
(1991) 02 AP CK 0021

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 28 of 1991

Venkateswara Talkies

APPELLANT

Vs

Appellate Deputy Commissioner and Others

RESPONDENT

Date of Decision : 15-02-1991

Acts Referred:

Andhra Pradesh Entertainment Tax Rules, 1939 — Rule 52

Citation : (1992) 193 ITR 746

Hon'ble Judges : I. Panduranga Rao, J

Bench : Single Bench

Advocate : S. Dasaratharama Reddi, for the Appellant; Government Pleader, for the Respondent

Judgement

1. Panduranga Rao, J.—This revision is filed by the assessee u/s 9D of the Andhra Pradesh Entertainment Tax Act, 1939 (hereinafter referred to as "the Act"), challenging the order dated October 19, 1990, of the Entertainment Tax Appellate Deputy Commissioner passed in Appeal No. R-4 of 1990-91 relating to the assessment for the quarters ending June 30, 1984, to March 31, 1986. The brief facts leading to the filing of the above revision petition are as follows :

2. The petitioner is an exhibitor of films at Pithapram, East Godavari District, paying tax u/s 4(1) of the Act. The petitioner filed returns before the Entertainment Tax Officer for the quarter ending June 30, 1984, to March 31, 1986. The petitioner filed a revision alleging that, after filing the returns, no communication was received by him regarding the assessments; that no show-cause notice or any notice of other nature was received by the managing partner; that he was under the impression that the returns filed were accepted; that, suddenly, an order of attachment of the theatre was communicated to the petitioner in May, 1989, by the Deputy commercial Tax Officer; that the petitioner was informed that the said attachment order was in pursuance of the best judgment assessment orders of the Deputy Commercial Tax Officer dated May 11, 1987, determining the tax due from the petitioner for all the six

quarters; that the petitioner applied to the Deputy Commercial Tax Officer for copies of the assessment orders which were supplied on January 23, 1990, and that the Deputy Commercial Tax Officer has arbitrarily determined the tax due based on the best judgment assessments. It is further alleged that, aggrieved by the order of the Deputy Commercial Tax Officer, the petitioner filed appeals before the Appellate Deputy Commissioner, Kakinada, on January 29, 1990, showing the date of service of the order as January 23, 1990; that the petitioner received an endorsement by the Appellate Deputy Commissioner dated June 26, 1990, rejecting the admission of the appeals on the ground that the filing of the appeals on the ground that the filing of the appeals has been delayed by 3 years, 10 months and 3 days; that the petitioner immediately wrote to the Appellate Deputy Commissioner on August 23, 1990, pointing out that no show-cause notice was issued to the petitioner nor was any opportunity given for being heard; that the petitioner, while resubmitting the appeal papers, requested the Appellate Deputy Commissioner to give him an opportunity for hearing and to consider the admission of the appeals as they were filed within time and that further an endorsement dated October 19, 1990, was received stating that as the appeals have already been rejected, no further action is required.

3. The Entertainment Tax Officer, Pithapuram, filed a counter-affidavit pleading that the petitioner was assessed to tax u/s 4 (1) of the Act for six quarters from June 30, 1984, to March 31, 1986, excluding the quarters ending September 30, 1984, and December 31, 1984, after issuing show-cause notices which were got served by affixture on refusal to take the notices when sent in person and by registered post with acknowledgment due; that, when the petitioner did not file any objections to the show-cause notices, the assessment orders for the six quarters were passed and got served by affixture on June 6, 1987, since the petitioner refused to receive the same when sent in person and by registered post with acknowledgment due; that thus, the petitioner was fully aware of the fact that he was assessed to entertainment tax for the six quarters in question and that he has to pay the tax accordingly; that if the petitioner was really aggrieved by the assessment orders of the Deputy Commercial Tax Officer, Kakinada, he ought to have preferred an appeal before the Entertainment Tax Appellate Deputy Commissioner, Kakinada, within 30 days from June 6, 1987; that, against the assessment orders which were got served by affixture on June 6, 1987, the petitioner preferred appeals on January 31, 1990, before the Entertainment Tax Appellate Deputy Commissioner, Kakinada, who dismissed the same on June 26, 1990, as the appeals were barred by limitation; that, as there were no stay orders, the amounts are collectable; that the Entertainment Tax Officer ha addressed the Joint Collector, Kakinada, on November 26, 1990, through the Commercial Tax Officer, Tuni, requesting him to attach the properties of the exhibitor under the Revenue Recovery Act when the demand notices to the petitioner for payment of the tax did not evoke any response; that, upon the instructions of the Joint Collector, Kakinada, the Mandal Revenue Officer, Pithapuram, issued Form No. 1 notice on January 8, 1991, under the Revenue

Recovery Act to the petitioner for attachment of the properties of the theatre and that the action of the Mandal Revenue Officer is in accordance with law.

4. It is asserted in the counter-affidavit that the contention of the petitioner that he had no knowledge of the assessment of the six quarters is a totally false and misleading statement in view of the fact that the assessment orders and demand notices were got served by affixture at the door of the office of the theatre on June 6, 1987, when he refused to receive the same and dismissal of the appeal by the Entertainment Tax Appellate Deputy Commissioner, Kakinada, is legally valid and correct.

5. On the facts alleged by the petitioner in the revision petition and by the Entertainment Tax Officer in the counter-affidavit, the only short point that arises for consideration in this revision petition is :

"Whether the affixture of the assessment orders for the six quarters in question on June 6, 1987, is a proper service as contemplated under the Act or the rules framed thereunder ?"

6. Learned counsel for the petitioner-assessee, relying upon rule 52 (d) of the Andhra Pradesh Entertainment Tax Rules, 1939 (hereinafter referred to as "the Rules"), argued that the said rule contemplates the procedure of service of notice, summons, order or proceedings in four modes provided in clauses (a) to (d) and that the procedure of service contemplated under clause (d) can be resorted to only when the procedure of service contemplated by clauses (a) to (c) are found impracticable. Rule 52 (a) provides for giving or tendering the notice to the proprietor or person or his manager or his agent. Clause (b) of the said rule provides that, if such proprietor or person or his manager or his agent is not found, by leaving the notice at his last known place of business or residence or by giving or tendering it to some adult member of his family. Clause (c) lays down that, if the address of the proprietor or person is known to the Entertainment Tax Officer, by sending it to him by registered post. Finally, clause (d) provides that, if any or all of the modes aforesaid is not practicable, by affixing it in some conspicuous place at his last known place of business or residence.

7. Learned counsel for the petitioner, relying upon a Division Bench decision of the Allahabad High Court in Gopal Das Uttam Chand v. STO 1970 25 STC 229, argued that, when the Rule provides for four alternative modes of service of notice, the service by affection provided for by clause (d) can be resorted to only if none of the other modes is practicable. Learned counsel argued that the other modes should be tried first and that unless it is shown that none of the other modes is practicable, recourse cannot be taken to the mode of service mentioned in clause (d). To appreciate that contention, reference to section 77 (d) of the U. P. Sales Tax Rules, 1948, which provides for the various modes of service is necessary. Section 77 (d) lays down that, if none of the modes aforesaid is practicable, the service of notice may be effected by affixing a copy thereof in

some conspicuous place at his last known place of business or residence. Having regard to the special wording used in clause (d), the learned judges have held that a plain reading of rule 77 of the U. P. Sales Tax Rules shows that four alternative modes of service mentioned in clauses (a) to (d) have been provided; that clause (d), however, provides that the service by affixation can be resorted to only if none of the other modes is practicable; it follows, therefore, that whenever recourse is desired to be taken to the mode of service mentioned in clause (d), the other modes should be tried first, unless it is shown that none of the other modes was practicable.

8. In the case before the Allahabad High court in *Gopal Das Uttam Chand v. STO* 1970 25 STC 229, the process-server has taken the notice to the assessee for personal service as contemplated by clause (a) and as the assessee's shop was found closed and the process-server was unable to ascertain the whereabouts of the assessee, he affixed the notice on the shop of the assessee. The assessment order does not show that the remaining modes mentioned in clauses (b) and (c) were tried. The process-server was instructed by the Sales Tax Officer that in case the former was not able to effect personal service upon the assessee, he could resort to service by affixation. Their Lordships held that such a procedure is not warranted by law; that whether a particular mode is practicable or not is a matter to be decided by the Sales Tax Officer and that if the Sales Tax Officer, after applying his mind to the facts of the case, expresses an opinion that service by other modes was not practicable, then it was legitimate for him to have ordered the service to be effected through affixation. Their Lordships further held that rule 77 of the U. P. Sales Tax Rules casts a duty on the Sales Tax Officer services by such of the modes enumerated in that rule as may appropriate to him and that the choice of the mode cannot be left to the discretion of the process-server. Their Lordships further clarified that the question as to whether the modes enumerated in clauses (a) to (c) of rule 77 are practicable or not is a question which can be decided by the Sales Tax Officer alone after examining the facts obtained in a particular case and that he cannot anticipate the facts and form an opinion beforehand so as to give instructions to the process-server to effect service under clause (d) without reporting the matter to him. The same view is confirmed by another Division Bench of the Allahabad High Court in *Sri Krishna Chandra v. State of U. P.* 1972 29 STC 635 holding that the mode of service by affixation could be resorted to only if none of the other modes was practicable; that, in that case, service by affixation was resorted to in the first instance without trying the other modes and that such a service could not be held to be valid, being contrary to rule 77 of the U. P. Sales Tax Rules.

9. Learned counsel for the petitioner also placed reliance upon another division of the Allahabad High Court in *Kunwar Industries v. STO* 1983 53 STC 385 which lays down that service by affixture should not be resorted to unless it is not possible to effect service in any of the modes mentioned in clauses (a) to (c) of rule 77 of the U. P. Sales Tax Rules; that the words in clause (d) that "if none of the aforesaid modes is practicable" is significant; that it has to be decided

objectively and cannot be assumed; that the officer or authority resorting to the mode of service by affixation is the weakest mode of service; that it has to be resorted to in exceptional circumstances and that that is why rule 77 provides for service by affixation if service by no other method is practicable.

10. As against the above rulings relied upon by learned counsel for the petitioner, the learned Government Pleader for Commercial Taxes relied upon the decisions of the Karnataka High Court and the Madras High Court in support of his case.

11. A Division Bench of the Karnataka High Court, while considering the scope of rule 53 (d) of the Karnataka Sales Tax Rules, 1957, held in *Manusukhlal A. Shah v. State of 1975* 35 STC 465 Mys that, before ordering the service of notice by affixture, it is the duty of the assessing authority to attempt to serve the notice either by personal service/delivery as contemplated in clause (a) or by sending it by registered post as contemplated in clause (c) and if none of the alternative modes is practicable after having tried it and found it to be unsuccessful, then it may order service by affixture. The Division Bench further held that the opinion that service in any of the modes provided under clauses (a) to (c) is not practicable must be formed by the assessing authority and not by a lesser authority like the inspector or the bill collector. In arriving at that view, the Division Bench of the Karnataka High Court has followed the decisions of the Madras High Court in *Sanjeevi Naidu v. Deputy CTO* [1973] 31 STC 377 which interpreted the scope and effect of clause (d) of rule 52 of the Tamil Nadu General Sales Tax Rules, 1959. The Division Bench, while holding that various modes of service referred to in clauses (a) to (c) of rule 52 are only alternative and not cumulative and, therefore, it cannot be said that all the above three modes have to be exhausted before the service affixture can be effected under clause (d), held that where the service contemplated under clause (c) (service by registered post) was found to be ineffective, the assessing authority would be justified in proceeding to serve the assessment order by affixing it in the assessee's place of business under clause (d).

12. On a careful consideration of the decisions of the Allahabad High Court, the Karnataka High Court and the Madras High Court referred to above, I am of the view that the decisions of the Allahabad High Court, *Gopal Das Uttam Chand Vs. Sales Tax Officer*, ; *Sri Krishna Chandra Vs. The State of Uttar Pradesh*, and *Kunwar Industries and Another Vs. The Sales Tax Officer*, holding that service of notice by affixture should not be resorted to unless it is not possible to effect the service in any of the modes mentioned in clauses (a) to (c) of rule 77 of the U. P. Sales Tax Rules, are based upon the specific wording used in clause (d) of that rule which is as follows (see [1970] 25 STC 229, 230) :

"If none of the modes aforesaid is practicable, by affixing a copy thereof in some conspicuous place at his last known place of business or residence."

13. Clause (d) of the above rule will, therefore, come into operation only if none of the modes mentioned in clauses (a) to (c) is practicable. But the wording used

in rule 52 (d) of the Rules is not identical with the wording used in rule 77 (d) of the U. P. Sales Tax Rules. Rule 52 (d) of the Rule runs as follows :

"If any or all of the modes aforesaid is not practicable, by fixing it in some conspicuous place at his last known place of business or residence."

14. The wording in clause (d) of rule 52 of the Rules requires that an attempt should be made to effect service on the assessee by any or all of the modes mentioned in clauses (a) to (c) of the said rule. If any or all of the modes mentioned in clauses (a) to (c) is not practicable, then it is open to the assessing authority to effect service by affixture. Having regard, therefore, to the different wording used in rule 52 (d) of the Rules, I hold that the reasoning given by and the decision arrived at by the three Division Benches of the Allahabad High Court has no application to the facts of this case.

15. On the other hand, having regard to the specific wording used in rule 52 (d) of the A. P. Rules, I hold that it is sufficient for the assessing authority to resort to any or all of the modes mentioned in clauses (a), (b) or (c) as a condition precedent for invoking the procedure prescribed under clause (d) and that it is not necessary that all the modes prescribed in clauses (a) to (c) should be exhausted before the assessing authority decides to invoke the procedure prescribed under clause (d) to effect service by affixture.

16. The next point that remains for consideration is :

"Whether the assessing authority has exercised his discretion in this case before resorting to the procedure prescribed under rule 52 (d) of the Rules for effecting service by affixture ?"

17. Even the decisions of the Allahabad High Court referred to above Gopal Das Uttam Chand Vs. Sales Tax Officer, ; Sri Krishna Chandra Vs. The State of Uttar Pradesh, and Kunwar Industries and Another Vs. The Sales Tax Officer, , have categorically held that whether a particular mode is practicable or not is a matter to be decided by the assessing authority and that if the said authority, after applying his mind to the facts of the case before him, expresses an opinion that service by other modes is not practicable, then he can order service to be effected through affixture. It is held in Gopal Das Uttam Chand Vs. Sales Tax Officer, , that the assessing authority cannot exercise his judgment before the facts are brought to his notice, i.e., he cannot anticipate the facts and form an opinion before and so as to give instructions to the process-server to effect service contemplated under clause (d) of rule 77 of the U. P. Sales Tax Rules without reporting the matter to him (assessing authority) and that, therefore, it is not open to an officer to instruct the process-server to serve the notice by affixation in case his attempt to effect personal service failed. Their Lordships held that the officer or authority resorting to the mode of service by affixation has to form an opinion and it cannot be anticipated; that, in between, there has to be application of mind that such application of mind could not be done beforehand. Since there was no application of mind by the Sales Tax Officer

before ordering service of notice by affixture, the Division Bench held that the failure to serve the notice in accordance with law resulted in rendering the proceedings without jurisdiction. Even the Karnataka High Court held in Mansukhlal's case [1975] 35 STC 465 that, before ordering the service of notice by affixture, it is the duty of the assessing authority to attempt to serve the notice either by personal delivery or by sending it by registered post and that the opinion that service in any of the modes provided under clauses (a) to (c) of rule 53 of the Karnataka Sales Tax Rules lesser authority like the inspector or the bill collector. Thus, the judicial opinion is uniform that it is the assessing authority that has to apply its mind and come to the conclusion that the mode of service prescribed under clauses (a) to (c) is not practicable but it cannot delegate that discretion to any of its subordinates like the inspector or the bill collector of much less to a process-server as is done in the present case.

18. The counter-affidavit does not disclose that, after the assessee refused to receive the assessment orders when sought to be served upon him by the process-server, that fact was brought to the notice of the Deputy Commercial Tax Officer. The said Deputy Commercial Tax Officer after applying his mind to the facts of the case has decided to effect the mode of service under the procedure prescribed in rule 52(d) and then empowered the process-server to effect service by affixture. The learned Government Pleader has produced the records relating to the assessments in question. The records contain the endorsements of the process-server with regard to each assessment that since the partners of Sri Venkateswara Talkies refused to receive the orders, the copies of the assessment orders were affixed on the wall of the office room of Sri Venkateswara Talkies, on the wall of Sri Devarapalli Suranna's house and on the wall of Sri Devarapalli Narayana Rao's house on June 6, 1987. The file relating to the assessment for the quarter ending June 30, 1984, also contains a cover addressed to Devarapalli Suranna which shows that a registered letter with acknowledgment due was despatched on June 4, 1987, and it contains an endorsement dated June 5, 1987, that as the addressee was not in town, the said letter was kept in deposit for two days. It contains another endorsement dated June 8, 1987, that the notice was refused. The file relating to the assessment for the quarter ending March 31, 1985, contains a cover addressed to Sri Devarapalli Venkata Ramana Murty, managing partner of Sri Venkateswara Talkies containing the endorsements dated June 5, 1987, June 6, 1987 and June 8, 1987, to the effect that the addressee was absent. The cover contains a further endorsement dated June 9, 1987, that the addressee was avoiding to take delivery and hence returned to the sender. The file relating to the assessment for the quarter ending June 30, 1985, contains a cover addressed to Dr. Devarapalli Narayana Rao, M. B. B. S., a partner of Sri Venkateswara Talkies, bearing endorsements dated June 5, 1987, June 6, 1987 and June 8, 1987, that the addressee was absent and a further endorsement dated June 9, 1987, that he has refused to take the notice. The files relating to the assessments for the quarters ending September 30, 1985, December 31, 1985 and March 31, 1986, contain covers addressed to

Devarapalli Venkata Ramana Murthy, managing partner of Sri Venkateswara Talkies, bearing endorsements dated June 5, 1987, June 6, 1987 and June 8, 1987, that the addressee was absent. The covers bear further endorsements dated June 9, 1987, that the addressee was avoiding to take delivery and hence returned to the sender. The above documentary evidence clearly shows that simultaneous modes of service were resorted to by the assessing authority which is not contemplated by rule 52 of the Rules.

19. As I had discussed earlier, there is no material on record to show that, after the alleged refusal of notices by the managing partner or the other partners of the assessee-theatre, that fact was brought to the notice of the assessing authority and that the assessing authority after satisfying himself that the modes of service as contemplated under clauses (a) to (c) of rule 52 are not practicable has ordered service of notice by affixture. The process-server has endorsed on October 14, 1986, that, since the proprietor has refused to take the notice, he has effected service of the notice by affixture. But, as seen from the record, the assessee is not a proprietary concern. The letters addressed to Devarapalli Venkata Ramana Murthy who is the managing partner and to Suranna, who is a partner of the theatre, show that it is a partnership concern. The endorsements of the process-server do not specify on whom he has sought to serve the notices and who has refused to receive the notices.

20. From the above discussion, I find on the point that the affixture of the assessment orders for the six quarters in question on June 6, 1987 is not a proper service as contemplated under the Act or the Rules framed thereunder.

21. The civil revision petition is, therefore, allowed setting aside the order of the Entertainment Tax Appellate Deputy Commissioner, Kakinada, dated October 19, 1990, passed in Appeal No. R-4 of 1990-91. The Entertainment Tax Appellate Deputy Commissioner, Kakinada, is directed to entertain the appeals filed by the petitioner against the best judgment assessments for the quarters for the quarters ending June 30, 1984, to March 31, 1986, excluding the assessments for the quarters ending September 30, 1984, and December 31, 1984, and dispose of the appeals on merits. Since the appeals have been rejected by the Appellate Deputy Commissioner, the petitioner is directed to represent the appeals within two weeks from the date of receipt of a copy of this order. There shall be however, no order as to costs. There shall be stay of collection of tax till the stay petition to be filed by the petitioner is disposed of by the appellate authority.