

(1977) 06 KL CK 0041

In the High Court Of Kerala

Case No : T.R.C. No's. 45 and 46 of 1975

M. K. THOMAS

APPELLANT

Vs

STATE OF KERALA.

RESPONDENT

Date of Decision : 23-06-1977

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 17(3)

Citation : (1977) 6 CTR 267

Hon'ble Judges : Gopalan Nambiyar, C.J

Bench : Division Bench

Judgement

Gopalan Nambiyar, C.J. - These revision cases raise the question whether the right of cross-examination is an essential ingredient of the reasonable opportunity to be afforded to an assessee in order to prove the correctness and completeness of his return or before completing a best of judgment assessment under S. 17(3) of the Kerala General Sales Tax Act 1963. The two tax revision cases by the same petitioner relate to different periods, T.R.C. No. 45 of 1975 to the assessment year 1965-66, and T.R.C. 46 of 1975 to the assessment year 1966-67. The Assessee-petitioner was a forest Coupe Contractor and was also running a rice mill. We are not concerned in these tax revision cases with the assessment of turnover derived as coupe contractor. The petitioner had not filed any return for the years in question. His case before the Assessing Authority was that the mill was idle during the first half of the assessment year 1965-66, that thereafter the control of the mill had been given to one Pappachan as lessee, and that the petitioner had no turnover from the Mill for the years in question. The Assessing Authority issued a preassessment notice dated 22-4-1967 fixing the turnover at Rs. 1,10,400 at four times the bid amount, of the coupes, of which, Rs. 33,500/- was to be taxed as turnover of timber and Rs. 22,000/- as turnover of firewood for the year 1965-66, and the balance left out of Rs. 1,10,400.00 was to be treated as the turnover for the year 1966-67. To this notice the Assessee replied with an objection dated 27-11-1967 that the turnover was excessive and the estimate should be only at two and a half times the bid

amount. Meanwhile, the Intelligence Officer, Ernakulam inspected the petitioners rice mill on 24-5-1967 and seized some records and also recorded a statement of Pappachan. These were sent over to the Assessing Officer. These disclosed that the Assessee was doing business in rice also. Pappachan, the alleged lessee denied the lease, and submitted that he was working only as an employee of the petitioner. The Assessing Officer therefore issued two revised pre-assessment notices dated 27-6-1968 estimating the turnover at Rs. 8,08,800.00 for 1965-66 and Rs. 8,28,210.50 for 1966-67. The petitioner filed objections which were overruled and the assessment was finalised as proposed in the notices. An appeal against the order was dismissed by the Appellate Assistant Commissioner and a further appeal to the Tribunal also proved unsuccessful.

2. Before the Sales-tax Officer, Alwaye, (Assessing Authority) as seen from the order, no contention, was raised either that the petitioner was denied the right to cross-examine Pappachan or that he was entitled to cross-examine him as part of his reasonable opportunity before the best of judgment assessment was completed under S. 17 of the Act. On appeal to the Appellate Assistant Commissioner, it is seen from the order that the petitioner complained that the conclusion that Pappachan was an employee of the petitioner was a mere guess work, and that no opportunity was given to him to cross-examine Pappachan. The Appellate Assistant Commissioner referred to the decision of the Gujarat High Court in Jayantilal Thakordas vs. State of Gujarat and held that any evidence which has some probative value could be used for the purpose of assessment and that the Sales-tax Officer was not bound by nice rules of evidence. On further appeal to the Tribunal, it was objected that the Assessing Officer was not justified in acting upon the seized records, without direct evidence connecting them with the appellant. There was a further objection that the statement of Pappachan recorded without giving notice to the appellant and without giving him an opportunity to cross-examine him, cannot be used against him. The Tribunal met this by stating that the appellants definite case was that the Mill had been leased to Pappachan who was doing business therein, and when the alleged lease was denied by Pappachan, who stated that he was an employee of the petitioner, there was no scope for any further enquiry.

3. In these tax revision cases, the petitioner repeated the objection that he should have been afforded an opportunity to cross-examine Pappachan before the latters statement was used against him in completing the best of judgment assessment. In support of this contention strong reliance was placed on a Division Bench ruling of this Court in K.T. Shaduli vs. State of Kerala. Reference was also made to the recent judgment of a learned Judge of this Court in Abraham vs. Addl. Collector of Customs. The latter decision, after surveying the relevant decisions bearing on this aspect of the matter and the Division Bench ruling in 1971 KLT 630, held that, on the facts the petitioner in that case had been afforded opportunity of cross-examination. No further reference to that decision is called for.

4. The real question for our consideration is whether 1971 KLT 630 can be said to have laid down the law correctly, and whether, on the facts, and in the light of settled principles, it can be stated that a right of cross-examination is inherent in the right of reasonable opportunity as known to the principles of natural justice or as embodied in S. 17 of the Act. On the facts of this case, the question does not seem to us to admit of much difficulty. S. 17(3) of the General Sales-tax Act reads :

"17. Procedure to be followed by the assessing authority -

(1) & (2) x x x x x

(3) If no return is submitted by the dealer under sub-S. (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as it may consider necessary and after taking into account all relevant materials gathered by it, assess the dealer to the best of its judgment :

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard and, where a return has been submitted to prove the correctness or completeness of such return".

Counsel for the petitioners also invited our attention to S. 53 of the Act which is in these terms :

"53. Power to summon witness and cause production of documents. -

An assessing authority or an appellate or revising authority (including the appellate Tribunal) shall, for the purposes of this Act, have all the powers conferred on a court by the Code of Civil Procedure, 1908 (Central Act 5 of 1908), in respect of the following matters, namely :

(a) summoning and enforcing the attendance of any person and examining him on oath to affirmation; and

(b) compelling the production of any document".

It was contended that the insistence on a right of cross-examination of Pappachan may be modulated and regarded as a reminder to the statutory authorities under the Sales-tax Act to exercise their powers under the above section to summon Pappachan and make him available for cross-examination. No request or application to summon Pappachan, was made to any of the authorities. We cannot therefore, accept the submission based on S. 53 of the Act.

5. We are therefore left with the main argument as to whether a right of cross-examination is a necessary ingredient of the reasonable opportunity to be afforded to the petitioner in the instant case. In K. T. Shaduli vs. State, a Division Bench of this Court, after referring to S. 17 of the Sales tax Act, Rules 14, 15 and 18 of the Rules framed thereunder, and the previous decisions on the point,

ruled that the principle laid down in connection with S. 23 (3) of the Indian Income Tax Act 1922, should be applied in interpreting S. 17(3) of the Kerala General Sales-tax Act, 1963. In regard to S. 23(3) of the Indian Income Tax Act, a Full Bench of the Lahore High Court had surveyed the position in Seth Gurmukh Singh & Another vs. Commissioner of Income Tax, Punjab. That decision was approved by the Supreme Court in Raghubar Mandal Harihar Mandal vs. State of Bihar and also in Dhakeswari Cotton Mills Ltd. vs. Commissioner of Income Tax, West Bengal. It was in view of these decisions that the Division Bench, by analogy, was prepared to equate S. 17(3) of the Sales-tax Act with S. 23(3) of the Indian Income Tax Act, 1922. The Assessee in the case before the Division Bench, had, at the earliest opportunity, prayed for an opportunity to cross-examination a local merchant whose accounts were looked into by the Sales-tax Officer and whose statement had been accepted by him. The prayer was declined by the Sales-tax Authorities. The Division Bench held that as the assessee had repeatedly insisted on cross-examination of the merchant, the assessment completed without affording this opportunity was vitiated. It was observed :

"When materials are collected by the assessing authority and when he decides to use them against he assessee to reject his accounts the proviso implies that those materials should be brought to the notice of the assessee to enable him to disprove the same and substantiate the completeness and correctness of his return. This is possible only when the assessee is allowed an opportunity to produce evidence."

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"The law is settled that when a Sales tax Officer holds an enquiry and makes an assessment though he is not a Court he should proceed in a judicial manner and come to a judicial conclusion upon the facts in accordance with the terms of the Section and according to the principles of natural justice.

In view of these principles, we are satisfied that the refusal to comply with the request of the assessee for cross-examination of the witnesses whose books have been relied on vitiates the proceedings."

The Division Bench differed partly from the prior ruling of a learned Judge, (Vaidialingam J.) of this Court (as he then was) in Appukutty vs. State of Kerala. In that case Vaidialingam J. had taken the view that the Assessing Authority had no justification for relying upon the books of account of a third party, as against the assessee without affording an effective opportunity to cross-examine those persons whose accounts were seized. The same learned Judge in M/s. Kottachery Sriaahara Srinivasa Shenoi & Co. vs. Sales-tax Officer stated that there is a duty and obligation on the part of the Assessing Authorities if they were using

information contained in books of accounts of a third party, to produce that party for cross-examination by the Assessee against whom the books were sought to be used. The Division Bench pointed out that neither of these decisions, were clear whether there was any request by the assessee for cross-examination of the persons whose accounts were sought to be used against him. It did not agree with the view of Vaidialingam J. that the Assessing Authority was bound to produce the party or witness for cross-examination, irrespective of whether a request for that purpose was made by the Assessee. To that extent, the principle in Appukuttys case and Srinivasa Shenoy's case was narrowed down. But the principle was accepted that the right of cross-examination is part of the reasonable opportunity to be afforded to the Assessee and had to be conceded if a request for the same was made. The Division Bench dissented from the decision to the contrary (that the right of cross-examination was not part of reasonable opportunity) of the Gujarat High Court in Jayantilal Thakordas vs. State of Gujarat.

6. Even on the touch-stone of the Division Bench ruling in 1971 KLT 630, the petitioner in this case cannot succeed. No request for cross-examination of Pappachan was made before the Sales-tax Officer. Before the Appellate Assistant Commissioner again, no such request was made, the grievance was only that the Sales-tax Officer did not afford an opportunity to the appellant to cross-examine Pappachan. This was factually incorrect, as no request for cross-examination was made before the Officer; so that, even before the appellate authority, the petitioner did not make an actual request to cross-examine Pappachan. Of course, the Appellate Assistant Commissioner relied on 23 S.T.C. 11 and held that the petitioner had no right of cross-examining Pappachan. The petitioner is entitled to complain in law, that the reliance placed on 23 S.T.C. 11 was wrong, in view of the dissent expressed from that ruling in 1971 KLT 630. He is also well founded in his contention that the reasoning of the Appellate Tribunal in rejecting his request for cross-examination was unsatisfactory and unsound. But, on the facts, the ground is cut from under the petitioners feet, as he made no request for cross-examination. As early as the decision in M/s. Fedco (P) Ltd., & Another vs. S. N. Bilgrami & Others, the Supreme Court had occasion to point out the two essential elements involved in the concept of reasonable opportunity. The Court observed :

"(8) The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable. In the present case, a notice to show cause against the proposed order was given; it was stated in the notice that the ground on which the cancellation was proposed was that the licences had been obtained fraudulently; and later on a personal hearing was given. It must therefore be held that the requirement that an opportunity to be heard must be given was satisfied. What the petitioners Counsel strenuously

contends however is that though an opportunity was given that opportunity was not reasonable. In making this argument he had laid special stress on the fact that particulars of the fraud alleged were not given and an opportunity to inspect the papers though repeatedly asked for was not given. It is now necessary to consider all the circumstances in order to arrive at a conclusion whether the omission to give particulars of fraud and inspection of papers deprived the petitioners of a reasonable opportunity to be heard.

(9). There can be no invariable standard for "reasonableness" in such matters except that the Courts conscience must be satisfied, that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take action against him that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause against such proposed action, the nature of the plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and all other matters which help the mind in coming to a fair conclusion on the question".

7. In the light of the above, principle we have little hesitation to hold that the petitioner is not entitled to claim a right of cross-examination of Pappachan as part of the reasonable opportunity to be afforded under S. 17 (3) of the Act.

8. Counsel for the petitioners argued with some force that he cannot be blamed for not making a request to cross-examine Pappachan, as, at the relevant time, the two ruling decisions noticed *supra*, made it the duty of the Sales-tax Authorities to offer the person for cross-examination irrespective of any request by the assessee. Whatever be the plausibility of this argument, we are not satisfied that interference in our revisional jurisdiction is called for.

9. We are spared the need to examine the ratio of the decision in 1971 KLT 630, in the light of principle and authority, as the same has been affirmed by the Supreme Court recently in *K.T. Shaduli vs. State of Kerala*. This was noticed after conclusion of arguments. What is the correct principle of the decision ? - is the question that still calls for examination.

10. We have extracted earlier, the observations in paragraph 9 of the Supreme Court decision in *Fedco (P) Ltd. and Another Vs. S.N. Bilgrami and Others*, . In the light of that, we are not prepared to hold that in assessment proceedings u/s 17(3) of the Act, the assessee has a right to insist on any party or witness whose statement or record is relied on by the assessing authority and the substance of which has been disclosed, to be tendered or made available for cross-examination. The decision of the Full Bench of the Lahore High Court in *Seth*

Gurmukh Singh vs. Commissioner of income tax-act, Punjab, treated as the basic decision in 1971 KLT 630, contains references and passages which are vital on the question of the principle involved. In the judgment of Din. Mohammed J. reference is made to an early decision of a Division Bench of the Madras High Court in Subbayya vs. Commissioner of Income Tax. There, it was observed referring to S. 23(3) of the Income Tax Act that there was nothing in the Act which requires the Income Tax Officer to disclose to the assessee the material on which he proposed to act or to it in his order; but that, natural justice demanded that he should draw the assessee's attention to it before making the order. It was stated that the Income Tax Officer is not bound to disclose the source of his information. Surely this decision cannot be understood as recognising a right of cross-examination as part of reasonable opportunity or of natural justice in assessment proceedings. Reference was made by the Full Bench of the Judicial Commissioner of Sind in Commissioner of Income Tax vs. Khemchand Ramdas, where it was observed that there can be no question of the assessee being entitled to demand copies of the confidential statements from the Income Tax Officer or to demand that his informations should be called for cross-examination. It is in the light of the discussion thus made that the propositions of law are stated at page 416, on which, the Division Bench placed reliance, and which it extracted in 1971 KLT 630. The decision of the Lahore High Court in (1944) 12 ITR 393 was approved by the Supreme Court in 8 S.T.C. 770 and also in 26 ITR 775. If, as noticed in the decisions referred to, the assessing authority is not bound to disclose the source of its information, and it is enough to draw the assessee's attention to the material collected, the assessee's right of cross-examination seems to rest on rather slender foundation.

11. The decision of Mathew J. of this Court (as he then was) in Nandakumaran vs. Principal, Govt. Victoria College, Palghat, discusses exhaustively how for the right of cross-examination can be said to be an essential attribute of the requirement of reasonable opportunity, and of natural justice. Reference is made to judicial decisions as well as to Juristic writings and texts. It was ruled in that case that the right of cross-examination was not a requirement of natural justice. Of particular interest in this context, is also the decision of the Supreme Court in Hiramath vs. Rajendra Medical College, Ranchi.

12. The learned Government Pleader invited our attention to the decision in T.A. Millier, Ltd. vs. Minister of Housing and Local Government and Another, and to the recent decision in Selvarajan vs. Race Relations Board. Attention was also called to the decision in Kishanlal Agarwalla vs. Collector of Land Customs, and to Malloch vs. Aberdeen Corporation, and the decision of the Privy Council in University of Ceylon vs. Fernando. We do not wish to make an elaborate dissertation in this case, or roam over a wider field than what is strictly necessary. On the facts disclosed, our decision can safely be rested in a narrow compass.

13. We must now refer to two cases of great importance in the context. In first of

these *M/s. Kanungo & Co. vs. The Collector of Customs, Calcutta & Others*, referring to adjudication by the Customs Authorities, the Court observed :

"12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.

The pronouncement is as categoric as it is significant. (See the comment at p. 910 to 913 of *Seervais Constitutional Law*, 2nd Edn. Vol. II).

14. The next decision is *C. Vasantlal & Co. vs. Commissioner of Income Tax, Bombay City*. The Supreme Court observed :

"The Income Tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it, the statements made by Achaldas and Poonamchand before the Income Tax Officer were material on which the Income Tax Authorities could not provided that the material was disclosed and the assessee had opportunity to render their explanation in that behalf. It was therefore open to the Tribunal in appreciating the evidence to rely upon the statements made by Achaldas and Poonamchand before the Income Tax Officer and to disbelieve the statements made by them before the Appellate Assistant Commissioner."

The facts of the case will show that two persons (Achaldas and Poonamchand) had been examined by the Income Tax Officer in the absence of the Assessee and that the Assessee had objected to receiving their statements. In view of these decisions, we think that the question whether the right of cross-examination is a necessary attribute of reasonable opportunity and of natural justice, must depend upon the nature of the proceedings involved, the provisions of the statute or the law regulating the same, the quiescence or the instance of the complaining party in demanding the right of cross-examination and other attendant circumstances. We are satisfied that the petitioner in these cases cannot claim the right of cross-examination as part of the reasonable opportunity contemplated by S. 17(3) of the Act.

15. After arguments had been completed and judgment was reserved on 5-4-1977, and while this judgment had got well under way, Counsel for the

petitioner and the learned Government Pleader sought a re-posting of the cases for further arguments on the ground that the decision in *K.T. Shaduli vs. State of Kerala* had been approved and confirmed by the Supreme Court recently in *State of Kerala vs. K. T. Shaduli Yusuff*. The cases were accordingly re-posted on 13-6-1977 and further arguments were heard. We are taken carefully through the judgment of the Supreme Court. In the judgment of Justice Bhagwati and Justice Sakaria, the learned Judges state :

"We do not wish to refer to the decisions various High Courts on this point since our learned brother has discussed them in his judgment. We are of the opinion that the view taken by the Orissa High Court in *Muralimohan Prabhudayal vs. State of Orissa* 1970 (26) STC. 22 and the Kerala High Court in *M. Appukutty vs. State of Kerala* 1963 (14) STC. 489) and the present cases represents the correct law on the subject."

That the decision in Appukuttys case, had been qualified by the decision in Shadulis case, was not pointedly or specifically noticed. Fazal Ali, J. who discussed the position, rejected at page 487 the argument advanced on behalf of the state that as the technical rules of evidence did not strictly apply, the right of cross-examination cannot be demanded by the assessee in a proper case, governed by a particular statute. At page 488 the learned Judge observed :

"It is true that the words "opportunity of being heard" are of very wide amplitude but in the context the sales-tax proceedings which are quasi-judicial proceedings all that the Court has to see in whether the assessee has been given a fair hearing. Whether the hearing would extend to the right of demanding cross-examination of witnesses or not would naturally depend upon the nature of the materials relied upon by the sales tax authorities, the manner in which the assessee can rebut those materials and the facts and circumstances of each case. It is difficult to lay down any hard and fast rule of universal application."

Adverting to the judgment of the Gujarat High Court in *Jayantilal Thakordass* case it was observed that it did not appear that the assessee had at any time made a specific prayer for cross-examining the party in question. It was made clear that the Supreme Court cannot endorse the extreme position that the right of cross-examination in the circumstances noticed stood completely excluded. Reference was made to Appukuttys case and it was observed that the decision was "substantially correct" and in consonance with the language of S. 17 (3) and the proviso thereto. At page 492, the learned Judge observed :

"Thus on a true interpretation of S. 17(3), the proviso thereto and rule 15, the inescapable conclusion would be that the assessee has been given a statutory right to prove the correctness of his return by showing that the materials on the basis of which his return is found to be incorrect or incomplete are wrong and if for this purpose the assessee makes an express prayer for cross-examining the wholesale dealers whose accounts formed the sheet anchor of the notice issued to the assessee, he is undoubtedly entitled to cross-examine such wholesale

dealers."

We do not, with respect, understand the decision of the Supreme Court, as recognising a right of cross-examination as an invariable attribute of the requirement of reasonable opportunity under S. 17(3) of the Act. We rather understand the rule to have been stated with sufficient elasticity and amplitude as to make the right depend on the terms of the Statute, the nature of the proceeding or of the function exercised, the conduct of the party, and the circumstances of the case. We are clear that on the facts disclosed, the petitioner in these revision cases is not entitled to demand a right of cross-examination of Pappachan either as part of the reasonable opportunity under S. 17(3) of the Act, or on the Rules of natural justice.

16. We dismiss these tax revision cases with no order as to costs.