

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SALES TAX REFERENCE NO.53 OF 2009
IN
REFERENCE APPLICATION NO.35 OF 2004

The Commissioner of Sales Tax,
Maharashtra State, 8th Floor,
Vikrikar Bhavan, Sardar Balwant
Singh Dhodi Marg, Mazgaon,
Mumbai – 400 010.

.... Applicant

- Versus -

Sunil Haribhau Pote,
Proprietor of
M/s. Sunil Haribhau Pote,
Station Road, Baramati,
Dist: Pune.

.... Respondent

Ms Jyoti Chavan, Asstt. Government Pleader, for
the Applicant-State.
None for the Respondent.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : MARCH 21, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. The Tribunal has referred the following questions of

law for opinion and answer of this Court:-

“(a) Whether on the facts and circumstances of the case and on true and correct interpretation of the provisions contained in rule 68 of the Bombay Sales Tax Rules, 1959, the Tribunal was justified in law in holding that the Revision notice dated 26.11.2002 calling the appellant for hearing on 27.01.2003 was not properly served as per the said provisions in Rule 68 and that therefore the entire revision-proceedings got vitiated to render the revision order as void and bad in law?

(b) Whether on the facts and circumstances of the case and on true and correct interpretation of the provisions in rule 68 of the Bombay Sales Tax Rules, 1959, and having regard to the rulings of the Patna High Court judgment in the case of M/s. Judagi Sao and Another (116 STC 106) and the Orissa High Court judgment in the case of M/s. Mahabir Prasad Agrawalla (79 STC 163), the Tribunal was justified in holding that the revision-notice dated 26.11.2002 calling the appellant for hearing on 27.01.2003 was not properly served, when in fact the said notice was properly sent by R.P.A.D. to the appellant's place and the same was returned by the postal authorities with the remarks regarding the appellant's having refused to accept it?

(c) Whether on the facts and circumstances of the case and on true and correct interpretation of the provisions in rule 68 of the Bombay Sales Tax Rules, 1959, the Tribunal was justified in holding that the revision notice dated 26.11.2002 calling the appellant for hearing on 27.01.2003 was not properly served for the reason of the pasting of the notice having been made without the satisfaction of the notice-issuing

authority (i.e. the Revising Deputy Commissioner), when in fact the said notice issuing-authority on being aware of the postal authorities' remarks regarding the appellant's refusal to accept the notice, had on necessary application of mind sent the notice to the Pune Sales Tax Office for necessary service as per Rule 68?

(d) Whether on the particular facts and circumstances of the case and on true and correct interpretation of the provisions in rule 68 of the Bombay Sales Tax Rules, 1959, the Tribunal was justified in holding that the satisfaction of the 'Sales Tax Authority concerned' as contemplated in the proviso to sub-rule (1) of the said Rule 68 is essentially of the notice-issuing authority and not of the authority which has been entrusted with the job of serving the notice?"

Although various questions have been formulated, we do not see any reason for answering each of them.

2. There is a very limited controversy before us. The statement of fact denotes that, one Sunil Haribhau Pote, the respondent before us, is the proprietor of a sole proprietary concern. He was the original appellant in Appeal No.94 of 2003, decided on 31-1-2004. He is engaged in the manufacture and sale of edible oils. He is duly registered under the provisions of the Bombay Sales Tax Act, 1959 (for short, "the BST Act"). He

was assessed for the Financial Year 1991-92 under the BST Act by virtue of the Assessment Order, dated 20-1-1995, passed by the Sales Tax Officer, Pune. Being aggrieved by the levy of tax on the sale of motor vehicle and interest under Section 36(3)(a) and Section 36(3)(b), he filed an appeal against the Assessment Order before the Assistant Commissioner of Sales Tax (Appeals), Pune. The appellant/sole proprietor could not remain present before this Appellate Assistant Commissioner. Hence, the appeal was dismissed for non-prosecution on 16-12-1996. No Second Appeal was filed against this order. However, during the pendency of the appeal, the sole proprietor's business premises were visited by the Enforcement Branch for certain investigation. On scrutiny of the books of account for the relevant period, the Enforcement Branch Officials noticed that the same proprietor had purchased oil from certain dealers situated at Manwat and Selu of Parbhani District worth Rs.95,03,825/-. The vendors' statements were recorded by the Enforcement Branch Officers which reveal that these vendors did not carry on any genuine business activity. Therefore the claims

of exemption made by the sole proprietor on the basis of the invoices issued by these vendors were untenable in law. In the light of these revelations, the Department proposed to reassess the sole proprietor under Section 35 of the BST Act. That was because of the findings in the investigation and visit. Accordingly, a reassessment notice in Form 28 for the aforesaid period was issued and there was an order passed on 15-11-1996 under Section 70 of the BST Act. That order was for transfer of proceedings. On the proceedings being transferred, the Competent Officer issued necessary notice to the sole proprietor and eventually passed an order of reassessment, dated 9-6-1999. That was in terms of the power conferred by Section 35 of the BST Act. The total demand of Rs.1,44,71,441/- was confirmed. Being aggrieved by this order, the sole proprietor filed an appeal before the Assistant Commissioner of Sales Tax (Appeals), Worli, Mumbai. In that it was contended that the reassessment order had already merged into the first appellate order and by virtue of which it stood confirmed. In that view of the matter the reassessment is bad in law. The Appellate Assistant

Commissioner accepted this background and on 28-3-2000 allowed the sole proprietor's appeal. He set aside the order of reassessment.

3. Thereafter, the Deputy Commissioner of Sales Tax (Admn.), Worli Division, Mumbai noticed that the appellate order, dated 28-3-2000, was not on merits. Since the appellant did not attend the appeal proceedings, it was only dismissed for want of prosecution. The Deputy Commissioner, therefore, felt that there was no merger of the original order, dated 20-1-1995, in the appellate order dated 16-12-1996. According to him, that view of the Appellate Assistant Commissioner was erroneous. There was an error in law in passing that order. In such circumstances, the Deputy Commissioner issued a revision notice in Form 40, dated 26-11-2002, with a proposal to set aside the first appellate order, dated 28-3-2000, and to restore the reassessment order dated 9-6-1999. This notice was addressed to M/s. Sunil Haribhau Pote, Station Road, Baramati, District Pune. The said Pote was called for a personal hearing on 27-1-2003. This notice was sent by Registered Post

Acknowledgement Due (for short, "R.P.A.D."). The postal authorities took the packet to the addressee but the addressee refused to accept it. There is an endorsement on the packet that the addressee has refused to accept the service. When the packet containing the notice was returned with this remark, the Deputy Commissioner proceeded on the footing that the sole proprietor is duly served. Though this was the factual position, yet this notice was also pasted on a conspicuous part of the sole proprietor's business place. It is in these circumstances that on 27-1-2003 the Deputy Commissioner passed an *ex parte* revisional order. He set aside the order passed in the appeal on 28-3-2000 and restored the reassessment order dated 9-6-1999. The Deputy Commissioner also issued directions to recover the dues in accordance with law.

4. It is aggrieved and dissatisfied with this order that Appeal No.94 of 2003 was preferred by the sole proprietor. It was heard by a Bench of the Maharashtra Sales Tax Tribunal. However, that Bench was divided in its views on the aspect of service. One Member recorded a finding that the sole proprietor

was duly served whereas the other was of the opinion that he was not duly served. That is why they recommended the constitution of a Special Bench. It is in these circumstances that the Special Bench rendered the findings based on which the questions of law, as reproduced above, are proposed for our answer and opinion.

5. Ms Chavan, appearing in support of this reference, would submit that there is due compliance with the procedural rule. She would submit that Rule 68 which has been relied upon by the sole proprietor is titled "Orders and Notices". That appears under Chapter XII. Chapter XII is titled "Service of Orders and Notices". From a perusal of sub-rule (1) of Rule 68, it is apparent that orders and notices under the Bombay Sales Tax Act or under the Bombay Sales Tax Rules shall be served by one of the methods indicated in the sub-rule. Thus, this provision sets out the modes of service. It could be by hand-delivery or by post. The proviso comes into play only if upon an attempt having been made to serve any such notice by either of the above modes, the sales tax authority concerned has

reasonable grounds to believe that the addressee is evading the service of notice or that, for any other reason which in the opinion of such authority is sufficient, the notice cannot be served by any of the above methods, then, after recording reasons the authority can take recourse to further modes.

6. We do not see how in the backdrop of the factual position which emerges from the record of this reference, can it be said that there was no service. This matter essentially is of fact. No question of law and for the opinion and answer of this Court in abstract can arise. Eventually a factual conclusion would have to be recorded if there is compliance with this procedural rule or not. The rule requires service to be effected. Thus, service is mandated but its mode is set out in the sub-rules. By sub-rule (3) of Rule 68 it is stated that when service is made by post, the service shall be deemed to be effected by properly addressing or preparing the order or notice and posting it by registered post with acknowledgement due, and unless the contrary is proved, the service shall be deemed to have been effected at the time at which the notice or order would be

delivered in the ordinary course of post. Thus, services of orders and notices under the Bombay Sales Tax Act and the Rules if by post, that is the mode chosen, then, this sub-rule amplifies as to how that should be deemed to have been effected. Admittedly, in the present case, there is an endorsement on the packet which was sent to the address of the noticee, namely, the sole proprietor; that the sole proprietor received it but refused to accept the same. When it was sent by R.P.A.D. to the address, it was returned by the postal authorities with the remark, that the addressee refused to accept the packet. That is why it is returned. Thus, the presumption that when the addressee whose address is set out on the envelope had an occasion to notice and peruse the packet, meant for him, but he refuses to accept it, then, that is deemed to be served. The addressee in this case is correctly described. There is no dispute about his identity. Even his address is correct. It is at that address the packet is carried and by the concerned postal authority. The duly authorised person carrying the packet reached the address. On noticing the addressee, he serves it, but the addressee after having perused

the packet refused to accept it. It is in these circumstances, the postal remark that the concerned person has refused to accept; hence, returned to the sender denotes good and valid service. Then there was no occasion to resort to the proviso. In the given facts and circumstances, when there was sufficient and adequate notice and the sole proprietor had an occasion to appear and object to the stand of the Department on merit, so also by raising other legal contentions, then, the conclusion is inevitable that there is no defect or deficiency as far as this service is concerned. There is a factual finding recorded that Rule 68(1) has been complied with. To our mind, therefore, such a conclusion in the backdrop of the peculiar facts and circumstances raises no question of law. There was nothing that required any answer and opinion by this Court. A purely factual finding and which, to our mind, would suffice enables the Tribunal to render a complete decision on the appeal. In other words, the other points in the appeal could have definitely been considered and answered, if required. The Tribunal got carried away only with this technical or procedural aspect of the matter

and erroneously refused to consider and decide the appeal on merits. The Tribunal should have rendered that conclusion once the aspect of notice is duly taken care of.

7. As a result of the above discussion, we are of the opinion that the reference is wholly unnecessary. The Tribunal's orders and referred by us above do not raise any question of law for opinion and answer of this Court. Suffice it to say that whether Rule 68 has been complied with in a given case would depend upon the circumstances and the record of that case. Whether there is proof of service or not would, therefore, necessarily depend on the facts and circumstances in each case. No general rule can be laid down.

8. In view of the above discussion, the reference is returned because there was no question of law arising for decision or opinion and answer of this Court. The Tribunal shall now decide the appeal on the remaining points, in accordance with law and as expeditiously as possible.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)