

KERALA HIGH COURT

M. Appukutty

Vs

State of Kerala

(C Vaidialingam, J.)

27.06.1962

JUDGMENT

C.A. Vaidialingam, J.

1. In this writ petition the main ground of attack that has been raised as against the order of assessment to sales tax, exhibit P-3, dated 28th March, 1960, for the assessment year 1958-59, passed by the Sales Tax Officer, Special Circle, Kozhikode, is that the assessing authority has acted arbitrarily and capriciously in adding 25% towards the so-called omission and fixing the estimate on this basis in the additional sum of Rs. 2,00,000.

2. There are also several other grounds of attack regarding the assessment order, which I do not think it necessary to go into at present.

3. It seems in the pre-assessment notice, exhibit P-1, the assessing authority states that from the secret account books detected from Shri Pattiarri Pachukutty of Kozhikode, three purchases are stated to have been made by Pachukutty from Messrs Haridas Bros., namely:-

- | | |
|--------------|--------------|
| 1. 5-5-1958 | Rs. 1,555-06 |
| 2. 31-3-1958 | Rs. 508-50 |
| 3. 10-6-1958 | Rs. 550-41 |

The total of these three items comes to Rs. 2,613-97. It is stated in exhibit P-1 that the petitioner has omitted these sales in his accounts, and therefore the accounts are incomplete and incorrect and cannot be accepted. There is also a statement that an assessment on best judgment basis will be made. But there is no indication in the pre-assessment notice, exhibit P-1, as to how the officer proposed to assess the income (sic) of the petitioner.

4. The petitioner sent the objection, exhibit P-2, on 28th March, 1960. In that objection, in particular he has stated that the so-called secret account books of Pachukutty cannot be relied upon as against the petitioner, because, even in the view of the officer, as the books in question are "secret books" they are not books of account maintained in the regular or ordinary course of business. The petitioner has also raised several other objections in exhibit P-2. The petitioner states that there are certain transactions entered into in the books of account of the petitioner,

which probably may not have been entered by Pachukutty in his books of account.

5. The objection, exhibit P-2, was received by the assessing authority on 28th March, 1960, as is evidenced by the assessment order, exhibit P-3. But on the same date, the assessing authority passed the order of assessment also. In exhibit P-3 the assessing authority again refers to the three transactions discovered from the secret account books of Pachukutty, and the officer says that those items do not find a place in the accounts of Messrs Haridas Bros. After referring to the objection filed by the petitioner and advertent to the petitioner's statement therein that he has not made any sales to Pachukutty and that he is not responsible for the books maintained by Pachukutty, the officer does not say further than this, namely, again reiterating that the secret account books detected from Pachukutty show actual transactions. As to how exactly any books of account maintained by somebody else, and much less the secret account books, which according to the department were discovered from a third party, can straightaway and without proof be utilized as against persons like the petitioner, has not been even indicated in the order of assessment. As to whether the petitioner had an opportunity to contest the correctness of the entries in those books, or as to whether the secret account books themselves have been proved by anybody appearing on behalf of Pachukutty, is not certainly clear from the assessment order. Therefore, the attack based on the order under attack, placing considerable reliance on the secret account books of Pachukutty, cannot certainly be said to be without any basis.

6. The assessing authority after stating that the secret account books of Pachukutty establish the transactions ultimately fixed the total turnover of the two concerns, namely the petitioner and Messrs Haridas Bros., after giving exemptions, in the sum of Rs. 7,98,662-71. To that the officer adds what he calls "25% towards omission estimated" at Rs. 2,00,000. As to how exactly the officer fixes the 25% towards omission, there is again no indication in the assessment order. Ultimately the turnover is fixed in the sum of Rs. 9,98,662-71.

7. The petitioner appears to have stated that so far as the transactions with R. M. Thiagaraja Pillai are concerned, there is an affidavit by that person. But nevertheless as the assessing authority passed the order of assessment on the date of filing of the petitioner's objection, without giving him any further opportunity, it is the grievance of the petitioner that no investigation worth the name has been made by the authority regarding the various matters mentioned in his objection.

8. Apart from all the other objections raised by the petitioner, the manner in which the assessing authority has proceeded to estimate the suppression at 25% passes all comprehension. In the first place the assessing authority in my view had absolutely no justification for relying upon the books of account of a third party, much less the secret account books, as against persons like the petitioner, without affording an effective opportunity to cross-examine those persons who are supposed to have maintained the secret accounts and from whom they have been discovered. The fact that some third party maintaining, even according to the department, some secret accounts has made certain entries in his accounts which may connect a person like the petitioner, by itself will not give jurisdiction to the assessing authority to utilize that information, unless that person has been given ample opportunity in the presence of the person who has kept the secret accounts to effectively cross-examine him and elicit the necessary facts as to how exactly the relevant entries came to be made connecting the petitioner with such books of account. No such

opportunity has been admittedly given to the petitioner in these proceedings.

9. Even assuming that the assessing authority is entitled to make some sort of a reasonable guess-work within well-defined limits, in the circumstances of this case, as per the pre-assessment notice, exhibit P-1, and the assessment order, exhibit P-3, the suppression, if at all, comes only to Rs. 2,613-97 covering a period of about five months. As to how, ignoring this vital circumstance, the assessing authority has estimated the total turnover of the petitioner and added 25% towards omission, is not clear from the order. So far as I could see the learned Government Pleader has not been able to satisfy me that such a procedure is based on any provision of the statute or the rules thereunder.

10. No doubt, when the assessing authority is not prepared to act on the materials placed before him in support of the return, there is jurisdiction in him to make an assessment on best judgment basis. Arbitrarily adding 25% on the turnover of a particular individual, as the officer has done in this case, cannot certainly be considered to be an assessment made on best judgment basis as that expression is understood in law.

11. For all these reasons, the order under attack will have to be set aside. The assessing authority is directed to take fresh proceedings for passing an order of assessment for the year in question. The petitioner will be given another opportunity to sustain the return itself, by producing the necessary evidence, oral or documentary. If the assessing authority nevertheless proposes to utilize the information contained in some secret books of account of persons like Pachukutty, as against the petitioner, the assessing authority will have to produce not only those books of account but also the person from whom those books had been seized, for cross-examination at the hands of the petitioner. After completing all these formalities, if the assessing authority proposes to make an assessment on best judgment basis, there is an obligation on his part to place before the assessee the basis which he still proposes to adopt, and invite objections from him. In this case unfortunately though the objections had been filed one day late, they have been taken into account by the assessing authority. But on the same day on which the objections were received, namely 28th March, 1961, the assessing authority has also made the order of assessment. The reasonable conclusion in such circumstances is that receipt of the objection from the party is nothing but an empty and idle formality, and the authority could not have given serious consideration to the objections, because an inquiry into that would lead to the necessity of giving further opportunity to persons like the petitioner of establishing their case. No such opportunity has been given to the petitioner in these proceedings.

12. Therefore subject to the directions and observations contained in this order, the assessment order under attack is set aside and the writ petition is allowed. There will be no order as to costs.