
(2002) 12 KL CK 0005

In the High Court Of Kerala

Case No : Writ Appeal No. 1133 of 2001 4 December 2002

Dy. Commissioner of Income Tax

APPELLANT

Vs

Muthoottu Mini Kuries

RESPONDENT

Date of Decision : 04-12-2002

Acts Referred:

Income Tax Act, 1961 — Section 142, 288

Citation : (2003) 128 TAXMAN 240

Hon'ble Judges : K. Balakrishnan Nair, J;G. Sivarajan, J

Bench : Full Bench

Advocate : P.K. Raveendranatha Menon and George K. George, for the Revenue
P. Balakrishnan, for the Assessee, for the Appellant;

Judgement

K. Balakrishnan Nair, J.

The point raised for decision in this writ appeal is whether before passing an order u/s 142(2A) of the Income Tax Act, the assessing authority should hear the assessee. The brief facts of the case are the following :

2. The respondent assessee is a firm engaged in the business of chitty. It filed the returns of income for the assessment years 1998-99 and 1999-2000 respectively on 7-3-2000 and 27-3-2000. The first appellant took up the matter for assessment. The assessee was directed to appear in his office on 23-5-2000 at 11 a.m. Though the representative of the assessee appeared, no hearing took place as the first appellant was not present on that day. While so, the assessee was served with Ext. P7 order dated 12-7-2000 passed by the assessing authority u/s 142(2A) directing it to get its accounts pertaining to the previous years relevant to the assessment years 1998-99 and 1999-2000 audited by Shri P.E..B. Menon, Balan & Co., XXIX/200, Bank Road, Alwaye, who has been nominated by the 2nd appellant and to furnish a report in Form No. 6B as prescribed in rule 14A of the Income Tax Rules alongwith the additional comments, if any, on the Auditor's report duly signed and verified by it on or before 1-11-2000. It was stated in Ext. P7 that the said direction was issued

having regard to the nature and complexity of the accounts maintained by the assessee and in the interest of the revenue. It was also stated that the said order was issued with the concurrence of the 2nd appellant. The remuneration of the Auditor was fixed as Rs. 50,000 for each year and incidentals not exceeding 10% thereof were also to be paid by the assessee.

3. Feeling aggrieved by the said order, the assessee filed O.P. No. 27629/00. The said original petition was finally heard and allowed by the learned Single Judge. It was held that before issuing an order under section 142(2A), the assessee is entitled to be heard. Therefore, for the violation of natural justice, Ext. P7 was quashed giving liberty to the assessing authority to pass fresh orders after hearing the writ petitioner.

4. Feeling aggrieved by the judgment of the learned Single Judge, the revenue has filed the present writ appeal. The appellants would submit that the relevant statutory provision does not provide for a hearing. So, according to them, the decision of the learned Single Judge is unsustainable. Reliance was placed on the decisions in *Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of Income Tax and Another*, *PEERLESS GENERAL FINANCE AND INVESTMENT CO. LTD. AND ANOTHER Vs. DEPUTY COMMISSIONER OF Income Tax AND OTHERS.*, *Pradeep Maheswari Vs. Commissioner of Income Tax and Others*, and *Living Media Ltd. Vs. Commissioner of Income Tax and Another*, . The relevant statutory provision to be interpreted in this case is extracted below for convenient reference.

"142. (2A) If, at any stage of the proceedings before him, the assessing officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below subsection (2) of section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the assessing officer may require."

A reading of sub-section (2A) will show that the assessing authority should form an opinion before issuing an order under the said sub-section. The said opinion is to be formed having regard to the nature and complexity of the accounts maintained by the assessee and in the interest of the revenue. Such a satisfaction is a condition precedent for passing an order under sub-section (2A). The point to be decided is whether before arriving at such a satisfaction, the assessing authority is bound to hear the assessee. The cardinal rule among the different rules of natural justice is that "No one shall be condemned unheard", An order affecting the rights of a person or having adverse consequences on him, should not be passed without affording a bearing to him. In the case at hand, the assessee has to spend more than one lakh rupees by way of fee to the Chartered

Accountant as a result of the impugned order Ext. P7. Therefore, it is definitely an order having adverse consequences on him.

5. It is true, the statute is silent as to whether the assessee should be heard before an order is passed under the said sub-section. Now, the principle is well settled in law that unless a hearing is statutorily excluded any administrator taking a decision affecting the rights of a citizen, is bound to hear him. Byles, J. in *Cooper v. Wansworth, Board of Works* 143 ER 414 said, "A long course of decisions beginning with *Dr. Bentley's* case and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard, yet justice of the common law will supply the omission of the Legislature." This statement of law has been quoted with approval by our Apex Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . De Smith in his *Judicial Review of Administrative Action*, says that "where a statute authorising interference with property or civil rights was silent on the question of notice and hearing, courts apply the Rules as it is "of universal application and founded with plainest principles of natural justice", H.W.R. Wade in his *Administrative Law* states, ". . . presumption is it (natural justice) will always apply, however, silent about it the statute may be". Netheim in "*Privy Council, Natural Justice and Certiorari*" stated, "formerly the presumption was that there was no obligation to give a hearing unless the statute itself indicated such an obligation, now the presumption is that there is such an obligation unless the statute clearly excludes it, notwithstanding the vesting of a power, in to Parliament". This statement of law by Netheim has been quoted with approval by the Supreme Court in *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, .

6. While considering the meaning of civil consequences in the context of application of the principles of natural justice, the Apex Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, held as follows :

"..... But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? "Civil consequences" undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequences."

The Supreme Court in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, has held as follows :

"...Conversely, if the statute conferring the power is silent with regard to the giving of a Pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory

features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications"

In the light of the above principles, it can safely be concluded that before passing an order under sub-section (2A) of section 142, the assessee is entitled to be heard. In the case at hand, if he was heard, the assessee could have explained to the assessing authority that there was no complexity in his accounts and, therefore, it was unnecessary for a separate audit. The decisions relied on by the revenue do not apply to the facts of this case. The contention of the revenue relying on the decision of the Apex Court in *Swadeshi Cotton Mills*" case (supra) is that in emergent cases, action can be taken without hearing and a post decisional hearing will cure the defect of absence of hearing. In the case at hand, there is no emergency to order the audit without hearing the assessee. Further, the post decisional hearing will not, in any way, redress its grievance as no one will repay the amount paid by it to the Auditor. Therefore, the said contention of the revenue is devoid of any merit. Since the order u/s 142(2A) was stayed by this court, the assessment was contemplated without the special audit. Therefore, in fact, the question framed for decision in this writ appeal has become academic. But the learned senior counsel for the revenue pleaded that this court may render a decision so that it will guide the assessing officers in future and, therefore, we have ventured a decision on merits.

7. For all the above reasons, we find that there is nothing wrong with the decision of the learned Single Judge in quashing Ext. P7. Therefore, the appeal fails and it is accordingly dismissed.