

(1983) 08 KL CK 0015
In the High Court Of Kerala
Case No : O.P. No. 2089 of 1982-A

Indian Transformers Ltd.

APPELLANT

Vs

Assistant Collector and Another

RESPONDENT

Date of Decision : 05-08-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 177C
Central Excises and Salt Act, 1944 — Section 4(4)
Constitution of India, 1950 — Article 12, 14, 217(3), 226

Citation : (1983) 14 ELT 2293

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : Govind Bharathan, for the Appellant; P. Santhalingam, for the Respondent

Judgement

K.S. Paripoornan, J.—The petitioner is a public limited company which manufactures power/distribution Transformers. The short question that arises for consideration is in this case is, whether the petitioner is a "related person" u/s 4(4)(c) of the Central Excise Act, 1944 with regard to its supply of transformers to M/s. Genelac . Company Ltd. The department proceeded firstly on the ground that the petitioner being a related person to M/s. G.E.C. Ltd. will not get the benefit of concession regarding the payment of excise duty as per notification No. 120 of 1975-C.E., dated 30-4-1975. The petitioner was personally heard in the matter on 28-12-1981. It is common ground that no order was passed immediately. Thereafter by Ext. P5 communication dated 16-1-1982 the 2nd respondent-the Superintendent of Central Excise, Kalamassery I Range, Ernakulam, Cochin 18 -informed the petitioner, that "on a perusal of invoices it is seen that the transformers were sold by the petitioner after 1-4-1979 to M/s. Genelac Ltd." It was said that it is a related company of the petitioner, on the ground that "the petitioner and M/s. Genelac Ltd. are subsidiary companies of M/s. G.E.C. of India, and thus M/s. Genelac Ltd. becomes a related company". The petitioner was requested to file the price lists immediately under the Central

Excise Rules, 1944, (vide Ext. P5). By Ext. P6 dated 29-1-1982 the petitioner filed their objections thereto. The petitioner denied the fact that M/s. Genelac Limited is a subsidiary company of the petitioner-company. According to the petitioner, it will not be a related company as stated by the 2nd respondent in Ext. P5. It was submitted that they may not be requested to file the price lists under Rule 177-C of the Central Excise Rules. It was also specifically stated that they maybe allowed to continue to pay duty on invoice "value as provided in Notification No. 120/75, dated 30-4-1975. Ext. P7 order was passed by the 1st respondent on 15-3-1962. In this O.P. the petitioner assails Ext. P7 on many grounds.

2. Counsel for the petitioner Mr. Govind Bharathan submitted that Ext. P7 order is illegal and infirm in holding that the Genelac Company Ltd. is a subsidiary of the petitioner-company or that it is a related company. The counsel also contended that before passing Ext. P7 order the petitioner was not afforded a reasonable and sufficient opportunity. Ext. P7 is illegal and void. In particular, it was contended, that the petitioner was not personally heard. The procedure adopted by the 1st respondent in passing an adverse order against the petitioner (Ext. P7) is violative of the principles of natural justice. The petitioner filed an appeal from Ext. P7 order. The Appellate Collector by his order dated 29-6-1982 (Appeals No. 60/82/C. No. V/68 p 128/82) disposed of the appeal. He held that since the matter is pending in this court, "the appeal is disposed of without prejudice to the rights and obligations that may accrue to the petitioner in the light of the High Court decision".

3. It is common ground that the Central Excises and Salt Act, 1944, and the Rules contain adequate provisions by way of appeal, second appeal and other proceedings by which the petitioner can ventilate his grievances. Ordinarily, in such circumstances, this court will not exercise its jurisdiction under Article 226 of the Constitution. But according to counsel for the petitioner Ext. P7 suffers from a jurisdictional infirmity and it was passed arbitrarily and in violation of the principles of natural justice. Counsel contends that before passing Ext. P7 order the authority concerned failed to hear the petitioner personally and this vitiates the order. It cannot admit of any doubt that Ext. P7 order visits the petitioner with civil consequences. If personal hearing, should have been afforded but was not adhered to, there is certainly a violation of the principles of natural justice. That is a fundamental infirmity which will afford sufficient ground for this court to invoke and exercise the jurisdiction vested in it under Article 226 of the Constitution of India. According to counsel for the petitioner, he should have been heard orally by the 1st respondent before passing Ext. P7 orders and failure to do so, is violative of the principles of natural justice. Ext. P7 is totally illegal and void. Counsel for the Revenue Mr. Santhalingam took the extreme position that the petitioner was afforded a reasonable opportunity to file his objections against Ext. P5 proposal and the petitioner did file his objection, Ext. P6. According to the counsel for Revenue, opportunity to afford to the petitioner to file his representations, is sufficient compliance of the requirements of law and

there is no violation of the principles of natural justice.

4. The interesting but vexed question that arises for consideration in this case, is whether an opportunity to be heard orally, should be afforded in all cases, invariably, before an adverse order is passed against a person. Is oral hearing, an essential pre-requisite, in order to comply with the principles of natural justice ? According to petitioner's counsel, an oral hearing is an essential postulate of the content of "natural justice" in all cases whereas according to the counsel for Revenue, it is not. It appears to me, that the oral position is, in between the two extreme positions canvassed by counsel appearing for both sides. The answer to this question depends upon the facts and circumstances of each case.

5. Let us examine the position with reference to leading text books and the important decisions on the subject. Halsbury's Laws of England (Fourth Edn.), Vol. 1, page 90, para 74 states :

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...."

In para 76 it is stated :

"A person or body determining a justiciable controversy between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to his view

Natural justice does not invariably require that the parties be entitled to an oral hearing. It will sometimes be fair to determine an issue, on the basis of written representations ; but the parties concerned must still be apprised of and given a proper opportunity of replying to any allegations against them or other relevant evidential material unless they have waived their right to be informed of such material. If the deciding body has created the impression that it will cause an oral hearing to be held, but then elects, in its discretion, to determine the matter without such a hearing, a prospective objector, who has been misled into submitting written representations in outline only, will be entitled to have the decision set aside. Similarly if a hearing is held, a party must not be precluded from putting his case adequately through being misled as to the basis on which the tribunal will found its decision."

(Emphasis supplied)

Geoffrey Flick in his book on "Natural Justice" (1979 Edn.) at page 14 observes :

"Although one who is entitled to protection of the audi alterem partem rule is prima facie entitled to an oral hearing, it is not necessarily a denial of natural justice for a tribunal to receive and rely upon written representations. Nor is it necessary a denial of due process. Provided a party is given a fair and adequate opportunity to present his case, it should be within the discretion of a tribunal

whether it proceeds by way of an oral or written hearing."

De Smith, in "Judicial Review of Administrative Action" (Fourth Edn.), 1980, states as follows at page 201 :

"In this book the word "hearing" has generally been used in a broad sense to include the making of written representations. When we have spoken of an opportunity or a right to be "heard", we have not necessarily meant an opportunity or right to be heard orally. It must be pointed out, however, that when the words "hearing" or "opportunity to be heard" are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered. In some legislative contexts the term "hearing" is used in contract to "inquiry"; in practice a hearing may be held in private, though members of the general public are not necessarily excluded ; the conduct of both hearings and inquiries in town planning matters is oral and is now governed by similar procedural rules.

In the absence of clear statutory guidance on the matter, one who is entitled to the protection of the audi alterem partem rule is now prima facie entitled to put his case orally ; but in a number of contexts the courts have held natural justice to have been satisfied by an opportunity to make written representations to the deciding body, and there are still many situations where a person will be able to present his case adequately in this way."

Garner in his book "Administrative Law" (Fourth Edn.) at page 118 states :

"It is then clear that a right to a hearing is not necessarily a right to a personal hearing before the person who is to make the decision. Sometimes the "appellant" may not have a right to any oral hearing ; this will depend on the terms of the statute and the circumstances of the case."

M.W.R. Wade, in his book "Administrative Law" (5th Edn. 1982) at page 482 states :

"A hearing will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument provided that it does in substance "hear" then and that dealing with an appeal or written communications only is not contrary to natural justice...." (It should be noted that in *R. v. Immigration Tribunal exp. Mehmet* 1977 (1) W.L.R. 795 : 1977 (2) All E.R. 602, the Queen Bench Division, consisting of Lord Widgery CJ, Forbes and Slynn, JJ quashed the Tribunal's decision and resulting deportation order for failure to afford oral hearing-Referred to by H.W.R. Wade, page 482, Footnote No. 10).

H.M. Seervai in his book "Constitutional Law of India" (Vol. 2, 1976 Edn.) at page 801 states as follows :

"But what are the requirements of a fair hearing ? A person entitled to a fair

hearing is entitled to know the case he has to meet and to have an adequate opportunity to meet it. But he is not entitled to an oral hearing unless it is expressly prescribed or unless a person would be unable adequately to present his case in writing."

Again at page 930 the author states:

"It has been said that though a person must have an adequate opportunity to know the case he has to meet, he is not entitled to an oral hearing unless such a hearing is expressly prescribed or unless the context indicates that he would be unable adequately to present his case in writing. The same view has been taken in India."

The decisions of the Supreme Court and the High Courts of Madras, Punjab, Travancore-Cochin, Patna, Calcutta and Andhra Pradesh have been referred to in the footnotes. In *Union of India (UOI) Vs. Jyoti Prakash Mitter*, at page 1103, delivering the judgment of the Constitution Bench, Shah CJ observed as follows :

"Article 217(3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned. The record apply supports the view that the President did not does it necessary to give an oral hearing. There were no complicated questions to be decided by the President."

In *Rose v. Humbles* 1970 (2) All. E.R. 519 an assessment was made in respect of unexplained increase in the tax payer's wealth (assessee's) alleging that it represented payments from undisclosed profits of company of which the taxpayer was a director. The assessee claimed that the increase arose from "betting winnings". The entire issue turned upon largely on evidence and credibility of the tax-payer. He was unable to attend the hearing of the appeal which was at first fixed or on the adjourned date of the hearing of the appeal. The further adjournment sought for was refused by the Commissioners and the appeal was determined without hearing the tax-payer. The question was whether the further adjournments should have been granted by the Commissioners to the tax-payer and whether the appeal should be remitted for further consideration. In

considering the matter Buckley, J. at page 523 held :

"I am led to think that they cannot really have given the application for an adjournment the consideration that it merited; and, having regard to the importance of Mr. Rose's own evidence in this case and to the fact that, on one footing, the whole outcome of the case depended on whether he was to be believed in regard to his claim to have made winnings from betting accounting for the whole of the unexplained increase in his wealth, I think that the case is one in which the Commissioners sought to have allowed an adjournment, and that their refusal to allow an adjournment in fact resulted in Mr. Rose suffering a substantial injustice. He was entitled to have his evidence heard and considered by the tribunal."

This decision was taken in appeal before the Court of Appeal and the appellate decision is reported in *Rose v. Humbles* 1972 (1) All. E.R. 314. On the point above referred to, the Court of Appeal affirmed the decision without discussion. (It should be mentioned that the decision was reversed on some other aspects). The following passage from the book, "Natural Justice", Principles and practical application, by Geoffrey A Flick 1979 Edn. at page 16 placing reliance on the observations of Justice Brennan, delivering the Judgment of the U.S. Supreme Court, in *Goldberg v. Kelly* (1970) 397 U.S. 254 (268-269) and the opinion of Justice Brennan, in *Richardson v. Wright* 405 U.S. 208 (215-21) states as follows :

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.... Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be, in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."

I would respectfully and gratefully adopt the above statement as my own.

6. It should be remembered that the requirement of audi alterem partem is to give an opportunity to the person likely to be affected, an opportunity to be heard, "an opportunity to blow off steam", so that justice is not only done but is also seem to be done. It will also be conducive to "fair" hearing and will be a safeguard against arbitrary action. The recent decision of the Supreme Court reported in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, states :

"It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification on which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective end of that Article. It

is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action-would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

The latest case in the series is the decision reported in *D.S. Nakara and Others Vs. Union of India (UOI)*, Arbitrary action in any form, is to be deprecated and the procedure adopted by any authority should be fair and reasonable, and should contain adequate safeguards to ensure that cardinal principle. The opportunity that is afforded, in all the circumstances of a given case, should be real and effective and not a sham or a "make-believe" or a meaningless ritual. The opportunity given should be at a "meaningful time, and in a meaningful manner",-*Armstrong v. Manzo* 380 U.S. 545 : 14 Law Ed. (2d) 6262. If this is the core of the principles of natural justice or "fair hearing" as has been emphasised over the period of years by decisions of courts, it is only fair and proper that in cases where the circumstances or issues involved demand or deserve an oral hearing it should be afforded. As long ago in 1951, H.W.R. Wade, in his article, "The Twilight of Natural Justice", (1951), 67 L.Q.R. 103 at 105 said :

"The court could riot, of course, review the substance of the decision; but it could control the procedure preparatory to the decision, and require a certain standard of fairness. This, as may be seen from the frequent and emphatic statements in the reports, was regarded as a wide and important general principle, which would yield only to a plain intention to the contrary in a statute creating a power. And the judges who developed it must surely be credited with the adoption of a fuel both enterprising and beneficent, which can prevent much injustice at negligible cost to the efficiency of good administration. Granted that the discretion in exercising an administrative power belongs to the administrator; yet the courts can insist that before acting he shall at least find out the facts, and find out in particular, whether there is another side to the case. The wielding of power would indeed be arbitrary if this were neglected and the courts have provided legal sanction to a canon of good administration by holding that unless the other side is first considered the power is improperly exercised. It is quite wrong to suppose that the rule is of little value in practice because it gives merely an opportunity, as the Attorney General has put it, for the objector to "blow off steam". Legally, the administrator is entitled to disregard all that is said to him and exercise his free discretion. But the courts well know that is not how responsible officials Act. The rule is a safeguard not against perversity but against well-meaning ignorance or carelessness-as-much more likely danger. The

official, endowed with power, is kept in the light leading-strings of fundamental justice. If he is only made to look fairly at the facts, that is the best security against an unreasonable decision."

Notwithstanding that this was so said, more than three decades ago, the aforesaid observations have greater weight and relevance today.

7. Bearing the above principles of law in mind, I am of opinion, that in the following cases an oral hearing must be afforded in order to "comply with the principles of natural justice. I should say, that the enumeration of the cases herein below are not exhaustive but are only illustrative :

(1) Where the facts in the case, to be marshalled and the questions of law that arise for consideration, are complicated. For example, where the matter in issue calls for discussion of technical matters or a variety of facts and circumstances and the application of the relevant principles of law or the facts involved cover a wide range, the party likely to be adversely affected should be heard.

(2) Where the authority, who is deciding the matter either expressly or by necessary implication (by his conduct or otherwise) has created the impression that the person likely to be affected will be heard orally, oral hearing must be afforded before an adverse order is passed.

(3) Where the decision in the case, will depend upon largely on the evidence and credibility and veracity of the person affected or likely to be affected.

(4) Where the proceedings taken against the person who is likely to be affected, requests that he may be heard in person and the authority who is to decide, is of opinion that personal hearing will facilitate a fair and effective or satisfactory disposal of the controversy involved oral hearing must be afforded. If the request of the person that "he may be heard orally" is rejected, it must be evident from the order and/or other records that the concerned authority had applied his mind pointedly to this aspect and in his opinion, no such oral hearing is necessary, for reasons stated.

(5) Where a penalty or penal consequence is proposed to be inflicted against the person, ordinarily, the person concerned must be heard unless the imposition of the penalty or the penal consequences is "automatic" and a mandate of the relevant statutory provision.

8. In my opinion this case will squarely fall under category No. 2 referred to above. The 1st respondent has conducted himself and give the impression that the petitioner will be heard before an order is passed. The petitioner was heard orally on 28-12-1981. Apparently the 1st respondent was not proceeding on the basis originally assumed, that the supply of transformers to M/s. G.E.C. Ltd. will be to a related person. It was subsequently by Ext. P5 notice the 2nd respondent informed the petitioner of a new or different basis that the sales by % petitioner to M/s. Genelac Company Ltd., will be treated as sales to related persons and so the benefit of Notification No. 120/75 will not be available. The petitioner no

doubt filed Ext. P6 objection. But in the way, things turned out and in view of the questions of law that required to be focussed and decided and in the light of the principles to be deduced from the legal position adverted to hereinabove, I am of opinion, that this is certainly a fit and proper case where the 1st respondent should have heard the petitioner orally before passing Ext. P7 order. It is common ground that the 1st respondent did not hear the petitioner orally before rendering Ext. P7 order. On that short ground, I hold that Ext. P7 order is illegal. It is violative of the principles of natural justice. It is quashed. The 1st respondent is directed to hear the petitioner and dispose of the matter in accordance with law. The petitioner is at liberty to bring to the notice of the 1st respondent any material he has got in order to substantiate the contention he had taken against Ext. P5 notice.

9. The O.P. is disposed of as above. There will be no order as to costs.

10. The Counsel for the petitioner brought to my notice that as per orders of this court dated 24-3-1982 in C.M.P. No. 6366 of 1982 he has furnished bank guarantee for amounts due as per Ext. P7. This order was extended by order dated 13-4-1982 in C.M.P. No. 7974 of 1982. In view of the fact that Ext. P7 order is annulled, the bank guarantee that is furnished by the petitioner will also stand discharged.