

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 23RD DAY OF DECEMBER 2021 / 2ND POUSHA, 1943

WP(C) NO. 19218 OF 2021

PETITIONER:

BHIMA JEWELS,
40/ 586, BHIMA TOWER,
MAHATMA GANDHI ROAD,
ERNAKULAM, 682 011,
REPRESENTED BY ITS MANAGING PARTNER.

BY ADVS.
SRI.A.KUMAR
SRI.P.J.ANILKUMAR
SMT.G.MINI(1748)
SRI.P.S.SREE PRASAD
SRI.JOB ABRAHAM
SRI.AJAY V.ANAND

RESPONDENTS:

1 PRINCIPAL COMMISSIONER OF INCOME TAX ,
 I.S PRESS ROAD, ERNAKULAM 682 018.

2 INCOME TAX OFFICER,
 NATIONAL E.- ASSESSMENT CENTRE,
 DELHI 110001.

BY ADV. CHRISTOPHER ABRAHAM, SC

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 24.11.2021, THE COURT ON 23.12.2021 DELIVERED
THE FOLLOWING:

BECHU KURIAN THOMAS, J.

W.P.(C) No.19218 of 2021

Dated this the 23rd day of December, 2021

JUDGMENT

When an existing system is undergoing a radical change, there may be times - transition times, when inadequacies to cope with the change, may result in hardship and immeasurable prejudice to one party. One such instance seemingly arises in the instant case.

2. An order of assessment issued for the assessment year 2017-18, under the Income Tax Act, 1961 (for short, 'the Act') is the basis for the challenge under Article 226 of the Constitution. Violation of the principles of natural justice is the premise on which the challenge is built upon.

3. Petitioner is involved in the business of gold and diamond jewellery and is an assessee under the Act. For the assessment year 2017-18, a return was filed by the petitioner, which was subsequently revised, declaring a total income of Rs.20,26,65,360/-. The return was taken up for scrutiny assessment and an intimation under

section 143(2) of the Act was also given. Thereafter, petitioner was called upon to furnish the data and documents under section 142(1) of the Act, by notice dated 02.12.2019. A detailed reply was given by the petitioner on 06.12.2019 and again on 11.12.2019. Since nothing was heard from the assessing officer, petitioner alleges that, based upon the replies submitted, it assumed that the assessing officer was satisfied and the assessment was concluded. The belief was fortified by the fact that in the meantime, the assessing officer had issued an order under section 92CA of the Act to the extent of holding that for the year 2017-18, no transfer pricing adjustment was even considered necessary.

4. In the meantime, petitioner was issued with notices for the subsequent assessment year 2018-19 also. Since nothing was heard as regards the assessment year 2017-18, petitioner alleges that it bonafide believed that the proceedings of the year 2017-18, had been concluded.

5. Much later, to the chagrin of the petitioner, it realised that the proceedings for the assessment years 2017-18 and 2018-19 progressed simultaneously under the Faceless Assessment Scheme. Though for the assessment year 2018-19, petitioner received a letter

from the jurisdictional authority that the case was transferred to the faceless assessment scheme, such an intimation was absent for the assessment year 2017-18. Therefore, the petitioner contended that it was unaware of the completion of the proceedings relating to the assessment year 2017-18 under the faceless scheme. According to the petitioner, it realized about the order of assessment for 2017-18 only when the department enquired with the petitioner's consultant, about non-compliance of the demand. Subsequently, when petitioner accessed the web portal of the income tax department, it realized to its horror that show-cause notice was issued to the petitioner on 03.04.2021 which culminated in an assessment order dated 22.04.2021. Petitioner alleges that it was completely oblivious of the notices issued and even the assessment order. Petitioner complains that the notices issued to it were never seen reflected in the portal and hence the petitioner was under the bonafide belief that the assessment proceedings for the year 2017-18 would have been completed by 31.03.2020 based on the orders of the transfer pricing officer.

6. Petitioner further contends that, one of the e-mail id's registered with the income tax department was that of one

Mr.Sreeram, who was the finance head of the petitioner, while the secondary e-mail id furnished was that of the Chartered Accountant. Petitioner alleges that unfortunately, Mr.Sreeram left the employment with the petitioner on 19.09.2020 and hence petitioner was unaware of the notices issued. Petitioner asserts that no mail or communication was ever sent to the secondary mail id for the assessment year 2017-18. Petitioner claims to have been in the dark about the various notices issued for assessment year 2017-18. It is the petitioner's specific case that, notice was issued to a defunct e-mail id, that too, to an employee who had quit the service and hence there was no proper service of notice.

7. In the absence of any mail sent to the secondary e-mail id, which according to the petitioner, was mandatory, the notice of assessment could not be said to have been properly served. Even otherwise, petitioner alleges that, due to the various glitches in the portal of the income tax department as well as the transition phase of switching into the electronic assessment, bonafide omissions in comprehending the notices resulted in the petitioner being deprived of an opportunity to participate in the proceedings relating to the assessment year 2017-18.

8. Sri..A.Kumar, learned counsel for the petitioner submitted that there was a clear failure of an opportunity to contest the assessment proceedings. According to the learned counsel, the aforesaid is evident from the circumstance that during the very same period while petitioner had been participating in the assessment proceedings for another period, i.e., assessment year 2018-19, petitioner was not responding for the assessment year 2017-18. Thus, while the two proceedings were going on simultaneously, petitioner was participating in one assessment year while not responding to the other. The learned counsel asserts that, the absence of participation in one assessment proceeding indicates absence of knowledge of the proceedings. The learned counsel further submitted that, the quantum involved in the present assessment year is also significant that, petitioner would never have purposefully avoided an opportunity to object to the same. It was also submitted that the technical issues with the web portal of the Income Tax Department were not alien and that contributed to the difficulty to various assesseees. Apart from that, the technical challenges of online system faced by the professionals who deal with assesseees accounts also contributed to the same, contends the

learned counsel.

9. Sri. Christopher Abraham, learned Standing Counsel for the respondents filed a statement contending that the reasoning of the assessee is least convincing and even defies logic. Respondents further pleaded that it was obligatory upon the petitioner to bring to the notice of the Assessing Officer the change of e-mail id by updating the same in the web portal. The necessity of sending communication to the secondary mail id would arise only in situations when communications sent to the principal mail id bounces back or returned unserved. Since none of those circumstances occurred in the instant case, this was not a fit case for interference under Article 226 of the Constitution of India.

10. Respondents further stated that completing assessments through e-proceedings is a participative process where all notices/communications to the assessee, concerning any proceedings under the Income Tax Act are shared to e-proceedings through e-filing portal. In other words, the assessee can access all notices, communications or the orders issued, by logging into the e-filing portal by using his login id and password and had the petitioner shown reasonable care, he could have avoided the present

predicament it finds itself in. Respondents also stated that the rejection of books of accounts of the assessee on the presumption that no proper books of accounts are maintained, could not be faulted since the assessing officer had no other option. It was pointed out that the matter has to be contested on merits through the statutory remedy of an appeal.

11. I have heard the arguments of Sri.A.Kumar, learned counsel for the petitioner as well as Sri.Christopher Abraham, learned Standing Counsel for the respondents.

12. A perusal of the impugned order of assessment shows that there was no response from the side of the assessee to any of the notices issued after the response to section 142(1) notice. A perusal of the assessment order reveals that, by notice dated 05.03.2021, the assessee was called upon to submit the details for the assessment year 2017-18. Since there was no reply from the assessee, a reminder was issued on 17.03.2021, granting the petitioner a final opportunity to reply by 18.03.2021. Even thereafter, when there was no response, a final show-cause notice was issued on 22.03.2021. In the said notice, it was mentioned that if a response is not coming by 25.03.2021, the assessment will be

finalised on the basis of the show-cause notice. However, even that notice failed to elicit any reply. Yet again, one more opportunity was granted to the petitioner, after obtaining permission from the superior officers under section 144A of the Act and a final opportunity was granted by issuing another notice on 03.04.2021. Even then, there was no response from the petitioner.

13. The assessing officer again adjourned the case for further consideration to 07.04.2021. Since even by 12.04.2021 there was no response from the petitioner, the provisions of section 145(3) of the Act was invoked and the assessing officer rejected the books of accounts of the assessee, and computed the profits at 8% of the total turnover and calculated the profit at Rs.1,32,19,88,372/-. A further addition of Rs.92,89,62,279/- was also determined and the total income was rounded off to Rs.223,41,88,410/-. Thereafter separate penalty proceedings have also been initiated under section 270A of the Act.

14. A perusal of the aforesaid details mentioned in the order of assessment reveals that the assessing officer tried his level best to elicit a response from the petitioner. However, for reasons best known to the assessee, there was no response.

15. While appreciating the contentions of the petitioner regarding the absence of knowledge about the notices issued to the petitioner, a significant circumstance is the participation of the petitioner in the assessment proceedings for 2018-19, at the same time. While participating in the said assessment proceedings, petitioner was not even responding to any notice issued for the year 2017-18. The aforesaid circumstance finds credence in the observations in the impugned order itself. The assessing officer has observed that, at the same time, assessment proceedings for the years 2018-19 were continuing simultaneously and the assessee was participating in those proceedings. Thus, for the assessment proceedings for the year 2017-18, petitioner was not responding, while for the assessment year 2018-19, the petitioner was participating and responding to the notices.

16. Participating in the assessment proceedings for 2018-19, while at the same time total non-response to any notices for the year 2017-18, compels this Court to conclude that petitioner was unaware of the proceedings being carried on against the petitioner for the assessment year 2017-18. The repeated notices issued to the petitioner had the same fate of no response. The contention of the

petitioner that the person whose e-mail id was furnished as the primary e-mail id had left petitioner's employment, when juxtaposed with the circumstances of lack of response to any notice for the year 2017-18, while at the same time, participating in the proceedings for 2018-19, indicate absence of knowledge of the proceedings against the petitioner for the year 2017-18. Though it is not mandatory that every communication should be addressed to the secondary e-mail id also, this Court is of the opinion that in the peculiar circumstances of the case, where repeated notices sent to the petitioner was not eliciting any response, it would have been ideal to have issued notice to the secondary e-mail id also.

17. The technical glitches that surrounded the income tax portal during the said period is also a factor that ought to have weighed with the assessing officer in contemplating issuance of a notice to the secondary e-mail id, especially since, as rightly contended by the learned counsel for the petitioner that, this is a high pitched assessment.

18. Viewed in the entire conspectus of the circumstances that surround the order of assessment, this Court is of the opinion that, though the assessing officer cannot be faulted, petitioner did not get

an effective opportunity to put forth his response for the year 2017-18. Since the assessment order is the platform from which the rights and obligations of not only the assessee but also of the department arise, it is essential that such a platform is built upon strong foundations, especially when the amount involved is large. The burden of an assessment order issued without hearing the assessee will fall, not only upon the petitioner alone but even upon the system itself and may create further waste of resources.

19. It is relevant to bear in mind that the principles of natural justice cannot be cribbed or cabined in a straitjacket formula. The concept of natural justice depends on the context and the circumstances of each case. The principle of natural justice must be flexible enough to adapt to the myriad of circumstances where a person is subjected to prejudice due to lack of knowledge, which stems from bonafide or genuine reasons. The right of a man to have a fair opportunity of hearing is fundamental to any civilised legal system as Lord Diplock observed in **O'Reilly v. Mackman** (1983 2 AC 237 at Pg.276).

20. The rules of natural justice must depend on the circumstances of each case, the set of facts that surround each

situation, the nature of the inquiry, the rules that govern the procedure and even the subject matter dealt with, apart from prejudice that could be caused to either side. The principles of natural justice are, as observed by the House of Lords in **Lloyd v. McMahon** [1987] AC 625], “not engraved on tablets of stone” and the courts will ensure so much and not more, to be introduced by way of additional procedural safeguards, as will ensure the attainment of fairness. The rules of natural justice are flexible to adapt to situations and circumstances to advance the cause of justice. In the decision in **Union of India and Another v. Jesus Sales Corporation** (1996 4 SCC 69), it was held that “under different situations and conditions the requirement of compliance of the principle of natural justice vary”.

21. When the tax department of the Country is in a transition phase, with conventional and traditional notices being replaced by e-notices or intimations in the web portal, the technological inadequacies and incompetence of the litigants cannot be brushed aside lightly, especially when the prejudice to the litigant is enormous. As the tax department and the assesseees are both passing through the transition phase and shifting to electronic modes, a rigid consideration and application of rules of natural justice

do not augur well for the system. The principles of natural justice are flexible enough to adapt to situations like the present, to insist for an effective opportunity for the assessee.

22. Considering the circumstances, this Court is of the opinion that an effective opportunity of hearing could not be availed of by the petitioner in its full sense and therefore there has been a violation of the principles of natural justice while issuing Ext.P6 order of assessment.

23. In this context, the fact that if a fresh opportunity is granted to the petitioner to reply to the notices issued and also to consider same in a time bound manner would not cause any prejudice to the department. On the contrary, it will cater to the advancement of the cause of justice for both sides.

24. Having regard to the circumstances of the case, I am of the opinion that Ext.P6 is liable to be set aside and a fresh opportunity of hearing be granted to the petitioner. While setting aside Ext.P6 order of assessment dated 22.04.2021, the petitioner is given an opportunity to respond to all the notices issued to the petitioner on or before 14.01.2022 and the assessing officer shall consider the objections of the petitioner and pass fresh orders

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thereon, after hearing the petitioner on or before 31.01.2022.

The writ petition is allowed as above.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

APPENDIX OF WP (C) 19218/2021

PETITIONER'S/S' EXHIBITS

EXHIBIT P1	TRUE COPY OF THE NOTICE DATED 02/12/2019.
EXHIBIT P2	TRUE COPY OF THE REPLY OF THE PETITIONER DATED 06/12/2019.
EXHIBIT P3	TRUE COPY OF THE REPLY DATED 11/12/2019.
EXHIBIT P4	TRUE COPY OF THE ORDER DATED 04/03/2020.
EXHIBIT P5	TRUE COPY OF THE SCN DATED 03/04/2021.
EXHIBIT P6	TRUE COPY OF THE ASSESSMENT ORDER DATED 22/04/2021.
EXHIBIT P7	TRUE COPY OF THE REPLY ACKNOWLEDGEMENT FOR THE ASSESSMENT YEAR 2018-19 DATED 15.04.2021.
EXHIBIT P8	TRUE COPY OF THE ORDER DATED 13/08/2021 IN WRIT PETITION (C) NO. 16891/2021.