State of Kerala

Vs

K. T. Suaduli Grocery Dealer Etc.

Civil Appeal Nos. 572 to 575 of 1972

(P. N. Bhagwati, R. S. Sarkarkaria, Syed M. Fazal Ali JJ)

15.03.1977

JUDGMENT

BHAGWATI, J. -

1. The facts giving rise to these appeals are about to be delivered by our learned brother S. Murtaza Fazal Ali and we do not think it necessary to reiterate them. So far as Civil Appeals 572-574 of 1972 are concerned, it would be sufficient to State briefly the following facts as these are the only facts necessary for appreciating the question of law which arises for determination in these appeals. In the assessments of the assessee to sales-tax for three assessment years, the returns filed by him on the basis of his books of account appeared to the Sales Tax Officer to be incorrect and incomplete since certain sales appearing in the books of account of one Haji P. K. Usmankutty as having been affected by the assessee in his favour were not accounted for in the books of account maintained by the assessee. The assessee applied to the Sales Tax Officer for affording him an opportunity to cross-examine Haji Usmankutty in regard to the correctness of his accounts, but this opportunity was denied to him and the Sales Tax Officer proceeded to make a best judgment assessment under Section 17, sub-section (3) of the Kerala General Sales Tax Act 1963. The assessee appealed but without success and this was followed by a revision application to the High Court. The High Court took the view that the assessee was entitled to an opportunity to cross-examine Haji Usmankutty before any finding could be arrived by the Sales Tax Officer that the returns filed by the assessee were incorrect and incomplete so as to warrant the making of the best judgment assessment and since no such opportunity had been given to the assessee, the High Court quashed the order of the Sales Tax authorities and remanded the case to the Sales Tax Officer for making fresh assessments according to law after giving an opportunity to the assessee to cross-examine Haji Usmankutty. The facts in Civil Appeal No. 575 of 1972 are almost identical, save that instead of Haji Usmankutty, certain wholesale dealers were sought to be cross-examined in that case and the opportunity to cross-examine them was denied by the Sales Tax authorities. Since the High Court quashed the orders of assessments in both cases, the State preferred an appeal by special leave in each case challenging the correctness of the view taken by the High Court.

2. Now, the law is well satlled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. vs. Commissioner of Income Tax West Bengal that a taxing Officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolute him from the obligation to comply with the fundamental rules of Justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural

justice are not a constant, they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George vs. The University of Kerala & Ors. that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tuker, L.J. in Russel vs. Duke of Norfolk and Ors.

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

3. One of the rules which constitutes a part of the principles of natural justice is the rule of audi alterem partem which requires that no man should be condenced unheard. It is indeed a requirement of the duty to act fairly which lies on all quasi-judicial authorities and this duty has been extended also to the authorities holding administrative enquiries involving civil consequences or affecting rights of parties because, as pointed out by this Court in A. K. Kraipak and Ors. vs. Union of India, "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent mis-carriage of justice, and justice in a Society which has accepted socialism as its article of faith in the Constitution, is dispensed not only by judicial or quasi-judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule of audi alterem partem requires that a particular specified procedure specified procedure is to be followed. It may be that in a given case the rule of audit alterem partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on facts and circumstances of each case.

4. Now, in the present case, we are not concerned with a situation where the rule of audi alterem partem has to be read into the statutory provision empowering the taxing authorities to assess the tax. Section 17, sub-section (3), under which the assessment to sales tax has been made on the assessee provides as follows :

> "If no return is submitted by the dealer under sub-section (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 taking into account all relevant materials gathered by it, assess the dealer to the best of its judgment :
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> Provided that before taking action under this sub-section the dealer should be given a reasonable opportunity of being heard and, where a return has been submitted, to prove the correctness or completeness of such return."

It is clear on a plain natural construction of the language of this provision that it empowers the Sales Tax Officer to make a best judgment assessment only where one of two conditions is satisfied, either no return is submitted by the assessee or the return submitted by him appears to the Sales Tax Officer to be incorrect or incomplete. It is only on the existence of one of these two conditions that the Sales Tax Officer gets the jurisdiction to make a best judgment assessment. The fulfilment of one of these two pre-requisites is, therefore, a condition precedent to the assumption of jurisdiction by the Sales Tax Officer to make assessment to the best of his judgment. Now, where no return has been submitted by the assessee, one of the two conditions necessary for the applicability of Section 17, sub- section (3) being satisfied, the Sales Tax Officer can, after making such inquiry as he may consider necessary and after taking into account all relevant materials gathered by him, proceed to make the best judgment assessment and in such a case, he would be bound under the proviso to give a reasonable opportunity of being heard to the assessee. But in the other case, where a return has been submitted by the assessee, the Sales Tax Officer would first have to satisfy himself that the return is incorrect or incomplete before he can proceed to make the best judgment assessment. The decision making process in such a case would really be in two stages, though the inquiry may be continuous and uninterrupted : the first stage would be the reaching of satisfaction by the Sales Tax Officer that the return is incorrect or incomplete and the second stage would be the making of the best judgment assessment. The first part of the proviso which requires that before taking action under sub-section (3) of Section 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not apply not only at the second stage but also at the first stage of the inquiry, because the best judgment assessment, which is the action of the inquiry, because the best judgment assessment, which is the action under Section 17, sub-section (3), follows upon the inquiry and the "reasonable opportunity of being heard" must extend to the whole of the inquiry, including both stages. The requirement of the first part of the proviso that the assessee should be given a "reasonable opportunity of being heard" before making best judgment assessment merely embodies the audi alterem partem rule and what is the content of this opportunity would depend, as pointed out above, to a great extent on the facts and circumstances of each case. The question debated before us was whether this opportunity of being heard granted under the first part of the proviso included an opportunity to cross-examine Haji Usmankutty and other wholesale dealers on the basis of whose books of accounts the Sales Tax Officer disbelieved the account of the assessee and came to the finding that the returns submitted by the assessee were incorrect and incomplete. But it is not necessary for the purpose of the present appeals to decided this question since we find that in any event the assessee was entitled to this opportunity under the second part of the proviso.

5. The second part of the proviso to section 17(3) of the Act lays down that where a return has been submitted, the assessee should be given a reasonable opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the enquiry before the Sales Tax Officer comes to the conclusion that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confer a corresponding right on the assessee to be afforded a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witness. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales Tax Officer. Here in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because

certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the books of account of the assessee. The Sales Tax Officer relied on the evidence furthised by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to an opportunity to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Hazi Usmankutty and other wholesale dealers for cross-examination, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.

6. We do not wish to refer to the decisions of 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 Murlimohan Prabhudayal vs. State of Orissa and the Kerala High Court in M. Appukutty vs. State of Kerala and the present cases represents the correct law on the subject. We accordingly dismiss the appeals with no order as to costs.

Fazal Ali, J.

These appeals by special leave involve an interesting question of law as to the interpretation of Section 17 (3) of the Kerala General Sales Tax, 1963 - hereinafter referred to as 'the Act' - and the proviso thereof read with Rule 15 formed under the Act. The assessment years in question are 1965-66, 1966-67 and 1967-68 in the case of the respondent K. T. Shaduli in Civil Appeals Nos. 572-574 of 1972 and 1967-68 in the case of Nallakandy Yusuff in Civil Appeal No. 575 of 1972. But both the cases involve an identical question of law. In this view of the matter, we propose to deal with all these appeals by one common judgment.

8. The assessee in Civil Appeals Nos. 572-574 of 1972 filed his sales- tax returns before the Sales Tax Officer who on an examination of the accounts found that the returns submitted by the assessee were both incorrect and incomplete inasmuch as certain entries in the books of account of Haji P. K. Usmankutty revealed certain transactions which were not accounted for in the assessee's books of account. The Sales Tax Officer, after hearing the assessee, made an assessment to the best of his judgment under Section 17 (3) of the Act read with Rule 15 made under the Act. The Sales Tax Officer thus rejected the accounts of the assessee as they did not reflect the goods said to have been purchased by Haji P. K. Usmankutty. The assessee sought an opportunity to cross-examine Haji Usmankutty with respect to the correctness of his accounts which were relied upon by the Sales Tax Officer, but this opportunity was refused to him by the Sales Tax Officer as also the other appellate authorities. Similarly in the case of the respondent Nallakandy Yusuff, in Civil Appeal No. 575 of

1972, the return filed by the assessee was rejected by the Sales Tax Officer on the ground that certain transactions shown in the accounts of some wholesale dealers were not reflected in his books of account and the opportunity asked for by the assessee for cross-examining the said wholesale dealers was refused to him. The order of the Sales Tax Officer was confirmed by the Appellate Authorities under the Act. Both the assessees then filed a revision application before the High Court which allowed the application of the assessees, quashed the orders of the Sales Tax Authorities and remanded the cases to the Sales Tax Officer for giving an opportunity to the respondents for cross-examining the wholesale dealers concerned and then making assessments in accordance with the law. The State having obtained special leave from this Court - hence these appeals before us.

9. The short question that fell for determination before the High Court was, whether under the provisions of the Act the opportunity of being heard which was to be given to the assessees, would include within its sweep the right of cross-examination of a third party whose accounts were the basis of the best judgment assessments made by the Sales Tax Officer and the examination of which later on showed that the returns filed by the assessee were incorrect and incomplete. The High Court on a consideration of Section 17 (3) and the Rules made under the Act came to the conclusion that the assessees were entitled to a fair hearing and the opportunity of being heard could not be said to be complete unless in the circumstances of these cases the assessees were allowed to cross-examine Haji P. K. Usmankutty and other wholesale dealers on whose accounts reliance was placed by the Sales Tax authorities.

10. A provision of law authorising the Taxing Authorities to make a best judgment assessment in default of the assessee complying with the legal requirements is not a new one, but existed in Section 23 (4) of the Income-tax Act, 1922 as amended by the Indian Income tax (Amendment) Act, 1939, the relevant part of which runs that :

> "If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same section or fails to comply with all the terms of a notice issued under sub-section (2) of the same section or, having made a return fails to comply with all the terms of a notice issued under sub-section (4) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and, in the case of a firm, may refuse to register it or may cancel its registration if it is already registered :
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> #Provided x x x x##

Describing the nature and character of a best judgment assessment, Lord Russell of Killowen in delivering the judgment of the Privy Council in Income-tax Commissioner vs. Badridas Ramrai Shop, Akola, observed as follows :

> "The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindicatively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fail estimate of the proper figure of assessment and for this purpose he must, their Lordships think, be able to take into consideration local knowledge or previous returns by, and assessments of, the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it

must be honest guesswork."

These observations were quoted with approval by this Court in Raghubar Mandal Harihar Mandal vs. State of Bihar.

11. Mr. Gupte, learned counsel for the appellant submitted that the main object of the best judgment assessment was to penalise the assessee for either not filing a return or for filing a return which was defective and if at this stage he is given a full-fledged hearing including the right to summon and cross-examine witnesses, then this would amount to condoning the default committed by the assessee. It was also argued that as the Income-tax authorities are not bound by the technical rules of evidence, the assessee cannot claim cross- examination of witnesses as a matter of right. In support of his submission he relied upon a decision of this Court in Dhakeswari Cotton Mills Ltd. vs. Commissioner of Income Tax, West Bengal., where agreeing with a similar argument put forward by the Solicitor-General in that case, this Court observed thus :

> "As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a Court of law, but there the agreement ends, because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23 (3)."

There can be no doubt that the principle that as the tax proceedings are of quasi-judicial nature, the Sales Tax authorities are not strictly bound by the rules of evidence which means that what the authorities have to consider is merely the probative value of the materials produced before them. This is quite different from saying that even the rules of natural justice do not apply to such proceedings so as to deny the right of cross-examination to the assessee where the circumstances clearly justify such a course and form one of the integral parts of the materials on the basis of which the order by the Taxing Authorities can be passed. The admissibility of a document or a material in evidence is quite different from the value which the authority would attach to such material. The Privy Council has held that the Taxing Authorities can even base their conclusion on their private opinion or assessment provided the same is fully disclosed to the assessee and he is given an opportunity to rebut the same. In these circumstances, therefore, we do not agree with Mr. Gupte that merely because the technical rules of evidence do not strictly apply, the right of cross-examination cannot be demanded by the assessee in a proper case governed by a particular statute.

12. This Court further fully approved of the four propositions laid down by the Lahore High Court in Seth Gurmukh Singh vs. Commissioner of Income Tax, Punjab. This Court was of the opinion that the Taxing Authorities had violated certain fundamental rules of natural justice in that they did not disclose to the assessee the information supplied to it by the departmental representatives. This case was relied upon by this Court in a later decision in Raghubar Mandal Harihar Mandal's case where it reiterated the decision of this Court in Dhakeswari Cotton Mills Ltd.'s case, and while further endorsing the decision of the Lahore High Court in Seth Gurmukh Singh's case pointed out the rules laid down by the Lahore High Court for proceeding under sub- section (3) of Section 23 of the Income-tax Act and observed as follows :

> "The rules laid down in that decision were these : (1) While proceeding under sub-section (3) of Section 23 of the Income-tax Act, the Income-tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false; (2) if he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the materials on which he is going to found that estimate; (3) he is not however debarred from relying on private sources of information, which sources he may not disclose to the assessee at all; and (e) in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilised to such as extent as to put the assessee in possession of full particulars of the case he is expected to ment and should further give him ample opportunity to meet it, if possible."

It will thus be noticed that this Court clearly laid down that while the Income-tax Officer was not debarred from relying on any material against the assessee, justice and fair-play demanded that the sources of information relied upon by the Income-tax Officer must be disclosed to the assessee so that he is in a position to rebut the same and an opportunity should be given to the assessee to meet the effect of the aforesaid information.

13. We, however, find that so far as the present appeals are concerned, they are governed by the provisions of the Kerala General Sales Tax Act, the provisions of which are not quite identical with the provisions of the Income-tax Act and the Kerala Act appears to have fully incorporated all the essential principles of natural justice in Section 17 (3) of the Act. In these circumstances, therefore, the answer to the question posed in these appeals would have to turn upon the scope, interpretation and content of Section 17 (3) of the Act, the proviso thereto and Rule 15 framed under the Act. It is true that the words "opportunity of being heard" are of very wide amplitude but in the context of the sales-tax proceedings which are quasi-judicial proceedings all that the Court has to see is whether the assessee has been given a fair hearing. Whether he 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 rules of universal application. We would, therefore, first try to interpret the ambit of Section 17 (3) and the proviso thereof in order to find out whether a right of cross-examination of witnesses, whose accounts formed the basis of best judgment assessment is conferred on the assessee either expressly or by necessary intendment. Section 17 (3) of the Act runs thus :

> "If no return is submitted by the dealer under sub-section (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 :
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> 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."

An analysis of this provision would show that this sub-section contemplates two contingencies (1) where the assessee does not file his return at all; and (2) where the assessee files his return which, however, is found to be incorrect or incomplete by the assessing authority. The sub-section further

enjoins on the assessing authority a duty to consider the necessary materials and make an enquiry before coming to its conclusion. The proviso expressly requires the assessing authority to give to the assessee a reasonable opportunity of being heard even if the assessee had committed default in not filing the return. Since the statute itself contemplates that the assessee should be given a reasonable opportunity of being heard, we are not in a position to agree with the contention of the learned counsel for the appellant that if such an opportunity is given, it will amount to condonation of default of the assessee. The tax proceedings are no doubt quasi-judicial proceedings and the Sales-tax Authorities are not bound strictly by the rules of evidence, nevertheless the authorities must base their order on materials which are known to the assessee and after he is given a chance to rebut the same. This principle of natural justice which has been raiterated by this Court in the decisions cited above has been clearly incorporated in Section 17 (3) of the Act as mentioned above. The statute does not stop here, but the second part of the proviso confers express benefit on the assessee for giving him an opportunity not only of being heard but also of proving the correctness or completeness of such return. In view of this provision it can hardly be argued with any show of force that if the assessee desires the wholesale dealers whose accounts are used against him to be cross-examined in order to prove that his return is not incorrect or incomplete, he should not be conceded this opportunity. Apart from anything else, the second part of the proviso itself confers this specific right on the assessee. It is difficult to conceive as to how the assessees would be able to disprove the correctness of the accounts of Haji P. K. Usmankutty or the other wholesale dealers, unless he is given a chance to cross-examine them with respect to the credibility of the accounts maintained by them. It is quite possible that the wholesale dealers may have mentioned certain transactions in their books of account either to embarrass the assessee or due to animus or business rivalry or such other reasons which can only be established when the persons who are responsible for keeping the accounts are brought before the authorities and allowed to be cross-examined by the assessees. This does not mean that the assessing authority is bound to examine the wholesale dealers as witnesses in presence of the assessees : it is sufficient if such wholesale dealers are merely tendered by the sale-tax authorities for cross-examination by the assessees for whatever worth it is. In view of the express provision of the second part of the proviso, we are fully satisfied that the respondents had the undoubted right to cross- examine the wholesale dealers on the basis of whose accounts the returns of the assessees were held to be incorrect and incomplete. We are fortified in our view by a decision of this Court in C. Vasantilal and Co. vs. Commissioner of Income Tax, Bombay City, where this Court observed as follows :

> "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."

It will be noticed that if the sales-tax authorities refused the prayer of the assessees to cross-examine the wholesale dealers, then such a refusal would not amount to an adequate opportunity of explaining the material collected by the assessing authority.

14. Mr. Gupta, learned counsel for the appellant, relied on a decision of the Gujarat High Court in Jayantilal Thakordas vs. State of Gujarat. In the first place the Gujarat High Court in that case was concerned with the Bombay Sales Tax Act which did not contain any express provision like the one which is to be found in the second part of the proviso to Section 17 (3) of the Kerala General Sales Tax Act and, therefore, any decision given by the Gujarat High Court would have no application to the facts of the present appeals. In Jayantilal Thakordas case, the Court was merely called upon to interpret the import of the words "reasonable opportunity of being heard" and the Judges held that as

ample opportunity was given to the assessee concerned to show cause why the sales said to have been suppressed by him should not be included in his turnover, the rules of natural justice were duly complied with. The Court further pointed out that the sales-tax authorities were not strictly bound by the rules of evidence nor did the Act require the assessing authorities to do more than what they had done in that case. The Gujarat High Court seems to have dissented from the view taken by a single Judge of the Kerala High Court in M. Appukutty vs. State of Kerala. Finally it does not appear from the facts mentioned in the judgment of the Gujarat High Court that the assessee had at any time made a specific prayer for cross-examining the representatives of the firm of M/s A. Alibhai & Co., In these circumstances, therefore, Jayantilal Thakordas's case does not appear to be of any assistance to the appellant. We might, however, state that we are not prepared to go to the extent to which the Gujarat High Court has gone even in interpretating the content and ambit of an opportunity given to the assessee of being heard so as to completely exclude the right of cross-examination. We have already held that whether the reasonable opportunity would extend to such a right would depend upon the facts and circumstances of each case.

15. We feel that the correct law on the subject has been laid down by a division Bench of the Orissa High Court in Muralimohan Prabhudayal vs. State of Orissa where the High Court, while adumbrating the 4th proposition, namely, as to how the assessee was to rebut the material used by the Department against him, observed as follows :

> "It is the amplitude and ambit of this fourth proposition which needs examination. There cannot be any controversy that the assessee can adduce independent evidence of his own to disprove the particulars proposed to be used against him . . . . . A third party's accounts are proposed to be used against the assessee and if such accounts are relied on, the assessee's accounts are to be discarded . . . . If the assessee gets an opportunity by cross-examination, he can establish that the accounts of the third party are wrong and manipulated to suit the interest of the third party, or that they were intended to be adversely used against the assessee with whom the third party had inimical relationship. It is difficult to accept the contention in such a case, that the ample and reasonable opportunity to be given to the assessee would not include within its sweep the right of cross- examination."

The High Court in the present appeals has relied on its earlier decision in Appukutty vs. State of Kerala where a single Judge of the Kerala High Court pointed out that the fact that a third party maintaining some secret accounts had made certain entries in his accounts which may connect the assessee will not give jurisdiction to the assessing authority to use that information unless the assessee has been given an opportunity to cross-examine him effectively. As no such opportunity was given, the Court held that the proceedings stood vitiated. In our opinion, the decision of the Kerala High Court was substantially correct and in consonance with the language of Section 17 (3) and the proviso thereto.

16. Other cases have also been cited before us which, however, are based on the peculiar language of the statutes which the Courts were construing and which are different from the language used in the Act.

17. Finally, apart from the provisions of Section 17 (3) and the proviso thereto, the rules further reiterate what the proviso contemplates. Rule 15 which dealt with provisional assessment where a return is incorrect and incomplete, runs thus :

> "If the return submitted by the dealer appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after issuing a notice to the dealer calling upon him to produce his accounts to prove the correctness or completeness of his return at time and place to be specified in the notice and after scrutiny of all the accounts, if any, produced by the dealer and after taking into account all relevant materials gathered by it, determine the turnover of the dealer to the best of its judgment, and fix provisionally the annual tax or taxes payable at the rate or rates specified in Section 5 or notified under Section 10. Before determining the turnover under this rule, the dealer shall be given a reasonable opportunity of being heard and also to prove the correctness or completeness of the return submitted by him."

The Rule clearly shows that where the return of the assessee is incorrect or incomplete, he must be called upon to prove the correctness or completeness of the same. It also enjoins that a reasonable opportunity of being heard should be given to the assessee to prove the correctness or completeness of the return submitted by him. Thus the requirement of the second part of the proviso to Section 17 (3) is reiterated in Rule 15. We understand that such a provision in the Act is peculiar to the Kerala Act and is not to be found in other sales-tax statutes which provide for best judgment assessment. Thus on a true interpretation of Section 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 material 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. In view of the language in which the Rules are couched, it seems to us that a determinative issue arises in this case the Department taking the stand that the returns filed by the assessees are incorrect and incomplete, whereas the assessees contend that their returns are correct and that the accounts of the whole-sale dealers which formed the basis of the information of the Sales-tax Authorities were wrong and incorrect. Such an issue can only be determined after examination of the accounts of both the parties and after affording the assessees the right to cross-examine the wholesale dealers concerned, particularly when the assessee makes a specific prayer to this effect.

18. For these reasons, therefore, we are convinced that the judgment passed by the High Court in all these appeals is correct in law and the High Court has rightly decided the issues involved. The appeals accordingly fail and are dismissed with no order as to costs.

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