

(2001) 07 CAL CK 0032

In the Calcutta High Court

Case No : G.A. No. 2164 of 2001 and W.P. No. 1047 of 2001

Chandraprabhu International Ltd.

APPELLANT

Vs

Commissioner of Customs, Kolkata and Others

RESPONDENT

Date of Decision : 27-07-2001

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 26, 28
Civil Procedure Code, 1908 (CPC) — Section 148A
Constitution of India, 1950 — Article 14, 16, 21, 226

Citation : (2001) 3 CALLT 29 : (2003) 159 ELT 39

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Judgement

The Court

1. This is an application for setting aside and/or recalling of order dated 28th May 2001 passed by me in writ petition being No. 1047 of 2001. The impugned order was passed admittedly ex-parte.

2. Commissioner of Customs contends that the aforesaid order was obtained by the writ petitioner without serving any notice in consonance with Rule 26 of Rules of this High Court relating to applications under Article 226 of the Constitution of India and as a result whereof the respondent No. 1 applicant herein was denied reasonable opportunity of being heard as because of Short notice the respondent No. 1 was prevented from appearing at the time of hearing of the writ petition when the aforesaid impugned order was passed,

3. Mr Debal Banerjee, learned senior advocate appearing with Mr. Biswanath Samaddar learned advocate submits that in this case a notice was served at around 3 p.m. on Friday the 25th May 2001 with an intimation that the writ petitioner was to be moved on 28th May 2001. Intervening days were being Saturday and Sunday which were holiday. Therefore, the applicant herein could not take any step for engagement of learned counsel. Even then the applicant tried his level best to take step for engagement of counsel and as such the copy

of the application and the papers relating to this application were sent to legal section of the respondent No. 1 at around 5.20 p.m. After observing all departmental formalities the applicant herein could take steps on Monday being the first available working day, i.e., on 28th May 2001 to contact with the concerned department, viz., the Appraising Group-II. Before the said concerned department could contact with the Law Ministry for the purpose of engaging counsel, the writ petitioner had already moved this Court sitting in Vacation on 28th May 2001 at the first sitting of the Court and by that time the aforesaid interim order was obtained. Under such circumstances it will appear that the petitioner could not appear at the time of passing of the aforesaid order.

4. Mr. Banerjee contends that the aforesaid facts and circumstances constitute sufficient cause by which his client was prevented from appearing. So, this impugned order needs to be recalled and fresh hearing needs to be made.

5. He also draws my attention to Rule 26 of Rules of this Court relating to application under Article 226 of the Constitution. He says that service of 48 hours" prior notice is mandatory, the aforesaid 48 hours means working 48 hours rather than numerical 48 hours. The concerned department could not get 48 hours working hours time to engage a learned counsel or to give any instruction, even no notice was served upon the Advocate-on-Record of the Central Government as required additionally under Rule 26.

6. Mr. Ghosh, learned senior advocate while opposing this application contends that prior notice was not only served upon the Commissioner of Customs on 25th May 2001 but it was attempted to be served upon the Advocate of the Central Government who refused to accept such service. Affidavit of service to that effect was filed and he has drawn my attention to the affidavit of service.

7. He submits that the notice so served was not short as in fact numerically it was more than 48 hours. The Government department could have taken proper steps in this matter when it had got two clear intervening days being Saturday and Sunday. The applicant herein cannot take the plea of holidays.

8. Having heard the respective contentions of the learned advocates in this matter the points which are fallen for my consideration are (1) whether 48 hours" prior notice as envisaged in Rule 26 of Rules of this Court relating to applications under Article 226 of the Constitution means working hours or numerical hours and (II) whether the petitioner has been able to make out a case which constitutes sufficient reason and/or ground by which the applicant herein was prevented from appearing on the day I passed the order.

9. In order to appreciate and to examine the first question Rule 26 of Rules of this Court relating to applications under Articles 226 of the Constitution is required to be reproduced which is done hereunder.

"Rule 26. Save and except as provided in these rules, all applications for a Rule Nisi shall be made in the first instance before the Court on such day or days and

at such time or times as may be fixed by the Court.

An application under Article 226 shall not be moved and no prayer for interim order shall be entertained in a writ petition under Article 226 of the Constitution without serving copy of such petition along with all annexures upon the respondents to be bound by or affected by such interim order and without giving such party a reasonable opportunity to contest the same, without serving 48 hours" prior notice along with a copy of the application under Article 226 of the Constitution, proposed to be moved, on the concerned respondent. Provided where the State Government is a party, service on the Legal Remembrancer/ Government Pleader, as appropriate, will be sufficient; where the Central Government/Local Authority/Body/Corporation or any of its officers is a party service may also be made on the Standing Counsel for the Central/ Government/ Local Authority or Body or Corporation notified to the Registrar in this behalf :

Provided that the Court may for reasons recorded allow the moving of the application and entertain the prayer for such interim order without such notice, in which case, a copy of the application along with all annexures in support thereof, shall forthwith be served by the petitioner, upon the respondents against whom the interim order has been obtained:

Provided that the provisions of section 148A of the Code of Civil Procedure. 1908 shall mutatis mutandis apply to proceedings under Article 226. Such caveats must be filed before an Officer nominated in this behalf by the Chief Justice:

Provided further that an affidavit of service shall be filed showing compliance with these rules before the matters is taken up for hearing. The Court hearing such an application may issue a Rule Nisi or summarily reject the application or issue notice or give direction/ directions or make such order thereon as it thinks fit.

A Judge for the reason recorded, at the hearing or at any subsequent stage of the proceeding may make it returnable before a Division Bench or may while hearing the Rule, refer the same to the Division Bench for hearing.

Explanation: The Judge hearing such application may dispose of the same by issuing notice and without issuing formal Rule."

10. Upon careful reading and proper scrutiny of the aforesaid Rule 26 it appears to me the intention behind framing of this Rule is to give a reasonable opportunity to the concerned respondent to contest any hearing at the ad interim stage and it was thought that 48 hours" prior notice is sufficient to take proper step in order to contest the hearing. This Rule in my view has to be read conjointly with Rule 28 of the aforesaid Rules which is also reproduced hereunder:

"Rule 28. Every such application filed shall ordinarily be listed before the appropriate bench under the hearing "For Admission" after 48 hours. The said period of 48 hours shall be deemed to be sufficient notice to the respondent-opposite party covered by Rule 26 of these rules to seek instruction. Except in

special circumstances no adjournment shall be granted by the Court in such cases for seeking instructions once the case has been so listed for admission."

11. Therefore, it is clear that 48 hours time is given to enable the concerned and affected respondent to seek instruction or to take proper step. Instruction can be sought for or steps can be taken in order to contest the hearing only when the concerned officials and the departments are in usual course of business available to supply such instruction or papers. If the departments and the staffs manning the same remain closed with due public notice then it is not possible to collect instruction or the papers and documents to contest the hearing. Therefore, it has to be ascertained whether the aforesaid 48 hours time falls during which the department remains open or the staffs are working under rule. Saturday and Sunday are the declared holiday in the Central Government office, so on those two days ordinarily instruction could not be sought for or the necessary papers and documents could not be procured. Therefore, in my view, 48 hours means 48 working hours not just numerical hours. If construction of numerical hours is given then it would lead to absurdity inasmuch as the respondent concerned would not be in a position to collect any paper or documents nor to seek instruction at all.

12. In the petition it has been stated that the office of the Commissioner of Customs was served with a notice at around 3 p.m. on Friday the 25th May 2001 and on the same day at around 5.20 p.m. from the office of the Commissioner of Customs the papers were sent to legal section which in its turn sent these to the concerned department, viz., the appraising Group-II. The said concerned department could send the concerned papers on Monday the 28th May 2001 that was the first available day after service of notice. A Government department which is acting through several departments and officials cannot collect information and/or records to contest a hearing effectively unless clear 48 hours working days are made available on hand. The aforesaid facts are not denied and disputed in the affidavit-in-opposition. The action taken by the Commissioner suggests promptness and diligence.

13. Therefore, I hold on the fact that the petitioner had been able to make out sufficient cause and/or reason by which the applicant herein was prevented from appearing at the time of hearing though upon service of notice but short of 48 hours.

14. Under Rule 26 of the aforesaid Rules litigant can move an application even without notice and in that case Court has to record its reasons for dispensing with service of prior 48 hours notice. In this case it was not moved without notice but the notice was short one as I already observed.

15. Under those circumstances I hold that the aforesaid impugned order is liable to be set aside and/or recalled. Therefore, I recall the aforesaid impugned order, however, it would be open for the writ petitioner to pray for fresh interim order before the regular Bench on the self-same facts and circumstances of this case.

16. It is submitted by Mr. Ghosh, learned counsel, that in terms of my earlier order the goods have been released and the orders have been acted upon. Mr. Samaddar, denies and disputes this submission and contends that the goods have been removed to warehouse but the same have not been released. In any view of the matter it would be open for the parties concerned to take steps in accordance with law in terms of this Judgment.

All parties concerned are to act on a xerox signed copy of the operative portion of this judgment and order on the usual undertaking.

17. Order accordingly