revenue. We will have occasion to refer in detail to the application filed as also the order passed in this connection. The Additional Member, Board of Revenue, West Bengal, who dealt with the case did not find any reasonable ground to condone the delay and by his order dated 17th August, 1971, rejected the revision petition on the ground that the revision petition filed before the Board of Revenue, West Bengal, was time-barred.

5. There was an application u/s 21 of the Act by the dealer for a reference to this Hon"ble High Court on certain questions of law. The Additional Member, Board of Revenue, having refused to make such a reference the dealer made an application before this Court. As directed by this Court u/s 21(3) of the Act, the following questions have been referred to this Court:

(i) Whether, on the facts and circumstances of the case, the Board of Revenue was justified in rejecting the petitioner's application for revision as barred by limitation ?

(ii) Whether, on the facts and in the circumstances of the case, the Board of Revenue was right in holding that the purported service of notice in form 26 of 11th May, 1970, was valid in law ?

6. The aspect which requires consideration is the second question, that is to say, whether the purported service of notice in form 26 on 11th May, 1970, was valid in law ? In order to consider this aspect it would be appropriate to refer to the relevant portion of the application filed by the dealer. There the dealer had stated that the place of business of the dealer was at 15, India Exchange Place, Calcutta, but the same was lying totally closed for more than a year from about January, 1970, due to what the dealer described as illegal strike of the employees of the dealer and their consequent gherao of the said place of business. The dealer had therefore no other alternative but to carry on his normal business, according to the dealer, from the remaining place of business at P. O. Belgharia, 24-Parganas, and paying regular taxes after filing of the quarterly returns and duly complying with all other notices of the said directorate for the purpose of hearing of the assessment cases, appeal, revision petitions, etc. The dealer further stated that the Additional Commissioner of Commercial Taxes, West Bengal, heard revision cases Nos. 612 of 1966-67 and 613 of 1966-67 in respect of the assessment for the four quarters ending 31st December, 1960, under the Bengal Finance (Sales Tax) Act, 1941, and the Central Sales Tax Act, 1956, respectively on 16th February, 1970, but the dealer did not receive from the Additional Commissioner of Commercial Taxes any intimation or notice of disposal of the said two revision cases for the same

assessment year, addressed to him a letter on 17th December, 1970, from the other place of his business at Belgharia, 24-Parganas, for favouring him with his intimations in form 26 about the disposal of the said revision cases. In reply thereto the learned Additional Commissioner of Commercial Taxes sent to the dealer on 16th January, 1971, an intimation in form 26 dated 11th January, 1971, about the disposal of revision case No. 513 of 1966-67 only in respect of the assessment for the 4 quarters ending 31st December, 1960, under the Central Sales Tax Act, 1956. About the disposal of the remaining revision case No. 512 of 1966-67 in respect of the assessment for the 4 quarters ending 31st December, 1960, under the Bengal Finance (Sales Tax) Act, 1941, the learned Additional Commissioner of Commercial Taxes addressed the dealer a letter dated 11th January, 1971, which was received on 11th January, 1971, stating most surprisingly that he had already served on the dealer an intimation in form 26 on 29th April, 1970, about the disposal of the said revision case by affixation at the said totally closed place of business of the dealer at 15, India Exchange Place, Calcutta-1, on 11th May, 1970. It is also stated by the Additional Commissioner of Commercial Taxes that as the intimation in form 26 sent to 15, India Exchange Place, by registered post with A/D returned unserved with postal remark "left", he served the same on 11th May, 1970, by affixation at the same address. The dealer therefore submitted that this was wrong because the authorities concerned were always aware that the petitioner had another place of business at Belgharia and the intimation of the Central sales tax case was intimated to the Belgharia address and the petitioner has been regularly paying tax. So, there has been no proper service by affixation at 15, India Exchange Place, as alleged or purported to be done. In any event, the dealer prayed that there is a delay in filing the revision petition. The delay should be condoned.

7. This matter was disposed of by the Additional Member, Board of Revenue. In disposing of the matter he observed, inter alia, as follows :

The learned lawyer of the petitioner was heard by the learned Additional Commissioner, Commercial Taxes, on 25th February, 1970. Intimations were duly sent up to the registered office of the firm at 15, India Exchange Place. The learned lawyer for the petitioner has argued that as no employee was allowed to enter into their above office since January, 1970, the notice and intimation sent up to the office was not received by them. It was the duty of the firm to ascertain the result of the hearing of the case, but that was not done till 6th July, 1970, when a letter was addressed to the office of the Additional Commissioner of Commercial Taxes requesting the latter to inform the result of hearing. Subsequently on 17th December, 1970, another letter was sent to the learned Additional Commissioner of Commercial Taxes to intimate the result of hearing of the revision petition No. 512 of 1966-67 before the Additional Commissioner of Commercial Taxes. The learned Additional Commissioner of Commercial Taxes sent a copy of the order on 11th January, 1971, which was received by the firm on 16th January, 1971.

The learned lawyer for the party has argued that as their registered office at 15, India Exchange Place, was closed since January, 1970, and as the intimation of the order was received by them at their workshop on 16th January, 1971, the delay in submitting the revision petition before the Board might be condoned.

Although the registered office at 15, India Exchange Place, was closed down since January, 1970, the firm should have enquired of the result of the revision petition filed before the learned Additional Commissioner of Commercial Taxes in time and the Commercial Tax Officer ought to have been intimated of the difficulty of entering into the office at 15, India Exchange Place, by any employee of the firm, instead of waiting for about four and half months and sending another letter after about 10 months from the date of hearing. I do not therefore find any reasonable ground to condone the delay in submitting the revision petition.

8. It is apparent that the fact that the registered office at 15, India Exchange Place, was closed down as alleged by the dealer was not controverted and the Additional Member, Board of Revenue, proceeded on that basis. The Additional Member, Board of Revenue, has stated that the dealer should have enquired of the result after the hearing of the case and it was negligent on his part to wait for four months and write a letter to the authorities about the disposal and then again write another letter after about 10 months. Therefore, there is no ground for condonation of delay and the application was rejected.

9. We have, therefore, to consider whether the service of notice on the dealer on 11th May, 1970, was proper service or not. It is apparent that the service of notice on 11th May, 1970, was served by affixation. Rule 84 of the Bengal Sales Tax Rules provides for service of notice. The said rule reads as follows:

Rule 84. (1) Any notice which is issued under the provisions of the Act or these Rules or which is required to be issued for carrying out the purposes of the Act may be served on a dealer by any of the following methods, namely :-

(i) personally upon the addressee, if present;

(ii) by messenger ;

(iii) by registered post:

Provided that if the authority issuing the notice is satisfied that an attempt has been made to serve a notice by any one of the above-mentioned methods and the dealer is avoiding service or that for any other reason the notice cannot be served by any of the above-mentioned methods, the said authority may, after recording his reasons for so doing, cause such notice to be served by affixing a copy thereof in some conspicuous place in his office and also upon some conspicuous part of the last notified place of business of the dealer, and a notice so served shall be deemed to have been duly served.

(2) When a notice is sent by a registered post, it shall be deemed to have been

received by the addressee at the expiry of the period normally taken by a registered letter in transit unless the contrary is proved.

10. It is more or less in the same terms as Order 5, Rule 17, of the Code of Civil Procedure. It enjoins, primarily service must be upon the addressee personally present, otherwise by messenger or by registered post. In this case admittedly the letter sent by the registered post with A/D had come back with the remark "left". Therefore, there was no proper service by registered post. The authorities concerned were aware of the same. Therefore, they purported to serve the notice by affixation. Before affixation under Rule 84 it has to be found that the dealer was avoiding service. If by the fact that the notice had come back with the remark "left" it can be presumed that the dealer was avoiding service, then there could not be affixation at that place without finding what is the other address of the dealer. In this case admittedly there is other address on the record. Quite apart from this there was no attempt made to fulfil the condition required under the proviso to Rule 84 before affixation could be effected. The fact that the place was closed since 1970 was accepted by the Additional Member, Board of Revenue, as recited in his order. Therefore, in our opinion, it is abundantly clear from the facts as found by the authorities below there is non-compliance of Rule 84 and the service on 11th May, 1970, was not valid in law.

11. The learned Advocate for the revenue, however, contended that whether there was valid service in law or not is primarily and essentially a question of fact. Therefore, according to him, when the authorities below have found that there was proper service, no question of law as such arose. He drew our attention to the observations of the Supreme Court in the case of Commissioner of Income Tax, West Bengal III and Others Vs. Ramendra Nath Ghosh, , where the Supreme Court was dealing with an appeal from the decision of the Calcutta High Court. The Calcutta High Court in that case was concerned with whether notice u/s 33B of the Indian Income Tax Act, 1922, had been served by the Commissioner before passing an order. The Division Bench of the Calcutta High Court, hearing an appeal from the decision of the learned single Judge, heard the matter on evidence and was satisfied on the evidence adduced by the process-server that there was non-compliance of the requirements of law, viz., Order 5, Rule 17, of the Code of Civil Procedure. While accepting that finding of the Calcutta High Court and upholding the order of the Calcutta High Court, the Supreme Court observed that a question whether an assessee had been served in accordance with the law or not was essentially a question of fact. The Income Tax Act provided for an appeal against the order passed u/s 33B. Normally the assessee should have gone up u/s 33B of the said Act. In this case, the facts are quite different. In the instant case before us, the assessee had gone before the Board of Revenue which is the authority and the authority after it had found that the conditions required to be fulfilled for the applicability of Rule 84 had been fulfilled, then it might well be argued that this might be a question of fact and unless the finding of fact was challenged as perverse based on evidence, no such question of law would arise. Here, it appears from the order of the Additional

Member of the Board of Revenue that, having accepted the position that the office of the dealer was closed at the relevant time, the Board had considered whether the dealer should have enquired about the passing of the order or whether he should have written earlier or not. There is no advertence or no finding as to the conditions required to be fulfilled for the application of the proviso. In that view of the matter, it cannot be said that this was essentially a question of fact.

12. Whether there has been a service in compliance of the law depends on the aspect on which the non-service is alleged. If the authorities were the fact-finding authorities advertent to this aspect arrived at certain facts, then those facts would primarily and essentially be question of fact. But if in arriving at a decision that there has been a valid service, the authorities concerned had not adverted their attention to the material aspect and gone on an irrelevant aspect, that does not remain any longer a question of fact but assumes a question of law. It is, for this reason, perhaps, this Court had directed reference on these two questions.

13. Our attention was also drawn to certain observations of a Division Bench of this Court in the case of Income Tax Officer, "I" Ward and Others Vs. B.N. Bhattacharya, , where the question was an appeal against a writ decision of a learned single Judge whether there was valid service u/s 34 for reopening under the Indian Income Tax Act, 1922. We had examined the affidavit of the process-server, the records of the Income Tax department and it was found that there was due compliance of Order 5, Rule 17, of the Code of Civil Procedure. In that context, we had observed that whether in a particular case there were proper and substantial efforts or whether reasonable efforts had been made to serve or find the person to be served with a notice before service by affixation is effected depended on the facts and circumstances of the case. In that case, we had found that there were substantial facts upon which the Income Tax Officer had directed the service to be effected by affixation. But, in this case, as we have mentioned before, these facts were not adverted to.

14. The learned Advocate for the revenue sought to urge that the dealer in the instant case was trying to shift the liability of finding out the dealer on the authorities. That is not the question. The question is whether an order was passed upon valid service made and conditions required by Rule 84 of the Bengal Sales Tax Rules being complied with or not. Our attention was drawn to the observations of Basu, J., in the case of Kali Prosad Poddar v. Additional District Magistrate, Howrah [1976] 2 C.L.J. 98, in aid of the proposition whether there has been valid service or not is a question of fact. As we have mentioned before, it depends on the aspect on which the validity of the service is challenged.

15. In that view of the matter, in the facts of the case and for the reasons mentioned before, we are of the opinion that the purported service of notice in form 20, on 11th May, 1970, was not valid in law. In the premises, the question No. (ii) must be answered in the negative and in favour of the dealer. In that

view of the matter, question No. (i) must automatically be answered in the negative and in favour of the dealer.

16. For the questions being answered in the negative and in favour of the dealer and, in the facts and circumstances of the case, there will be no order as to costs.

Sudhindra Mohan Guha, J.

17. I agree.