

Court No. - 29

Case :- WRIT TAX No. - 913 of 2018

Petitioner :- M/S Kashi Bartan Bhandar

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Pooja Talwar

Counsel for Respondent :- C.S.C., Anant Kumar Tiwari

Hon'ble Pankaj Mithal, J.

Hon'ble Ashok Kumar, J.

Heard Ms. Pooja Talwar, learned counsel for the petitioner and Sri C.B. Tripathi, Special Counsel appearing for the Assistant Commissioner, Commercial Tax, Sector-18, Varanasi. The pleadings exchanged by the parties have also been perused.

The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India so as to challenge the order dated 27.01.2018 passed by the Assistant Commissioner, Commercial Tax, Sector-18, Varanasi, by which the registration of the petitioner as a dealer under the U.P. G.S.T. Act has been cancelled.

The main thrust of the argument of learned counsel for the petitioner is that the aforesaid order is in violation of principles of natural justice inasmuch as the show-cause notice alleged to have been issued to the petitioner on 18.01.2018 was never sent in any proper mode as prescribed under the Act and was not served upon the petitioner.

Secondly, it has been contended that only on *prima-facie* satisfaction that the petitioner is not carrying any business without coming to any final conclusion thereof, the registration of the petitioner has been cancelled.

Sri C.B. Tripathi, learned Special Counsel, in response to the above argument has submitted that the show-cause notice was sent to the petitioner at its e-mail address as provided by it. It was also sent by messenger and affixed at some conspicuous place of business of the petitioner.

On being specifically asked as to the basis on which the Assistant Commissioner has drawn the conclusion that the petitioner is not carrying any business and that its business is lying closed, he is unable to point out any such basis or material except to submit that as no one was found at the place of business when the messenger had gone there, it was presumed that the business is lying closed.

The notice under the Act is required to be served in accordance with the provisions of Section 169 of the Act which provides that it can be served by giving or tendering it directly or by messenger to the person concerned or to a person regularly employed by him in connection with his business or to an adult member of the family residing with him; or by registered or speed post or courier with acknowledgement due by sending at the last known place of business or residence of the person concerned; or by sending a communication at its email address provided at the time of registration and amended from time to time; or by making it available on the common portal; or by publication in a newspaper circulating in the locality in which the person concerned has last resided or carried business; or if none of the modes aforesaid is practicable, by affixing it at some conspicuous place, of his last known place of business or residence.

It is only if the mode of service as provided in the earlier parts of Section 169 are not practicable that the authorities can resort to service of notice by affixation. In this regard the words ***"if none of the modes is practicable"*** are relevant and important. The use of the aforesaid words clearly indicates that it is only after the authorities are satisfied that all earlier methods are not practicable for service of notice that resort can be taken for service of notice by affixation.

In the present case, we do not find that the Assistant Commissioner had come to any conclusion that all previous modes as prescribed under Section 169 are not practicable for the service of notice and has directly resorted to service by affixation. In such a situation, service if any by affixation cannot be regarded as a proper service. Moreover, nothing on record has been brought to establish the time, date and place and the manner in which service by affixation was resorted to.

Similarly, there is no averment as to through whom the notice was sent for service. The name of the messenger or the time and date when he went to serve the notice has not been disclosed.

Lastly, it has been stated that the show-cause notice was sent at the e-mail address of the petitioner on 18.01.2018 but again there is no material to support the said contention and the sending and receiving of any such e-mail has been categorically denied by the petitioner. The

petitioner has even annexed the printout of its e-mail inbox to show that no mail from the office of the Assistant Commissioner, Commercial Tax was sent to the petitioner on 18.01.2018.

In view of the above, we are of the definite opinion that the petitioner was not served with any show-cause notice before passing of the impugned order and service through affixation could not have been resorted to in the facts and circumstances of the case. The order impugned, therefore, is in violation of the principles of natural justice.

Apart from the above, a bare reading of the impugned order dated 27.01.2018 discloses that it has been passed only on the basis of *prima-facie* opinion and the material on which such a *prima-facie* opinion was formed has not been indicated.

The Assistant Commissioner could not have passed the order on the basis of *prima-facie* opinion until and unless he was of a definite opinion that the petitioner has closed down the business.

A feeble attempt was made by the Special Counsel to sabotage the hearing of the petition on merits on the ground that against the order of cancellation of the registration, the petitioner has a remedy of appeal. Notwithstanding the remedy of appeal, we do not propose to relegate the petitioner to it for the simple reason that the petition was entertained and the parties have completed the pleadings to enable the Court to hear the matter on merits. Moreover, it is a case of clear violation of principles of natural justice and it is well accepted norm of exercising extraordinary jurisdiction that alternate remedy would not be a bar where the order is *ex-facie*, illegal and has been passed violating the principles of natural justice.

In view of the aforesaid facts and circumstances, the impugned order dated 27.01.2018 is not at all sustainable and is accordingly quashed.

The writ petition is **allowed** with no order as to costs with liberty to the respondent No.2 to pass a fresh order in accordance with law.

Order Date :- 31.10.2018
Nirmal