Allahabad High Court
Kumaon Tractors And Motors vs Commissioner Of Sales Tax on 7 April, 1998
Equivalent citations: 1998 111 STC 675 All
Author: R Gulati
Bench: R Gulati
JUDGMENT R.K. Gulati, J.

1. This revision has been filed under Section 11 of the U.P. Sales Tax Act, 1948 (now called U.P. Trade Tax Act) (hereinafter referred to as "the Act"), and is directed against the order dated March 15, 1990 passed by the Sales Tax Tribunal, Bench I, Bareilly.

2. The revisionist, Kumaon Tractors and Motors, Bareilly, in the assessment year 1971-72, which is in dispute, was a partnership-firm constituted by two partners and it carried on business as a main dealer of Tractors and Farms Equipments Ltd. The said firm, hereinafter referred to as "the assessee", was assessed to sales tax by an assessment order dated August 30, 1974 for the year in dispute on the disclosed turnover of Rs. 14,41,545.54. Subsequent to the assessment order the Sales Tax Officer (S.I.B), Bareilly came across certain information, which indicated that some taxable turnover relating to the said assessment year had escaped assessment and was not returned by the assessee as a part of its taxable turnover. Acting on the said information, the assessing authority took proceedings under Section 21 of the Act with a view to bring to tax the turnover which had escaped assessment. It may be pointed out that as a result of the reconstitution of the assessee-firm, it stood dissolved with effect from May 31, 1972 and a new partnership-firm started functioning at the place of business where the erstwhile firm carried on its business earlier. The notice under Section 21 for reassessment for the year in question was issued in the name of the erstwhile firm at the address where it carried on its business before its discontinuance. The notice under Section 21 was issued for the first time on March 22, 1976 fixing March 24, 1976 for appearance as a date for hearing. However, this notice was returned unserved by the process-server with his report that he had met the manager of the firm who refused to accept the notice after going through its contents by saying that the notice would be received by the owners of the firm. Another notice was sent on March 24, 1976 fixing March 26, 1976 and it was also returned unserved by the process-server with a report that he had met an employee of the firm who stated that the notice could be accepted by the partners of the firm alone who were stated to be out of station. Thereafter a third notice dated March 27, 1976 was issued under Section 21 fixing March 30, 1976 which was served by affixation as the service of that notice was also refused. In due course, in pursuance of the notice under Section 21 aforesaid, the reassessment order was completed and an additional turnover of Rs. 8,50,000 was brought to tax over and above the turnover assessed under the original assessment order.

3. The record of the case indicates that before the assessment was completed, the assessee appeared before the assessing authority and contested the validity of the service of notice under Section 21 by affixture and demanded cross-examination of the process-server which was not granted due to paucity of time as the assessment was shortly becoming barred by time.

4. Against the reassessment the assessee preferred an appeal where the reassessment order was set aside and the proceedings were remanded for fresh assessment to the assessing authority in the light

of the directions given in the appellate order amongst others that the assessee will be allowed an opportunity to cross-examine the process-server. In pursuance of the remand, a fresh assessment order was passed on November 11, 1978 and the escaped turnover of Rs. 8,50,000 was again brought to tax making the assessee liable to a tax liability of Rs. 44,000. The assessee again preferred an appeal before the Assistant Commissioner (Judicial), Sales Tax, Bareilly, where the validity of proceedings under Section 21 of the Act were upheld but the assessed turnover was reduced to Rs. 6 lakhs. Against the appellate order the assessee as well as the Revenue filed cross-appeals before the Sales Tax Tribunal. The case of the Revenue was that no reduction in the turnover assessed was called for, whereas, the complaint of the assessee was that proceedings under Section 21 were not valid, inasmuch as, the notice under that provision was not served in accordance with law in terms of Rule 77 of the Rules framed under the Act, called "U.P, Sales Tax Rules, 1948". The Tribunal by its common order dated December 23, 1986 dismissed the appeal filed by the Revenue and that of the assessee was allowed with the following observations :

".....The record of the case also goes to show that the assessee-firm consisted of two partners and this firm was dissolved on May 31, 1972 and another firm at this place was started on June 1, 1972. The alleged service was effected on March 29, 1976 when the old firm had been dissolved and it appears that the fact of the dissolution was in the knowledge of the department. The notice under Section 21 was sent at the address where the old firm did not exist and a new firm was conducting business. No notice was sent at the residential address of the partners of the firm. The address of the partners of the firm was available on the assessment file. The process-server has taken the notice at the place of the new firm and it appears that the employees of the reconstituted new firm had refused the notice. The cross-examination of the process-server also makes it clear that the names of the persons who had refused to accept the notice was not known. No evidence of affixation is available. It is clear that affixation was made on the firm at a place where the firm did not exist. No notice was sent at the residential address which was available in the assessment file. In these circumstances, we are of the opinion that the service of notice was improper and in this connection the assessee is fully supported by the principles of law laid down in the case of Kunwar Industries v. Sales Tax Officer, Sector I, Ghaziabad [1983] 53 STC 385 (All.). Since no notice was served so the assessment order under Section 21 is liable to be annulled. The assessee's appeal succeeds."

5. Against the order of the Tribunal, the Revenue preferred a revision before this Court which was decided on April 6, 1989 by a learned single Judge of this Court. The revision was allowed in part. The order of the Tribunal was set aside and the matter was remanded to the Tribunal for its fresh consideration. From the order passed by this Court, it would be evident that the learned counsel then appearing for the assessee had conceded that on facts of the case there was no other mode possible than to serve the notice under Section 21 by affixation. This Court held that there was no material available on record to indicate that the residential addresses of the partners of the assessee-firm were available to the assessing authority or on the records of the case and the notice under Section 21 could have been sent to them on their residential addresses. The findings recorded by the Tribunal that the service by affixation was invalid, as no notice was sent at the residential address of the partners of the firm, were set aside by this Court. However, as already stated, the matter was remanded to the Sales Tax Tribunal with the following directions :

"I am of the opinion that it is not correct to say that the proper address of the partners of the firm was available on the assessment file and in my opinion, the order of the Tribunal cannot appear to be correct. The counsel for the Revenue as well as the assessee both have placed reliance on a Division Bench decision of this Court in Bipin Bihari Lal Gupta v. Sales Tax Officer, Sector II, Agra reported in 1973 UPTC 53. Without expressing any opinion on merit, I would like to mention that the Tribunal has in fact not properly applied its mind to the true import of Rule 77 and was misled by the facts that the addresses of the partners were available on the record and as such I feel that the Tribunal should be directed to decide the appeal afresh keeping in view the language used under rale 77 of the Rules and also in view of the law laid down by this Court in Bipin Bihari Lal Gupta 1973 UPTC 53."

6. When the Tribunal took up the matter again in pursuance of the order passed by this Court, it dismissed both the cross-appeals by a common order, which is the subject-matter of this revision. The Tribunal held that the service of notice under Section 21 by affixation was valid. The process-server had affixed the notice in terms of the directions issued by the assessing authority and there was nothing wrong with it. As regards the quantum of turnover, the Tribunal found no ground for interference with the order of the first appellate authority. Feeling still aggrieved, the assessee has preferred this revision against the order of the Tribunal as stated earlier.

7. Heard learned counsel for the parties.

8. At the outset, it may be stated that although the order under revision has been challenged on diverse grounds in the memorandum of revision, but during the course of arguments the learned counsel for the revisionist-assessee pressed for only one ground that service effected by affixation was not in accordance with law because the assessing authority could not have issued instruction beforehand to the process-server to effect affixation without reporting the matter to it. Now the importance of service of notice for assessment or reassessment under Section 21 of the Act in respect of any escaped turnover cannot be minimised. In absence of a valid notice under the said provision, the entire proceedings taken in pursuance thereof may fall through. The service of a notice for taking proceedings under Section 21 of the Act is not a procedural requirement but a condition precedent.

9. In Laxmi Narain Anand Prakash v. Commissioner of Sales Tax [1980] 46 STC 71 ; 1980 UPTC 125 a Full Bench of this Court held that mere issuance of notice under Section 21 of the Act was not sufficient. The jurisdiction to proceed under Section 21 could be exercised only if condition precedent was satisfied and notice for assessment or reassessment under Section 21 was not only issued but validly served on the assessee. If no notice is issued or the notice is shown to be invalid, or no notice has been served on the dealer, the proceedings and the consequential order under Section 21 will be illegal and void irrespective of the fact that the dealer gets knowledge of the proceedings under Section 21 of the Act.

10. Rule 77 of the U.P. Sales Tax Rules, 1948 provides for service of notice, summons, etc., under the Act. Sub-rule (1) of the said rule which alone is relevant for the purposes of this case and as it stood at the material time, read as under :

"Rule 77. Modes of service.--(1) The service of any notice, summons or order under the Act or the Rules may be effected in any of the following ways, namely--

(a) by giving or tendering a copy thereof to the dealer or his manager, accountant or agent or one of his employees ; or

(b) if such dealer or his manager, munim, accountant or agent cannot easily be found, by leaving a copy thereof at the last known place of business or residence of the dealer, or by giving or tendering it to some adult male member of the dealer's family ; or

(c) if the address of such dealer is known to the Sales Tax Officer, by sending a copy thereof to him by a registered post ; or

(d) if none of the modes aforesaid is practicable, by affixing a copy thereof in some conspicuous place at the last known place of business or residence of the dealer."

11. An explanation was added to the said Rule retrospectively with effect from April 1, 1975 by an amendment which was effected in the year 1980, The explanation inserted was to the following effect :

"Explanation.--For the purposes of this rule, the expression 'last known place of business' in relation to a discontinued business includes the last known place of business of the dealer where the business was carried on before its discontinuance."

12. Now the above provisions prescribe service of notice, (a) by giving a copy to the dealer or manager, etc., i.e., personal service ; (b) by leaving it at the last known place of the business or residence or to some adult male members of the dealer's family ; (c) by registered post if the address was known and, the last mode is by affixation under Clause (d) of Rule 77 which enacts that "if none of the modes aforesaid is practicable, by affixing a copy thereof in some conspicuous place at the last known place of business or residence of the dealer". Service by affixation is the substituted mode of service and has been held as weakest mode of service. It could be resorted to in exceptional circumstances. The expression "if none of the modes aforesaid is practicable" in Clause (d) is significant and clearly suggests that the officer or authority before resorting to affixation has to form an opinion objectively that the service by other modes in terms of Clauses (a) to (c) of Sub-rule (1) of Rule 77 is not practicable. To put it differently, if the authority has attempted to serve the notice by other modes and it has reasonable ground to believe that the addressee is evading service or that service of notice cannot be effected on the addressee by other methods, then the said authority may cause the notice to be served by affixation. The provisions with which we are concerned, had been the subject-matter of adjudication before this Court on more than one occasion. It has repeatedly been held that the service by affixation should be resorted to only if it is not possible to effect the service by any other manner enumerated in Clauses (a) to (c) of Rule 77 of the Rules aforesaid.

13. In Gopal Das Uttam Chand v. Sales Tax Officer, Dehra Dun [1970] 25 STC 229 a Division Bench of this Court consisting of honourable Mr. Justice R.S. Pathak (as his Lordship then was) and

honourable Mr. Justice R.L. Gulati, while explaining Rule 77 held as under :

"A plain reading of this rule shows that four alternative modes of service mentioned in Clauses (a) to (d) have been provided. 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.

.....

Now, whether a particular mode is practicable or not is a matter to be decided by the Sales Tax Officer and if the Sales Tax Officer after applying his mind to the facts of the case expressed the opinion that service by other modes was not practicable, it was legitimate for him to have ordered the service to be effected through affixation. But that has not been done in the instant case. What appears to have happened is, as is evident from the order of the appellate authority, that the process-server was instructed by the Sales Tax Officer that in case the latter was not able to effect personal service upon the assessee, he could resort to service by affixation. We are of opinion that such a procedure is not warranted by law. Rule 77 casts a duty upon the Sales Tax Officer to effect service by such of the modes enumerated in that rule as may appear appropriate to him. The choice of the mode cannot be left to the discretion of the process-server. At any rate the question as to whether the modes enumerated in Clauses (a) to (c) are practicable or not is a question which can be decided by the Sales Tax Officer alone after examining the facts obtaining in a particular case. He cannot exercise his judgment before the facts are brought to his notice. In other words, 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. In the instant case it was not open to the Sales Tax Officer to have instructed the process-server to serve the notice by affixation in case his attempt to effect personal service failed."

14. To the similar effect is the decision of another Division Bench of this Court in the case of Bipin Bihari Lal Gupta v. Sales Tax Officer 1973 UPTC 53.

15. Now, before proceeding further, it may also be mentioned that in the instant case a notice under Section 21 of the Act was also sent under registered cover. It is not disputed that as the law then stood a notice under Section 21 of the Act could be issued within a period of four years from the assessment year in question. Thus, in the present case, service of the notice under Section 21 beyond 31st March, 1976 was barred by limitation. The question for consideration is whether the service by affixation on facts of the case was in accordance with rale 77. It has been seen earlier that personal service under Clause (a) could not fructify as the process-server had returned the notices unserved on two different occasions. An attempt to serve the notice by registered post within limitation also proved ineffective. It is not a case where before ordering substituted service, the assessing authority had not applied its mind and formed an opinion that service of notice by other modes contemplated under Clauses (a) to (c) was not practicable. Once that opinion was formed by the assessing authority having unsuccessfully attempted to serve the notice by other modes, there was no legal hindrance in the way of the assessing authority to direct the process-server to serve the notice by

affixation. The contention that service of notice was not in accordance with law, has no merits.

16. Likewise, the second limb of the contention that the assessing authority was not justified in issuing instructions beforehand to the process-server to affix the notice without reporting to him, is stated to be rejected. The decision in the case of Bipin Bihari Lal Gupta v. Sales Tax Officer 1973 UPTC 53 on which reliance was placed by the learned counsel for the assessee is clearly distinguishable. In that case, the process-server had been instructed to resort service by affixation in case he was unable to effect personal service on the addressee. This factual position has been clearly stated in that case and is evident from the following observations made by the court :

"In the instant case the process-server reported that as the petitioner was not available and his father who met him did not disclose his whereabouts and he himself refused to accept the notice, he affixed the notice on the residence of the petitioner in accordance with some order given to him by the Sales Tax Officer beforehand. This was clearly not permissible."

17. It is clear from the facts of that case that the Sales Tax Officer had not applied his mind to the question whether the service of notice was possible by other modes set out in Clauses (a) to (c) of Sub-rule (1) of Rule 77 of the Rules. The choice of mode of service was left at the discretion of the process-server without requiring him to report the outcome of personal service which he was directed to attempt at first instance.

18. In the instant case, substituted service was not resorted to without application of mind about the non-practicability of serving the notice by other modes. When the assessing authority directed service by substitution it had before it two earlier reports of the process-server that personal service of the notice was returned unserved on March 22, 1976 and March 24, 1976. Service by registered post was also uncertain for want of complete address of the partners. This position is not in dispute in view of the earlier pronouncement of this Court when the matter was remanded to the Sales Tax Tribunal for fresh consideration in the light of the directions given in the order dated April 6, 1989 passed by this Court. The limitation for service of notice was expiring shortly on March 31, 1976 when the substituted service was ordered. In the background of these facts, the assessing authority had hardly any other option but to resort to Clause (d) of Rule 77 having exhausted the other modes of service provided under Clauses (a) to (c) and realising the futility of attempting service by those modes. The process-server was also cross-examined by the revisionist-assessee. The Sales Tax Tribunal has returned a finding that nothing was obtained on cross-examination. The contention of the learned counsel for the assessee that the earlier notices were not refused by the proper person, cannot be accepted for the simple reason that no such plea was raised at any earlier stage and the question sought to be raised before this Court is purely one of fact which cannot be gone into for the first time by this Court in exercise of its revisional jurisdiction. The second contention is also rejected. The order under revision does not suffer from any infirmity whatsoever and this revision is devoid of merits.

19. Before parting with the case, it may also be pointed out that a Division Bench of the Karnataka High Court in Manusukhlal A. Shah v. State of Mysore [1975] 35 STC 465 and a Division Bench of the Madras High Court in A. Sanjeevi Naidu v. Deputy Commercial Tax Officer [1973] 31 STC 377

while dealing with the respective corresponding sales tax provisions of those States which are in pari materia to Rule 77 of the U.P. Sales Tax Rules, 1948 have expressed somewhat a different view, namely, that before ordering affixation, it is the duty of the assessing authority to attempt service of notice either by personal 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 having tried and found it to be unsuccessful, then it may order service by affixture. In other words, the modes of service referred in Clauses (a) to (c) are only alternative and not cumulative and, therefore, it cannot be said that all the three modes had to be exhausted before service of affixation under Clause (d). However, it is not necessary for the purposes of the present case to dwell upon the View expressed by the Madras and Karnataka High Courts because as stated earlier, the order under revision is perfectly valid and it is hereby sustained.

20. In the result, the revision fails and is dismissed. Stay order dated April 6, 1990 is discharged.