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**(1989) 01 MAD CK 0084**

**In the Madras High Court**

**Case No : Writ Petition No. 15898 of 1988**

Indian Express (Madurai) Pvt. Ltd. and Others

APPELLANT

Vs

The Collector of Customs

RESPONDENT

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**Date of Decision : 30-01-1989**

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Customs Act, 1962 — Section 108, 124, 28

**Citation : (1990) 26 ECC 140**

**Hon'ble Judges : Bakthavatsalam, J**

**Bench : Single Bench**

**Final Decision : Dismissed**

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## **Judgement**

Bakthavatsalam, J.—The petitioners seek the issue of a writ of certiorarified mandamus to call for the records to quash the communication No. 58/264/87 SIB dated 14.12.1988 of the respondent and to direct the respondent to give a hearing to the petitioners and pass order on the application dated 15.11.1988 filed by the petitioners for production of documents in connection with the proceedings in the show cause notice No. 58/264/87 SIB 94/87 dated 29.9.1987.

2. It is necessary to state a few facts: The second petitioner imported 14 Nos. of Hong Hua Web Off-set Printing Units from M/s. Hong Hua Machinery Works Ltd., Taiwan, during 1984 and at the time of assessment they claimed certain concessions under Customs Notification No. 114/80 dated 19.6.1980. After obtaining necessary declarations from the petitioners, the petitioners were allowed clearance under OGL and the benefit of the Customs Notification No. 114/80 was extended to the goods. Subsequently when the intelligence wing of the respondent stated that the second petitioner had imported printing units which are having much lower output than the one declared to Customs Department and has wrongly availed of the benefit of the Customs Notification No. 114/80 dated 19.6.1980, the matter was taken up for necessary investigation. After close investigation of the matter in detail, a show cause

notice running about 50 pages, was issued to the petitioners and others under the proviso to Section 28(1) of the Customs Act, 1962 and u/s 124 of the Customs Act, 1962 on 29.9.1987 calling upon them to show cause as to why they should not be held liable to pay the differential duty of Rs.29,99,430.30 and that why the imported units installed by the petitioners in the premises should not be confiscated and penalty imposed on the petitioners and others under the provisions of the Customs Act, 1962. In the show cause notice, details of evidence based upon the allegations which were sought to be sustained were indicated in Annexures to the said notice and enlisted in the Appendix. An interim reply was given on 15.7.1988. The first hearing was held by the respondent on 21.10.1988. At the said hearing, the petitioners and other parties to the show cause notice were represented by their counsel and chartered accountants. At the said hearing, the only issue that figured was the request of the petitioners and others for production of the documents which were sought for in the letter dated 23.11.1987 and reiterated in the interim reply dated 15.7.1987. Time was taken by the petitioners for filing a petition for issuing summons for the production of certain documents and witnesses u/s 108 of the Customs Act. On 3.11.1988, the counsel for petitioners informed the respondent as follows:

...You had given us time till 4.11.1988 for this purpose... Unfortunately owing to Mr. Guruswamy's inability to come to Madras this week, we have not been able to prepare and finalise the applications. We request you to grant us time till 9.11.1988 for above purpose....

On 17.11.1988, the counsel for petitioners enclosing the application dated 15.11.1988, requested the respondent as follows:

...I am enclosing the said application and request you to kindly take it on file and give us a date for arguments on the said application....

But the respondent, by letter dated 14.12.1988, fixed the hearing on 23.12.1988 to take up the evidence of one Shri S. Srinivasan and requested the petitioners to be present on that date and time; and the petitioners were informed that otherwise the case would be taken up for adjudication without any further reference to the petitioners in the matter. At this stage, the petitioners have come up before this Court on 21.12.1988 and on 22.12.1988. Sivasubramaniam, J. has issued notice of motion granting interim stay for four weeks.

3. The respondent has filled a counter affidavit. It is claimed in the counter affidavit that at the hearing on 21.10.1988, the counsel for petitioners requested for the production of certain documents relating to the imports of the similar machines imported by the petitioners, by certain other Newspaper concerns. It is further claimed in the counter affidavit that the petitioners undertook to file an application to request the respondent to issue summons u/s 108 of the Customs Act, 1962 for summoning the officials of the various other companies which imported the printing machines for the production of shipping documents and also for summoning the Customs officials of the Ports through which the said

imported machines were cleared. It is further claimed in the counter-affidavit that the request of the petitioners to issue the summons u/s 108 of the Customs Act, 1962 is to be considered legally and has to be examined whether such issuance of the summons could be sustained and that the summons issued u/s 108 of the Customs Act is only for proper investigation to be conducted for a preliminary enquiry and the same cannot be issued by the department in the adjudication proceedings. It is further claimed in the counter affidavit that at the stage of adjudication, the department can only rely upon the documents or statements that are referred to in the show-cause notice, that Section 108 of the Customs Act does not empower or meant for the adjudicating authority to issue summons to some third persons not involved in the case and that the respondent has to consider the facts and evidences in the case for arriving at a decision whether it is necessary to invoke the powers as claimed by the petitioners. It is claimed in the counter-affidavit that the respondent has not taken any "decision" in this behalf. In the counter-affidavit, it is further claimed that the submissions by the petitioners in the application would be fully considered before a final decision, is taken, that the petitioners would be given an opportunity to present their case, that the said notice cannot be construed by the petitioners that their application dated 15.11.1988 was not considered by the respondent, that the petitioner's presumption and inference that their application would not be considered by the respondent are not concerned that the adjudicated proceedings cannot be completed on 23.12.1988 and that the issuance of notice was issued only for taking evidence of only one witness. It is further claimed in the counter-affidavit that whether the documents referred to by the petitioners are vital for the proper disposal of the adjudication proceedings and whether the adjudicating authority could issue summons u/s 108 of the Customs Act in this behalf to some third parties would be considered along with all other issues at the appropriate time before passing order in this matter. It is claimed in the counter affidavit that there cannot be any compulsion to deal with the said application at any particular time and that the department has since taken steps with regard to the imports of similar consignments both through Madras Port and other Ports to cause investigation to be made. It is further claimed in the counter affidavit that the proceedings cannot be jeopardised by challenging the procedures adopted and that in the midst of investigation the petitioners are not entitled to. invoke the jurisdiction of this Court under Article 226 of Constitution of India. In the counter affidavit it is further claimed that the respondent will consider the application of the petitioners at the appropriate time considering the relevancy under the personal hearing for the purpose of considering the case taken as a whole not as projected by the petitioners and that nowhere in the notice of hearing it is stated or no indication by the respondent that the application filed by the petitioners dated 15.11.1988 will not be considered. It is further claimed in the counter affidavit that the evidence pertaining to the particular case is relied upon such proceedings, that the documents in respect of such evidence were supplied to the petitioners by the respondent, that the personal hearing was also granted to the petitioners and that the consideration of

documents not pertaining to the subject imports would be beyond the scope of the adjudication proceedings, It is further claimed in the counter affidavit that whether the goods imported by the petitioners would attract the benefit of the Customs Notification No. 114/80 and whether the machines imported by the petitioners satisfy the conditions of the Customs Notification 114/80 or not and that for this purpose the documents and the statements given by the petitioners have to be considered.

4. By consent of both parties, the main writ petition is taken up for final disposal, after admitting the writ petition.

5. Mr. Govindaswaminathan, the learned Counsel for petitioners submits that the limited request of the petitioners is to give a hearing on the application filed by the petitioners on 15.11.1988, with regard to the summoning of the documents in connection with the adjudication. The learned Counsel further submits that the said documents can be summoned at the petitioners' costs and that they are necessary for the purpose of giving a detailed reply to the show cause notice. The sum and substance of the argument of the learned Counsel for petitioners is that the petitioners may be given a hearing on the application dated 15.11.1988.

6. Mr. R. Krishnamurthi, the learned Advocate General appearing for the respondent/department submits that the petitioners cannot compel the departments not to proceed with the proceedings till the said application is disposed of. The learned Counsel further contends that it is always open to the petitioners to challenge any order passed at a later stage and the petitioners' assumption that they will not be given an opportunity is not correct. The learned Counsel submits that there is no violation of principles of natural justice on the facts of this case and refers to the decision in Union of India (UOI) Vs. Jyoti Prakash Mitter, , in F.N. Roy Vs. Collector of Customs, Calcutta, and the unreported decision of a Division bench of the Court in (W.A.Nos. 1015, 1017 and 1021 of 1981 dated 10.11.1987) VITTALANATHAN and Ors. v. THE COLLECTOR OF CUSTOMS, COIMBATORE and Ors. (since reported in [1989] 23 ECC 232). The learned Counsel further contends that the short question to be considered at the adjudication proceedings is whether a benefit under a particular notification is to be given to the petitioners or not and when all the materials on which the department relies upon were given to the petitioners it is open to the petitioners to put forth the case on the materials already on record to show that they are entitled to the benefit under the concerned notification. The learned Counsel further contends that it is not open to the petitioners to invoke the jurisdiction of this Court under Article 226 of the Constitution of India at this stage of the adjudication proceedings and that it is time enough for the petitioners to challenge any order passed by the respondent/department by way of appeal as provided under the Customs Act.

7. I have considered the arguments of Mr. Govindaswaminathan, the learned Counsel appearing for the petitioners and of Mr. R. Krishnamurthi, the learned Advocate General appearing for the respondent. The simple question which has

to be considered in this case is whether a writ of mandamus can be issued to give a hearing to the petitioners and pass orders on the application dated 15.11.1988 filed by the petitioners, for production of documents, in connection with pending adjudication proceedings. Here is a case where the adjudication proceedings has just started under the Customs Act 1962 and the petitioners have given an interim reply. The department has also given an appendix to the show cause notice with regard to the materials on which the department relies upon. It is the case of the petitioners that they need certain other documents and witnesses, to give a detailed reply. As rightly pointed out by the learned Advocate General, it is open to the petitioners to produce necessary evidence on their behalf, so to say to produce certain other documents or witnesses in their favour. But, in the instant case, the petitioners require certain documents and witnesses to be summoned for the purpose of a fair adjudication of the case. For that purpose, the petitioners have filed an application on 15.11.1988 u/s 108 of the Customs Act to call for certain other documents and certain witnesses. It is open to the department either to reject or to allow the application filed by the petitioners. At this stage, it is unnecessary to go into the question whether the petitioners are entitled to invoke u/s 108 of the Customs Act, 1962. Here is a quasi-judicial Authority before whom an application is filed during the course of an adjudication proceedings. In my view, he is duty bound to dispose of the application one way or other. It is not fair on my part to go into the merits at this stage, especially when the adjudication proceedings are still pending. I am not able to accept the arguments of the learned Counsel for petitioners that the principles of natural justice have been violated, because no final order has been passed by the respondent on his application. The mere issuance of notice for a hearing to examine a witness cannot be said to be violation of the principles of natural justice. Assuming that the respondent proceeds with the adjudication proceedings and passes a final order without disposing of the petitioners' application dated 15.11.1988 u/s 108 of the Customs Act, even then, I am of the view that the petitioners have not [sic] enough remedy provided under the Act to attack any order passed in the adjudication proceedings. I am inclined to accept the argument of the learned Advocate general that, the petitioners cannot compel the respondent to pass an order on the application dated 15.11.1988. If the respondent does not pass an order and proceed with the adjudication proceedings, then the petitioners have, got a right of appeal under the Act to challenge the decision. It is necessary for me to extract certain portions of the counter affidavit, to show that this writ petition cannot be maintained at this stage. In paragraph 7 of the counter affidavit it is stated as follows:

...I submit at this juncture that the request of the petitioners to issue the summons u/s 108 of the Customs Act, 1962 is to be considered legally and has to be examined whether such issuance of the summons u/s 108 could be sustained....

In paragraph 9 of the counter affidavit, it is stated as follows:

...I have to consider the facts and evidences in the case for arriving at a decision, whether it is necessary to invoke the powers as claimed by the petitioners. In any event, I have not taken any decision in this behalf .

In paragraph 10 of the counter affidavit it is stated as follows:

...The petitioners have failed to" advert that I will not follow the procedure of principles of natural justice when considering the application filed by the petitioners and in this behalf there cannot be any compulsion to deal with the said application at any particular time....

So also, in paragraph 14 it is stated thus:

...The personal hearing fixed to 23.12.1988 was only for purposes of considering the case taken as a whole and not as projected by the petitioners and nowhere in the notice of hearing it is stated nor there was any indication given by me that the application filed by the petitioners dated 15.11.1988 will not be considered....

In view of the statements made by the respondent in the counter affidavit as stated above, I do not think it is necessary to issue a writ of mandamus at this stage. So also, I do not feel it is necessary to refer to the decisions cited by the learned Advocate General, at this stage with regard to the proposition whether a personal hearing is to be given or not. As seen from the counter affidavit, it is clear that the respondent has not taken any decision with regard to the application filed by the petitioners. As such, the writ of mandamus is not a writ of course, or a writ of right, but is as a rule a matter for the discretion of the Court. I am not inclined to issue a writ of mandamus as prayed for.

8. I am of the view that if the petitioners are aggrieved by any order passed by the respondent, either on the application filed by the petitioners on 15.11.1988 or in the adjudication proceedings, it is open to the petitioners to challenge the same. The writ petition is dismissed. However, there will be no order as to costs.