

**IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

Present :

Hon'ble Justice **PINAKI CHANDRA GHOSE**

Hon'ble Justice **SANKAR PRASAD MITRA**

ITA No. 373 OF 2005

BANGODAYA COTTON MILLS LTD.
Versus
COMMISSIONER OF INCOME TAX, KOLKATA – IV

For the Appellant : Mr. J.P.Khaitan, Sr. Advocate
For the Respondent : Mr. Nizamuddin, Advocate
Heard on : 05.11.2008 & 24.11.2008
Judgment on : 17.03.2009

PINAKI CHANDRA GHOSE, J. - This appeal was admitted on the following substantial questions of law

:-

- (i) *Whether the Tribunal was justified in law in upholding the addition of Rs.50 lacs made on the basis of materials seized from a third party, the veracity and genuineness of which was not established by summoning and examining the parties concerned inspite of the appellant's specific request and its purported findings in that behalf are arbitrary, unreasonable and perverse?*
- (ii) *Whether the Tribunal was justified in law in holding that the appellant was required to produce the concerned persons for examination and that the Assessing Officer had no obligation/duty in that behalf or to prove the genuineness and veracity of the materials seized from a third party on which the Department was seeking to rely?*
- (iii) *Whether and in any event, the Tribunal was justified in law in reversing the finding of the Commissioner of Income Tax (Appeal) that the said sum of Rs.50 lacs could, if at all, form subject matter of assessment only in the hands of the then Chief Executive of the appellant*

D.R.Khatau, since neither the appellant nor the Special Officer appointed by this Hon'ble Court had received the said amount and its purported findings in that behalf are arbitrary, unreasonable and perverse ?

The facts of the case briefly are as follows :

The company, the assessee was incorporated in the year 1931 and carried on business of running a textile mill. The manufacturing operations at the said mill was stopped on January 21, 1984 due to the financial difficulties. It appears from the facts that the assessee had borrowed money from Industrial Reconstruction Bank of India (hereinafter referred to as "the Central Bank").

The said Bank initiated the proceedings before the Hon'ble Court for recovery of their dues on May 29, 1985. A Special Officer was appointed by the Court for sale of the moveable and immoveable properties of the assessee' farm. The purpose of the said Farm to settle the liabilities of the creditors including the workers.

On December 23, 1988, an order was passed by the Court in **Matter No. 847 of 1985 (*Industrial Reconstruction Bank of India – Vs. – Bangodaya Cotton Mills Limited*)** whereby the Court directed the sale of the movable assets of the assessee including the plant, machinery, factory shed etc. on a consideration of Rs.1 crore to M/s. Prasad Steel Traders, a proprietary concern of one Sunil Kumar Jaiswal.

It would be evident from the said order dated December 23, 1988 that the moveable assets of the assessee were valued by an approved valuer and the sale thereof was directed by the Special Officer at the value determined by the approved valuer. Payment of the consideration was to be made by the purchaser to the Special Officer and directions were given to the Special Officer as to how each payment received from the purchaser was to be disbursed. Two workers' unions, namely, Bangodaya Cotton Mills Employees' Union and Bangodaya Cotton Mills Workmen's Union agreed to accept an aggregate sum of Rs.50 lacs in full and final settlement of all their dues and claims.

It is also submitted that an appeal was preferred from the said order dated December 23, 1988 and the said appeal and application were disposed of by the Hon'ble Division Bench on March 14, 1989. It was provided in the order of the Hon'ble Division Bench that if the workers' dues exceeded Rs.50 lacs, the sum would be met from the sale proceeds of the immoveable properties of the assessee.

On August 19, 1993 the search was conducted at the places of the assessee. The search was also carried on against one Thakur Prasad Jaiswal, father of Sunil Kumar Jaiswal. In course of such search, three letters were seized. The said three letters were exchanged between Sunil Kumar Jaiswal and one D.R. Khatau, the then Chief Executive of the assessee.

On the basis of the said three letters, the Assessing Officer held that in the assessment order dated March 30, 1994, the consideration for the sale of the moveable assets were raised from Rs.1 crore to Rs.1.50 crore by the parties. The assessee preferred an appeal from the said assessment order before the Commissioner of Income Tax (Appeals). By an order dated March 29, 1996 the Commissioner of Income Tax (Appeals) set aside the said assessment for reconsideration. The Assessing Officers were directed to allow the assessee an opportunity to examine the three letters.

It further appears that the assessee was provided with the copy of the said three letters dated December 15, 1990; December 17, 1990 and December 18, 1990 respectively. It was revealed from the said letters that the sale consideration for the moveable assets were increased by the parties to Rs.1.50 crore for paying off the workers and on that basis the Department contended that the return filed by the assessee was not correct.

The assessee contended that the letters dated December 15, 1990 and December 18, 1990 were not signed by its Chief Executive and were forged document. It was further contended by the assessee before the authority that there was no question to alter the sale price since the sale price was fixed by the Hon'ble Court and the matter was entirely dealt with by the Special Officer. It was further submitted that no reliance

could be placed on these letters and it was the duty of the Assessing Officer to issue summons and to make further enquiries from M/s. Prasad Steel Traders and the Special Officer.

However, it appears that the Assessing Officer without issuing such summons to the persons concerned or making them available for cross-examination, treated the sum of Rs.50 lacs in addition to the sum of Rs. 1 crore. It was further submitted that since the assessee had contended that the seized letters were forged and the contents thereof were not true, the onus was upon the assessee to prove the same by producing the concerned persons for examination. In other words, the Assessing Officer presumed the said seized letters to be genuine and the contents thereof as correct.

It is further submitted that being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). Before the said appellate authority, the assessee submitted an affidavit of its Chief Executive D.R. Khatau (**see page 116 of the paper book**) stating on oath that the signatures appearing on the seized letters dated December 15, 1990 and December 18, 1990 were not his nor did he receive any letter dated December 17, 1990 from M/s. Prasad Steel Traders. He also stated that the Special Officer appointed by this Hon'ble Court dealt with M/s. Prasad Steel Traders and that he did not deal with M/s. Prasad Steel Traders nor did he receive the sum of Rs.50 lacs.

The Commissioner of Income Tax (Appeals) by an order dated April 29, 2003 (**see page 80 of the paper book**) deleted the said addition of Rs. 50 lacs. He held that the Assessing Officer was not justified in proceeding on the basis of the three letters without examining on oath the concerned parties such as, the buyer, the Chief Executive, the assessee and the Special Officer. He held that no corroborative evidence was found in course of the search against the assessee to prove the Department's case. He held that it was unbelievable that when M/s. Prasad Steel Traders was entitled to purchase the moveable assets for the price of Rs. One crore, it would increase the same by Rs.50 lacs for the mere asking. He also accepted the assessee's alternative contention that taxation of the sum of Rs. 50 lacs was required to be considered in the hands of D.R. Khatau as neither the assessee nor the Special Officer had received the said amount.

The appeal was preferred from the said order dated April 29, 2003 and the Tribunal by order dated March 28, 2005 reversed the order of the Commissioner of Income Tax (Appeals) and upheld the addition of Rs.50 lacs made by the Assessing Officer.

The Learned Counsel appearing on behalf of the appellant contended that from the facts it would be revealed that the approach of the Tribunal was entirely erroneous. The said three letters in question were not seized from the custody of the assessee. The said letters were seized from the father of Sunil Kumar Jaiswal. It is further submitted that that the signatures on the two letters alleged to have originated from the assessee were not of its Chief Executive D.R.Khatau, he has submitted other letters to show his usual signature.

The Assessing Officer on comparison found the signatures in the seized letters to be different but brushed the discrepancy away by observing that somebody entering into an illegal and surreptitious deal was unlikely to put his usual signature. Presuming the seized letters to be genuine and the contents thereof as true and correct, the Assessing Officer cast the burden to prove otherwise on the assessee by producing the persons concerned and did not summon the persons concerned or make them available for cross-examination. In course of the proceedings before the Commissioner of Income Tax (Appeals), the assessee submitted an affidavit of its then Chief Executive D.R.Khatau affirming on oath that he had not written the two letters alleged to have originated from the assessee and the signatures therein were not his. He further stated that all the dealings with the purchaser were carried out by the Special Officer in accordance with the directions of this Hon'ble Court and that he had never dealt with the purchaser or received any sum of Rs.50 lacs. He further stated that the Income Tax Department had not made any enquiry from him and had not issued to him any summons or notice. The Tribunal did not advert to the said affidavit in its order.

It is further submitted that in the instant case, where the revenue has sought to rely upon the three letters seized from a third party and it was incumbent upon the revenue to make available the concerned persons namely, the purchaser, M/s. Prasad Steel Traders/its proprietor, Sunil Kumar Jaiswal, the person from whom the letters were seized, namely, Thakur Prasad Jaiswal, the Special Officer appointed by this

Hon'ble Court and D.R. Khatau for cross-examination and for the said purpose, the Assessing Officer should have issued summons to them as required by the assessee. Since the said D.R. Khatau had been the assessee's Chief Executive, the assessee had submitted his affidavit before the Commissioner of Income Tax (Appeals). The revenue did not consider it necessary to cross-examine D.R. Khatau. It is submitted that in such circumstances, the revenue could not rely upon the seized letters and the Tribunal was not justified in basing its findings thereon.

The Learned Counsel appearing on behalf of the appellant relied on the decision reported in **(1980) 125 ITR 713 (SC) [Kishinchand Chellaram – Vs.- CIT]** and submitted that the Revenue sought to rely upon a letter addressed by the Manager of the bank to the ITO which was not even shown to the assessee. The Hon'ble Supreme Court held that the letter could not be taken into account for the purpose of arriving at a finding against the assessee. At page 720 of the Reports, the Hon'ble Supreme Court held as follows :-

“.....It is true that the proceedings under the income-tax law are not governed by the strict rules of evidence and, therefore, it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the I.T. authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the manager of the bank with reference to the statements made by him.....”

He further submitted that the aforesaid judgment of the Hon'ble Supreme Court is a clear authority for the proposition that materials collected by the revenue from a third party have to be disclosed to the assessee and the assessee has the right to controvert the same by asking for cross-examination.

He further relied on the decision reported in **(1977) 39 STC 478 (SC) [State of Kerala – Vs.- K.T.Shaduli Yusuff]** and submitted that the Sales Tax Officer sought to rely upon evidence by way of entries in the books of account of the person with whom the assessee had dealings for arriving at the finding that certain sales made by the assessee were not accounted for in the books of account of the assessee. The assessee requested for an opportunity to cross-examine the person in whose books the

entries were found but the Sales Tax Officer declined the assessee's prayer. At page 484 of the Reports, the Hon'ble Supreme Court held as under :-

“.....The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Haji 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 Haji 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 Haji Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Haji 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 Haji Usmankutty and other wholesale dealers summoned as witness for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood.....”

It is further submitted that in view of the aforesaid judgments of the Hon'ble Supreme Court, it is settled law that where the revenue seeks to rely upon evidence obtained from other parties, the assessee has to right to ask for cross-examination of such parties to show that such evidence is false, bogus, or manipulated and should not be accepted and that the revenue has to make the parties available for cross-examination by summoning them. As has been held by the Hon'ble Supreme Court, cross-examination is one of most efficacious methods of establishing truth and exposing falsehood.

It is further submitted that both the Assessing Officer and the Tribunal went wrong in holding that it was for the assessee to produce the persons concerned for examination. As has been held by the Hon'ble Supreme Court, cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood.

It is further submitted that both the Assessing Officer and the Tribunal went wrong in holding that it was for the assessee to produce the persons concerned for examination. As has been held by the Hon'ble Supreme Court in the aforesaid decisions, the assessee had to be granted the opportunity to cross-examine the persons concerned and the Assessing Officer should have made them available for the said purpose by summoning them. In the instant case, though the assessee had requested the Assessing Officer to summon the concerned persons, he declined to do so and required the assessee to produce the persons for examination. It is submitted that it was the duty of the Assessing Officer to summon the persons concerned and make them available for cross-examination by the assessee.

It is further submitted that the assessee had no control over the other persons and could not be expected to produce them before the Assessing Officer. Only D.R. Khatau had been the assessee's Chief Executive and as such, the assessee submitted his affidavit but the revenue did not cross-examine him.

In the decision reported in **(1956) 30 ITR 181 (SC) [Mehta Parikh & Co. – Vs. – CIT]** the assessee had produced affidavits of three persons before the Appellate Assistant Commissioner. The deponents of the said affidavits were not cross-examined by the revenue. It was held by the Hon'ble Supreme Court that the revenue could not challenge the correctness of the statements made in the affidavit without cross-examining the deponents.

The Learned Counsel further submitted that in the instant case, the Commissioner of Income Tax (Appeals) had given good reasons for deleting the addition made by the Assessing Officer and the Tribunal was not justified in reversing his order. The moveable assets were sold by the Special Officer to the purchaser as directed by this Hon'ble Court at a consideration of Rs. one crore. The said consideration was arrived at after having the assets valued. The Special Officer was to have the plant, machinery, etc. dismantled and representatives of IRBI were entitled to be present at the time of delivery of the materials to the purchaser. The consideration was to be paid by the purchaser to the Special Officer. Detailed directions were given as regards the manner of payment by the purchaser to the Special Officer and subsequent disbursement of the amount received by the Special Officer. The assessee did not at any time receive any

amount from the purchaser. In fact, the assessee had no right to deal with any of its properties or assets and had no right to require the purchaser to pay any amount to it. The purchaser was entitled to get the moveable assets for the consideration of Rs. one crore in terms of the order passed by this Hon'ble Court. It did not stand to reason that the purchaser would part with even a rupee more than what it was required to pay in terms of the order passed by this Hon'ble Court. It is inconceivable that the consideration fixed by this Hon'ble Court for sale of the moveable assets by the Special Officer appointed by the Court to the named purchaser could be altered by anyone.

As submitted hereinbefore, the letters in question can not be relied upon by the revenue. Even otherwise, the letters speak of increase of the price on account of higher labour payment. The purchaser could not possibly have had any interest in the assessee's labour. That apart, though in terms of the order dated December 23, 1988 of the Learned Single Judge, the workers were entitled only to Rs.50 lacs out of the sale proceeds of the moveable assets, in terms of the order dated March 14, 1989 of the Division Bench, workers' dues if found to be in excess of Rs.50 lacs were to be met from the sale proceeds of the immovable properties. The workers were thus fully protected. The improbability of the contents of the said letters is self-evident. He has further submitted that no material corroborating the contents of the letters was found at the assessee's premises which were simultaneously searched.

In course of the search at the assessee's premises, no copies of the two letters alleged to have been written by it nor the letter of the purchaser alleged to have been written to the assessee were found. No record was found of the purchaser having paid the money or of the assessee having received it by way of any entry in any books of account or in the form of a money receipt or otherwise. There is no statement of any person that a sum of Rs. 50 lacs was paid over and above the consideration of the said letters without even making the persons concerned available for cross-examination by the assessee.

He further submitted that even if taken at face-value, the letter only speak of enhancement of the price but there is no evidence that such enhancement had actually been given effect. In fact, it was in the interest of the revenue to summon the concerned persons to establish that the higher amount was actually

paid by the purchaser and received by the assessee but no such step was taken. In **Kishinchand Chellaram's case** (supra), at pages 720-1 of the Reports, the Hon'ble Supreme Court held as under :-

“.....The revenue authorities could have very well called upon the manager of the bank to produce the documents and papers on the basis of which he made the statements contained in his letter and confronted the assessee with those documents and papers but instead of doing so, the revenue authorities chose to rely merely on the statements contained in the letter and that too, without showing the letter to the assessee.....”

The Learned Counsel further submitted that the Commissioner of Income Tax (Appeals) rightly accepted the assessee's alternative contention that even assuming that the money had changed hands, neither the assessee nor the Special Officer appointed by this Hon'ble Court having received it, any addition on that account was required to be considered in the hands of the beneficial owner and if D.R.Khatau was the beneficial owner, in his hands. The Tribunal simply dismissed the said contention observing that it was nothing but an alternative plea.

He further submitted that the questions on which the instant appeal was admitted should be answered in the assessee's favour and its appeal be allowed by setting aside the addition of Rs.50 lacs made in the assessment.

On the contrary Md. Nizamuddin, Learned Counsel appearing on behalf of the Department submitted that the scope of the instant appeal is very limited. He pointed out that from question No. 1 and 2 it would be evident that the grievance of the assessee is Tribunal's confirmation of addition of Rs.50 lacs made on the basis of the material seized from a third party and the genuineness of which had been challenged by the assessee. The further grievance of the assessee that the Assessing Officer did not summon and examine the parties to establish the genuineness of the said seized documents. He further submitted that the assessee company was not given an opportunity by the Assessing Officer to clarify on the issue as it would be evident from the order passed by the Assessing Officer (**see page 63 second paragraph, page 65 second paragraph, page 66 of the Paper Book**).

The third question relates to the taxability of the said amount. According to the Learned Counsel, the assessee company took the defense in response to the aforesaid opportunity provided by the Assessing Officer to clarify on the aforesaid issue as would appear from page 68, fifth line from the top of the Paper Book; inter alia which is reproduced as follows :

“.....Whatever evidences particularly letter dated 5.12.90, 17.12.90 & 18.12.90 seized of search & seizure operation (marked as TP – 6) received by the ADi is nothing but forged documents. Signatures in the letter dated 15.12.90 and 18.12.90 of Sri D.R.Khatau, Chief Executive of M/s. Bangodya Cotton Mills Ltd. is forged by a person who may have vested interest to put the company or its directors in the false position and in trouble.”

He further submitted that the Assessing Officer duly dealt with the matter elaborately and after scrutinizing the signatures appearing on the said letters came to the conclusion that the signatures concerned are of Mr. D.K. Khatau and not the forged one. He further submitted that the issue is totally based on appreciation of evidence by the Assessing Officer. The Tribunal is the last fact finding of the aforesaid findings of the Assessing Officer.

Hence, according to him, this Court in exercise of its jurisdiction to decide substantial questions of law under Section 260A of the Income Tax Act, 1961, can reappraise the evidence and declare as to whether a document relied upon by the Tribunal is genuine or forged? He raised a question can the Court decide that question at this stage or substitute its finding with the findings of the Assessing Officer as well as by the Tribunal based on some material evidence available before them. He further pointed out that the decisions relied upon by the assessee before the Assessing Officer being reported in the decision reported in **(117) ITR 186 (Addl. C.I.T. – Vs – Radha Shyam Jagdaish Prasad)** where the Hon'ble Division Bench of Allahabad High Court at Page 189 held as follows:

“In these circumstances, we are one with the Tribunal in holding that the assessee was denied opportunity to justify the cash payment exceeding Rs.2,500/-. But we see no legal justification for the consequent action of the Tribunal in deleting outright the addition retained by the AAC on this ground. The Tribunal ought to have remanded the case to the ITO and asked him to pass fresh orders in that behalf summoning the parties concerned.”

Another decision of The Hon'ble Supreme Court consisting of three Judges' Bench, relied on by the assessee being **(39) STC Page 478 (S.C.) (State of Kerala – Vs – Shadul Yusuff)** which is a case under Sales Tax when the Officer afforded him opportunity to cross-examine another person whose books of accounts were relied upon by the Assessing Officer which was denied by the assessee and The Hon'ble Kerala High Court remanded the matter to the Sales Tax officer to make fresh assessment order after giving opportunity to the assessee to cross-examine the person concerned. Such action of remand of The Hon'ble High Court was upheld/affirmed by the three Judges' Bench of The Hon'ble Supreme Court in the aforesaid decision.

The Learned Counsel further submitted that where two views are possible on the materials on record and the Learned Tribunal has taken one view, in such a case that even if this Hon'ble Court is not agreeable to the view taken by the Learned Tribunal being the last fact finding authority; should not re-appreciate the evidence afresh and draw a conclusion different from those drawn by the Assessing Officer and upheld by the Learned Tribunal; at best this Hon'ble Court could remand the case to the Assessing Officer to consider afresh by giving opportunity to the assessee to cross-examine the person concerned as the view taken by the Hon'ble High Court and the Hon'ble Supreme Court in cases referred above upon which the assessee itself has relied on.

After considering the facts and circumstances of this case and after considering the decisions of the Hon'ble Apex Court in **State of Kerala vs. K.T. Shaduli Yusuff (supra)** and also after considering the decision of the Allahabad High Court in **Additional C.I.T. vs. Radha Shyam Jagdaish Prasad (supra)** and after analyzing the decision cited at the Bar as well as the decision in Kishinchand Chellaram's case (supra) as submitted by the learned counsel on behalf of the assessee that the Commissioner of Income Tax (Appeals) rightly accepted the assessee's alternative contention that even assuming the money had changed hands but, neither the assessee nor the Special Officer appointed by the High Court have received the same. Therefore, addition on that account was required to be considered in the hands of the beneficial owner but it appears that without any reason the Tribunal dismissed the said contention. It further appears that the assessee could not get the three letters on the basis of which the Assessing Officer proceeded on.

No corroborative evidence was found in the hands of the Assessing Officer and, therefore, in our considered opinion, the Assessing Officer without issuing such summons to the person concerned or making him available for cross-examination on the basis of the said letter proceeded in the matter. Although, the assessee had contended that the letters were forged and the contents thereof were not true it appears from the case that the Assessing Officer presumed the seized letters to be genuine and the contents thereof were correct.

In these circumstances, we feel that the assessee must get a chance to prove the facts and further as submitted on behalf of the department that the order so passed by the learned Tribunal should be set aside and the matter has to be remanded to the Assessing Officer to consider the matter afresh by giving an opportunity by the assessee to cross-examine the person concerned. We accept such contention of Md. Nizamuddin, the learned Counsel appearing on behalf of the department and, accordingly we set aside the order passed by the learned Tribunal and remanded the matter back to the Assessing Officer for hearing afresh.

Accordingly, we answer the questions No.1, 2 and 3 in favour of the assessee.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(PINAKI CHANDRA GHOSE, J.)

I agree.

(SANKAR PRASAD MITRA, J.)