

(1994) 04 KL CK 0021
In the High Court Of Kerala
Case No : T.R.C. No. 189 of 1993

Sisco

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 05-04-1994

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 34, 34(3), 39, 41

Citation : (1994) 04 KL CK 0021

Hon'ble Judges : Varghese Kalliat, J; P.A. Mohammed, J

Bench : Division Bench

Advocate : P. Sukumaran Nair and Thottathil B. Radhakrishnan, for the Appellant; V.C. James, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.A. Mohammed, J.—This Tax Revision Case by a registered dealer under the provisions of the Kerala General Sales Tax Act, 1963 (for short "the Act") relates to the assessment year 1985-86. It is directed against the order of the Kerala Sales Tax Appellate Tribunal, Additional Bench, Ernakulam (hereinafter described as "Tribunal") dismissing an appeal filed by the Petitioner-firm u/s 39 of the Act.

2. By the assessment order dated 30th March 1989 the Assistant Commissioner (Assnt.) II, Special Circle, Ernakulam who is the assessing authority in this case, determined the taxable turnover of the Petitioner-firm for the year 1985-86 at Rs. 22,72,140.50 as against the turnover of Rs. 20,11,470.50 returned by the firm. Being aggrieved by this assessment, the Petitioner-firm filed an appeal before the Additional Deputy Commissioner (Appeals), Ernakulam (hereinafter described as Deputy Commissioner) u/s 34 of the Act. That appeal, was happened to be decided ex-parte. As against the said ex-parte order dated 15th July 1991 a further appeal was filed by the Petitioner-firm before the Tribunal as T.A. No. 141 of 1992. Notwithstanding the contentions urged by the Petitioner-firm the Tribunal dismissed the appeal upholding the order of the Deputy Commissioner.

3. The contention advanced before us on behalf of the Petitioner-firm is that the Petitioner did not get "a reasonable opportunity of being heard" while disposing of the appeal under Sub-section (3) of Section 34 of the Act by the Deputy Commissioner. It is further urged that by reason of this infirmity the impugned order of the Tribunal confirming the order of the Deputy Commissioner is unsustainable in law. We have no disagreement with the position that this is a question of law to be decided by this Court in exercise of its revisional power u/s 41 of the Act.

4. The relevant portion of Sub-section (3) of Section 34 of the Act reads thus:

34. (3) In disposing of an appeal, the Appellate Assistant Commissioner may, after giving the Appellant a reasonable opportunity of being heard,-

(a) in the case of an order of assessment or penalty,

(i) confirm, reduce, enhance or annul the assessment or the penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or

What is necessary to be examined here is the ambit and scope of "reasonable opportunity of being heard" contemplated in the above Sub-section. There are two indispensable primary requisites which exist in the, concept of hearing envisaged in the above provision. They are: (i) an opportunity of being heard must be made available, and (ii) such opportunity must be reasonable. Whether in a given situation, the opportunity of being heard made available to the Appellant is "reasonable" or not is largely depended on the facts of each case. In this case there is no dispute on the fact that the order of the Deputy Commissioner dated 15th July 1991 was passed without hearing the Petitioner-firm, the Appellant therein. In the appeal, S.T.A. No. 196 of 1989, before the Deputy Commissioner the Petitioner-firm was represented by a Chartered Accountant, Sri N. Vittal Rao. According to the Deputy Commissioner, the appeal was posted for hearing on different dates, namely, 13th June 1989, 12th July 1989, 18th October 1989 and 15th November 1989. The appeal was finally posted for hearing on 17th July 1991 and it was disposed of on 15th July 1991 by the Deputy Commissioner. The Petitioner's representative has filed an affidavit dated 18th December 1991 before the Tribunal, a copy of which is produced along with this revision as Annexure A. Since no reference has been made about the above affidavit in the impugned order of the Tribunal, we have directed the Government Pleader to ascertain as to whether such an affidavit has been actually filed before the Tribunal. After receiving instructions in that behalf, the Government Pleader submitted before us that such an affidavit had been filed by the Petitioner's representative before the Tribunal as contended by learned Counsel for the Petitioner-firm. Therefore, we are inclined to record that the Petitioner's representative has filed the affidavit dated 18th December 1991 in the appeal T.A. No. 141 of 1992 before the Tribunal.

5. In order to examine the correctness or otherwise of the contentions advanced on behalf of the Petitioner-firm, we find it extremely essential to reproduce the averments contained in Annexure A affidavit. It is therefore reproduced below.

I.N. Vittal Rao, B.Com. F.C.A., aged 54, son of Sri N. Subba Rao residing at Sharada Mandir, Cullen Road, Alappuzha solemnly affirm and state as follows:

1. I am a Chartered Accountant by profession.
2. The Appellant had authorised me to represent him before the Deputy Commissioner (Appeals), Agricultural Income Tax and Sales Tax, Ernakulam, as regards the case S.T.A. 196/89.
3. The above case was first posted for hearing on 13th June 1989. I had gone to Ernakulam and had appeared before the Deputy Commissioner and represented the case. But the Deputy Commissioner was transferred before the order could be written.
4. Subsequently, the case was re-posted for hearing by the incumbent Deputy Commissioner on 12th July 1989. Against this notice, I had applied for an adjournment as I had to appear other time barring assessment.
5. The case was again re-posted on 18th October 1989. I had appeared before the Deputy Commissioner but the Deputy Commissioner did not take up the appeal. The same was re-posted on 15th November 1989.
6. The posting notice posting the case on 15th November 1989 was received by me on 15th November 1989 only and I had no other alternative, but to apply for adjournment by my letter dated 17th November 1989, a true copy of which is duly enclosed.
7. The case was re-posted on 11th July 1991. But I was away at Jodhpur on domestic engagements. My office had duly applied for adjournment stating explicitly the reason for my inability to represent the appeal on 11th July 1991, a true copy of which is duly enclosed.
8. In the circumstances of the case there is no failure on my part in complying with the notices issued by the Deputy Commissioner (Appeals), Ernakulam. I respectfully submit that the observation of the Deputy Commissioner (Appeals), Ernakulam that there was no response is wrong.
6. Of course, it is true that even though the appeal S.T.A. 196/89 was posted for hearing before the Deputy Commissioner on the dates referred to above, it was not heard on those occasions for some reason or the other. From the above affidavit it is evident that the Petitioner's representative appeared on the first hearing date, namely, 13th June 1989, and argued the case. It appears, the Deputy Commissioner who heard the appeal on 13m June 1989 was transferred to some other station, before the order could be passed. Then again the appeal was posted for hearing on 12th July 1989. On that day the Petitioner's representative could not be present for hearing because he had some other

urgent work and therefore he applied for adjournment. The appeal was thereafter posted for hearing on 18th October 1989 on which day the Petitioner's representative appeared but the Deputy Commissioner did not take up the appeal for hearing on that day. It was reposted to 15th November 1989. According to the Petitioner's representative, he had received the notice of the above reposting only on 15th November 1989 and therefore he had applied for adjournment. Now, let us examine the position as to the final date of hearing on 11th July 1991. It may be noticed that the appeal was posted for hearing only after 18 months. The Petitioner's representative stated in the affidavit that he was away at Jodhpur on a domestic engagement during that time and his office had applied for adjournment stating his inability to be present for hearing in view of the aforesaid reason. While confirming the order of the Deputy Commissioner the Tribunal observed:

For the last notice issued on 28th June 1991 posting the case on 11th July 1991 an adjournment application was filed by somebody whose name and address were not given in the petition.

Leaving aside the defect noticed in the application for adjournment the fact remains that there was an application for adjournment on 11th July 1991. The aforesaid observation of the Tribunal substantially agrees with the case of the Petitioner's representative that his office had applied for adjournment may be in a defective form. The method of posting the appeal for hearing and submission of application for adjournment of the type and nature which we have discussed herein before, are not uncommon in the ordinary practice of the hearing and disposal of the appeals under Sub-section (3) of Section 34 of the Act by the Appellate Assistant Commissioner or the Deputy Commissioner, as the case may be. We therefore accept Annexure A affidavit filed by the Petitioner's representative as reflective of the correct state of affairs with regard to the postings of the appeal S.T.A. Na 196/89, and seeking adjournments thereof.

7. The point that invites decision in this case is whether the Petitioner-firm had a reasonable opportunity of being heard" as contemplated in Sub-section (3) of Section 34 of the Act. What is engrained in this provision is not an empty formality but a valuable right made available to an Appellant-registered dealer under the Act. Even though this right personifies the principle of natural justice it can accurately be described as a statutory right in the present case. Such a right cannot be allowed to be defeated by procedural wrangles or whims and fancies of the authorities concerned. "A reasonable opportunity of being heard" contemplated in the section shall be effective and adequate and it cannot be made illusory under any circumstance. Mere issue of a notice of hearing of the appeal will not suffice at all circumstances. In the facts set out herein before, we are fully convinced that the Petitioner-firm did not get reasonable or effective opportunity of being heard in the appeal S.T.A. Na 196/89 for decision on merits by the Deputy Commissioner.

8. Now, let us see how this issue has been dealt with by the Tribunal while

disposing of the appeal u/s 39 of the Act. After pointing out the different dates of hearing, the Tribunal observed:

So the first appellate authority cannot be found fault with in dismissing the appeal.

Such a conclusion, without properly examining the true facts of the case, cannot be countenanced by this Court. It appears, the Tribunal has not bestowed due regard to its duty as the highest fact finding authority among the hierarchy of Tribunals functioning under the Act. The fact that the application for adjournment of hearing posted on 11th July 1991 does not show the name and address of the Appellant may be a defect in the application. But that by itself does not constitute a ground for denial of statutory right of hearing. Unless the number of the appeal is available in the application for adjournment in the normal course the Tribunal cannot say that the said application was intended to be filed in the appeal which came before the Deputy Commissioner for hearing. A detailed study of the facts on this question would have made the Tribunal to think that dismissal of the appeal without affording a further opportunity of hearing will result in manifest injustice. In this connection, we fail to see any reason for non-consideration of Annexure A affidavit filed by the Petitioner's representative before the Tribunal. I as noticed, not even a reference is made about this affidavit by the Tribunal in the impugned order. The circumstances stated by the Authorised Representative of the Petitioner-firm in Annexure A affidavit as regards the posting of the appeal on 11th July 1991 and seeking of adjournment thereof have not been considered by the Tribunal while upholding the rejection of the application for adjournment of hearing on 11th July 1991 by the Deputy Commissioner. We have therefore no hesitation to hold that the Petitioner-firm did not get an opportunity of being heard in the matter as contemplated in Sub-section (3) of Section 34 of the Act.

9. In view of what is stated above, we are of the view that the impugned order of the Tribunal upholding the order of the Deputy Commissioner in S.T.A. No. 196/89 is illegal, improper and erroneous. Accordingly the impugned order is set aside and the matter is remitted back to the Deputy Commissioner to decide S.T.A. Na 196/89 afresh on merits and in accordance with law after affording a reasonable opportunity of being heard to the Petitioner-firm in the case. The Tax Revision Case is allowed as above.