
(2003) 07 MP CK 0020
In the Madhya Pradesh High Court
Case No : Writ Petition No. 1108 of 2003

Mena Transport

APPELLANT

Vs

Assistant Commissioner of Commercial Tax

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Income Tax Act, 1961 — Section 33B

Madhya Pradesh Commercial Tax Act, 1994 — Section 25(1), 45A, 45A(1), 45A(10), 45A(11)

Citation : (2003) 4 MPLJ 52 : (2006) 143 STC 58

Hon'ble Judges : A.K. Gohil, J

Bench : Single Bench

Advocate : P.M. Choudhary, for the Appellant; Shailendra Mukati, Government Advocate and R.K. Gupta, Assistant Commissioner of Commercial Tax, for the Respondent

Judgement

A.K. Gohil, J.

Justice hurried is justice buried. Rule of audi alteram partem (No one should be condemned unheard) or audiatur et altera pars (Hear the other side). Nemo in-auditus condemnari debet is non sit contumax (No man should be condemned without being heard unless he be contumacious). Qui aliquid statuerit, parie inaudita altera, acquum licet, dixerit, haud acquum facerit (He who determines any matter without hearing both sides, though he may have decided right, has not done justice). Justice should not only be done, but be seen to be done.

These are some of the basic maxims/principles which are sine qua non for the enforcement of rule of law as well as rule of justice.

In this petition under article 226/227 of the Constitution of India the petitioner has prayed for quashment of orders dated June 6, 2003 and June 13, 2003 passed by the Assistant Commissioner of Commercial Tax, Check-post, Gavadi, Sendhwa (MP) u/s 45-A (12) of the Madhya Pradesh Commercial Tax Act, 1994

(for brevity "the Act of 1994") respectively.

In nutshell the case of petitioner is that the petitioner is a transporter engaged in the business of transportation of goods at Bombay. That certain consignments containing various consumer goods were loaded at Bombay in two Truck Nos. MP-09-KB-2195 and MP-09-KB-817. The goods loaded in the trucks were consigned by various parties for delivery to M/s. Hindustan Lever Ltd., at different places. Part of the goods were to be delivered at Indore and Jabalpur in the State of Madhya Pradesh and part of the goods to be delivered at places outside the State of Madhya Pradesh, viz., Varanasi and Shuklaganj in Uttar Pradesh. The goods consigned to the places outside Madhya Pradesh were only to pass through the State of Madhya Pradesh and were not meant for sale in Madhya Pradesh. The Truck No. 817 reached Sendhwa Check-post on May 27, 2003 and Truck No. 2195 reached on May 28, 2003. They were stopped and detained at Check-post barrier. Admittedly it is the case of the petitioner that the requisite declarations in form No. 75 were not available with the trucks. Though the case of the petitioner is that the trucks were having invoice, bulity, chalan, etc., containing the details of the consignor as also the consignee except the requisite declarations in respect of some of the cases and in some cases declarations were found to be incorrect. It is further submitted by the petitioner that when nothing was heard till June 1, 2003, the proprietor of the transport, Shri Mukul Doshi requested one Shri Anil Arora, a transporter of Indore, to enquire about the reasons for detention of the trucks and after enquiry they came to know that the trucks were detained because of the absence of requisite declarations in form No. 75 in respect of other consignments of Jabalpur and some wrong declarations were sent instead of form No. 75 in form No. 85. Thereafter the petitioner received two notices in form No. 76 u/s 45-A(10) of the Act of 1994 (annexures "P/2" and "P/3") directing the petitioner to show cause on June 11, 2003 that for not filing proper declarations why a penalty of Rs. 7,80,270 and Rs. 26,90,860 be not imposed on the petitioner and without providing opportunity of hearing and without waiting till the date of hearing up to June 11, 2003, the respondent passed an order of imposing penalty on June 6, 2003 by annexure-"P/8" and thereafter on June 13, 2003 by annexure "P/9" the respondent authority rejected the reply of the petitioner which was filed on June 11, 2003. Even the respondent has neither taken the reply dated June 11, 2003 on record nor maintained the order sheet and passed another order on March 13, 2003. Thus, the petitioner has filed this petition on June 30, 2003.

Notices were directed to be issued. The respondent has also filed reply of the petition. The petitioner also prayed for interim relief and prayed for the stay of the impugned orders dated June 6, 2003 and June 13, 2003 (annexures-"P/8" and "P/9") and also prays for its quashment.

Instead of hearing on interim relief, at the request of the parties the matter was finally heard.

Shri P.M. Choudhary, learned Counsel for the petitioner submitted that the order

dated June 6, 2003 is contrary to all basic norms of law and justice. When a showcause notice was given to appear on June 11, 2003, then it was the duty of the concerned authority to wait for the reply and thereafter to hear the petitioner and decide the matter. His further submission is that the authority concerned has already passed the order on June 6, 2003 imposing the penalty and thereafter taking the reply of June 11, 2003 on record passed another order which is nothing in the eyes of law but futile exercise. He vehemently argued and opposed the action taken by the Assistant Commissioner. He cited the provisions of newly added Section 45-A in the Commercial Tax Act, 1994 and submitted before me that the Assistant Commissioner has neither followed the principles of natural justice nor the mandatory requirement under the law. He further submitted that Shri Anil Arora had gone just to enquire on behalf of the owner of the petitioner-company and he did not know anything about the case but the concerned authority, i.e., Assistant Commissioner illegally recorded his presence and treated it as a participation in the proceedings and as a part of providing hearing to the petitioner and now just to cover their illegal acts, now the respondent is trying to submit that opportunity of being heard was provided to the representative of the petitioner. He further submitted that the imposition of penalty without proper notice, enquiry and hearing is also illegal. He also cited one circular of the Commissioner, according to which, in such cases, where the party is not having declaration form but fulfilling all the terms and conditions of the declaration forms, as required, the lenient view should be taken in the matter and it should be ascertained that whether it was an act of bona fide mistake or a deliberate action on the part of the petitioner for passing the goods with a view of evasion of tax and for the purposes of Section 45-A(10) Shri Arora cannot be treated as an authorised representative. He further argued that the order of imposition of penalty is totally illegal and contrary to the spirit of the provisions of Section 45-A as well as guidelines issued by the Commissioner as per circular dated October 17, 2002. Shri Choudhary submitted that the orders passed by the concerned authority are without jurisdiction and contrary to the provisions of law and principles of natural justice. He further submitted that the orders have been passed without application of mind. His further submission was that the remedy of revision was not available to him as u/s 62 of the Act of 1994, revision can only be filed after expiry of 30 days which is the period of appeal and u/s 61 the appellate authority is not having any power of releasing the goods. Shri Choudhary further submitted that the notices annexures "P/2" and "P/3" are also vague as the details of allegations have not been stated therein.

In reply Shri Shailesh Mukati, learned Government Advocate raised a preliminary objection about the maintainability of the petition. He submitted that the petitioner is having alternative remedy of appeal and revision against the impugned order and further submitted that the Government of Madhya Pradesh and Commissioner, Commercial Tax have not been added as parties to the petition. Therefore, this petition is not maintainable. He further submitted that the order passed by the respondent is legal and proper. The respondent has

jurisdiction to initiate the proceedings against the transporter and to impose penalty of Rs. 34,71,130. It was further submitted that u/s 45-A(7) of the Act of 1994, a transporter is required to produce declarations in form Nos. 75 and 85 or 86 duly filled in for verification at the check-post. In order to evade taxes, the transporter only produced form No. 85 in respect of vehicle coming from outside the State and bound for outside the State, whereas a vehicle was carrying the goods which were to be delivered in the State of Madhya Pradesh at Jabalpur/Indore. The petitioner was required to produce form No. 75 in respect of the goods being imported into Madhya Pradesh and form No. 85 for goods exported out of Madhya Pradesh. The petitioner deliberately submitted form No. 85 for part of the goods to be brought in Madhya Pradesh and this was a mala fide and intentional act on the part of the petitioner in order to evade tax payable in Madhya Pradesh. He further submitted that the driver of both the trucks had left the spot leaving the trucks at the check-post. On May 30, 2003 show cause notices were directed to be issued but on June 2, 2003 representative of the transporter appeared before the respondent, he was heard and impugned order was passed on June 6, 2003 and the penalty has also been rightly imposed and prayed for the refusal of the stay as well as for dismissal of the petition. Shri Mukati submitted that there is no bar in filing revision and the petitioner is not required to wait till the expiry of time for filing appeal.

I have heard learned Counsel for the parties, perused the record and documents and also case file, and the record of the penalty.

Section 45-A of the Act of 1994 is being reproduced below for ready reference :

Section 45-A : Establishment of check-posts.--The State Government or the Commissioner may, with a view to prevent or check evasion of tax under this Act, set up or erect in such manner as may be prescribed, check-posts or barriers at such places in the State, excluding railway premises, as may be notified :

Provided that the Commissioner shall not set up a check-post or erect a barrier for a period exceeding six months at a time.

(2) An officer, not below the rank of Commercial Tax Officer shall be in-charge of the check-post (hereinafter referred to as the Check-post Officer) and he shall be assisted by other category of officers.

(3) Subject to other provisions of this section a Check-post Officer shall exercise all powers conferred on him by this section.

(4) Every person transporting such goods as may be notified by the State Government in this behalf (hereinafter referred to in this section as the transporter) shall carry with him an invoice, bill or chalan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed.

(5) Every transporter shall, before crossing any check-post or barrier set up or

erected under Sub-section (1), deliver to the Check-post Officer a declaration duly signed by the consignor in such manner, in such form and containing such particulars as may be prescribed. A separate declaration shall be filed in respect of the consignment or consignments relating to each consignee where the goods are being imported into Madhya Pradesh and of each consignor where the goods are being sent outside the State. No declaration in relation to goods to be delivered in Madhya Pradesh shall be accepted if the consignee in Madhya Pradesh is shown or described as "self unless the full particulars and address of the person who will take delivery of the goods at the destination in Madhya Pradesh are furnished.

(6) The transporter shall stop the vehicle at every check-post or barrier mentioned in Sub-section (1) and keep it stationery for as long as may reasonably be necessary and allow the Check-post Officer to verify and check the declarations and the documents mentioned in Sub-section (4), to search the vehicle and inspect the goods and all documents relating to such goods which are in the possession of the transporter. The transporter shall, if so required, give his name and address and names and addresses of the owner of the vehicle and of the consignor and consignee of the goods.

(7) If the Check-post Officer finds after searching the vehicle and verifying the declaration or other documents relating to the goods, that--

(a) goods notified under Sub-section (4) are being transported in respect of which the transporter has not filed any declaration ; or

(b) the declaration filed in respect of any goods is false or incorrect, either in respect of the kind of goods, or the quantity of goods transported, or the value thereof ; or

(c) the consignor or the consignee of the goods is shown to be a dealer registered under this Act, while the records available in his office do not show the existence of such a dealer,

such officer may presume, until the contrary is proved, that an attempt was being made to facilitate the evasion of tax in respect of such goods and he may, after recording his reasons therefore in writing, a copy of which shall be forthwith supplied to the transporter, seize such goods or the vehicle alongwith the goods in such manner as may be prescribed.

(8) The Check-post Officer seizing the goods or the vehicle alongwith the goods under Sub-section (7) shall also record the statement of the transporter on all the facts of the case and also obtain particulars of the consignor and consignee of the goods and the vehicle seized. The reasons, if any, stated by the transporter for the violation of the provision of this section shall also be recorded.

(9) If, after considering the statement of the transporter, the Check-post Officer is satisfied that the explanation is satisfactory and that there was no attempt to evade tax in respect of the goods seized, he shall record his findings giving his

reasons therefore and release the goods or the vehicle alongwith the goods to the transporter in such manner as may be prescribed.

(10) If the Check-post Officer is not so satisfied, he shall record his findings accordingly giving reasons therefor, and he shall serve on the transporter a notice in writing requiring him to show cause, ordinarily within fifteen days of the service of the notice, why a penalty as specified in the notice, which shall be equal to ten times of the amount of tax which would have been payable if the goods were sold within the State on the date of seizure, should not be imposed upon him for the attempt made to facilitate the evasion of tax on such goods.

(11) If, after taking into consideration the explanation, if any, of the transporter and after giving him an opportunity of being heard, the Check-post Officer is satisfied, for reasons to be recorded in writing, with the explanation and the statement of the transporter, he shall discharge the notice and release the goods or the vehicle alongwith the goods seized in favour of the transporter, in such manner as may be prescribed.

(12) If the Check-post Officer is not so satisfied, he shall record his findings accordingly giving reasons therefore and he shall pass an order imposing such penalty, not exceeding the sum specified in the notice, as he may deem fit :

Provided that the amount of penalty shall not be less than half the amount of penalty specified in the notice.

(13) A copy of the order passed under Sub-section (12), shall be served on the transporter.

Relevant excerpts of circular dated October 17, 2002 issued by the Commissioner, Commercial Tax, are also reproduced below :

dk;kZy; okf.kfT;d dj vk;qDr] e;/izns"k

dzekad okd@22@tkap pkSdh@2002@5422 bUnkSj] fnukad 17-10-2002

fo"k;%& tkap pkSdh dh O;oLFkk ds laca/k esaA

tkap pkSdh ij QkeZ 75 izLrqr djus ds laca/k esa vkS|ksfxd@O;kikfjd laxBuxsa ls le;≤ ij izkIr lq>koksa rFkk muds }kjk vuqHko dh tk jgh dfBukbZ;ksa ds laca/k esa vko";d funsZ"k bl dk;kZy; ds i= dzekad 2746 fnukad 29-5-2002 ls izlkfjr fd, x, FksA dfri; O;kikfjd laxBuxsa }kjk orZeku esa Hkh bu funsZ"kksZ ds vuq:i tkap pkSdh ij dk;Zokgh lEiUu ugh dh tkus ckCkn~ yxkrkj f"kd;rsa izLrqr dh tk jgh gSA vr% iqu% funsZf"kr fd;k tkrk gS fd b; dk;kZy; }kjk tkjh fd, x, funsZ"kksa dk dM+kbZ ls ikyu fd;k tk, vU;Fkk =qfVdrkZ vf/kdkjh ds fo:) vuq"kklukRed dk;Zokgh ds fy, ck/; gksuk iM+sxAblh vuq?e esa fuEu rF;ksa dh vksj fo"ks"k vfrfjDr /;ku vkdf"kZr fd;k tkrk gS&

QkeZ 75 esa fcy@fcYVh vkfn dk fooj.k

dbZ ckj ,d gh dUlkbuj }kjk fdLh ,d gh dUlkbuh dks ,d gh V?d@okgu ds lkFk Hksts tkus okys vFkok jkT; ds ckgj ls izkIr gksus okys eky ds lanHkZ esa ,d ls vf/kd fc?

h fcy@fcYVh gksrh gS] ftUgsa Hkjus ds fy, QkeZ 75 ds lanfHkZr dkye esa i;kZIr LFkku miyC/k ugh gksrk gSA ,sls ekeyksa esa ,d ls vf/kd fc?h@fcYVh gksus ij rRlaca/kh tkudkjH QkeZ 75 ds i`"B Hkkx ij ;fn dUlkbuj }kjk HkjHkj rFkk muds uhps gLrk{kr o lhy vafdr dh tkrh gS rks mls ekU; fd;k tk,A

rduhdh fcUnqvksa esa lanHkZ esa okguksa dk jksdk tkuk %

O;kikfjd@vkS|ksfxd laxBuksa }kjk ;g rF; /;ku esa yk;k x;k gS fd eky ds lanHkZ esa bUokbl@chtd] fcYVh] fMysojh pkyku] fofgr ?kk"k.kk i= ?QkeZ&75] 85 rFkk 86? vkfn gksus ij Hkh dfri; rduhdh =qfV;kW crykrs gq, tkap pkSdh ij okgu jksdk tkrk gS rFkk dbZ fnuksa rd fcuk fdLh dk;Zokgh ds mls [kM+k jgus ij foo"k fd;k tkrk gSA dfri; ekkeyksa esa ;g Hkh ns[kk x;k gS fd eky ls lacaf/kr lHkh dkxtkr okgu pkyd ds ikl gS] ijUrQ =qfVo"k QkeZ 75 ds LFkku ij QkeZ 85 vFkok 86 izLrqr fd;k tkrk gS] rC Hkh eky tIr fd;k tkdj "kkfLr vkjksi.k dh dk;Zokgh izkjaHk dj nh tkrh gS] tcfd leqfpr volj fn, tkus ij ifjogudrkZ fookfnr eky ds lanHkZ esa QkeZ & 75 vFkok vU; fofgr QkeZ izLrqr dj nsrk gSA

vr,o funsZf"kr fd;k tkrk gS fd ;fn eky esa lanHkZ esa fcy] chtd] fcYVh] fMysojh pkyku vkfn lgh gS rFkk muesa okafNr tkudkjH i;kZIr gS vkSj leqfpr volj fn, tkus ij okafNr ?kk"k.kki= izLrqr dj fn;k tkrk gS tks dsoy rduhdh =qfV ds vk/kkj ij eky tIr dj "kkfLr dh dk;Zokgh u dh tk,A ;gkW ;g Hkh mYys[kuh; gS fd tkap pkSdh LFkknfir djus dk ;gkW izeq[k mn~ns"; dj&vioapu dks jksduk gS ogh ;g Hkh lqfuf"pr fd;k tkrk gS fd bZekunkj O;olkbZ@V?kaliksVZj tkap pkSdh dh O;oLFkl ls ijs"kku u gksaA

Admittedly, in this case, the petitioner was not having declaration form No. 75 which is required as per Sub-section (5) of Section 45-A of the Act of 1994. A bare reading of the aforesaid provisions of section 45-A would show that under Sub-section (4) every person transporting such goods as may be notified by the State Government in this behalf shall carry with him an invoice, bill or chalan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed. Under Sub-section (5) every transporter shall, before crossing any check-post or barrier set up or erected under Sub-section (1), deliver to the Check-post Officer a declaration duly signed by the consignor in such manner, in such form and containing such particulars as may be prescribed. A separate declaration shall be filed in respect of the consignment or consignments relating to each consignee where the goods are being imported into Madhya Pradesh and of each consignor where the goods are being sent outside the State. No declaration in relation to goods to be delivered in Madhya Pradesh shall be accepted if the consignee in Madhya Pradesh is shown or described as "self unless the full particulars and address of the person who will take delivery of the goods at the destination in Madhya Pradesh are furnished. A bare reading of two provisions would show that the intention of the Legislature is to make them mandatory. Therefore, after the enforcement of Section 45-A, it is mandatory for every person or transporter who is transporting the goods to deliver to the Check-post Officer a declaration duly signed by the consignor as has been prescribed.

Sub-section (7) of Section 45-A provides that after searching the vehicle and verifying the declaration or other documents, if the officer finds that an attempt was being made to facilitate the evasion of tax in respect of such goods he may, after recording his reasons in writing, a copy of which shall be forthwith supplied to the transporter, seize such goods or the vehicle alongwith the goods in such manner as may be prescribed. Therefore, this section provides that the Check-post Officer may seize the goods and vehicle after recording his reasons in writing and after supplying a copy of the same forthwith to the transporter. This section also clearly states that in the absence of the declaration or if the declaration filed in respect of any goods is false or incorrect, either in respect of the kind of goods, or the quantity of goods transported, or the value thereof ; or the consignor or the consignee of the goods is shown to be a dealer registered under this Act, while the records available in his office do not show the existence of such a dealer, such officer may presume, until the contrary is proved, that an attempt was being made to facilitate the evasion of tax in respect of such goods and he may, after recording his reasons in writing and shall supply the copy thereof to the transporter in the manner prescribed.

Sub-section (8) of section 45-A also provides that the Check-post Officer seizing the goods or the vehicle alongwith the goods under Sub-section (7) shall also record the statement of the transporter on all the facts of the case and also obtain particulars of the consignor and consignee of the goods and the vehicle seized. The reasons, if any, stated by the transporter for the violation of the provision of this section shall also be recorded.

Sub-section (9) of Section 45-A provides that if, after considering the statement of the transporter, the Check-post Officer is satisfied that the explanation is satisfactory and that there was no attempt to evade tax in respect of the goods seized, he shall record his findings giving his reasons therefore and release the goods or the vehicle alongwith the goods to the transporter in such manner as may be prescribed.

Sub-section (10) of Section 45-A provides that if the Check-post Officer is not so satisfied, he shall record his findings accordingly giving reasons therefor, and he shall serve on the transporter a notice in writing requiring him to show cause, ordinarily within fifteen days of the service of the notice, why a penalty as specified in the notice, which shall be equal to ten times of the amount of tax which would have been payable if the goods were sold within the State on the date of seizure, should not be imposed.

Sub-section (11) of Section 45-A provides that if, after taking into consideration the explanation, if any, of the transporter and after giving him. an opportunity of being heard, the Check-post Officer is satisfied, for reasons to be recorded in writing, with the explanation and the statement of the transporter, he shall discharge the notice and release the goods or the vehicle or under Sub-section (12) shall pass an order imposing such penalty, not exceeding the sum specified in the notice, as he may deem fit.

From the reading of the aforesaid sections, it is clear that the Check-post Officer has to record his reasons firstly under Subsection (7) thereafter under Sub-section (9) and thereafter under Subsection (10) before issuing showcause notice and thereafter under Subsection (11) after giving him an opportunity of being heard and on consideration of the explanation and thereafter record his findings under Sub-section (12) before imposing penalty.

From the aforesaid reading, it is also clear that before imposing penalty, the Check-post Officer shall also consider whether the transporter has deliberately violated the provisions for not delivering the declarations with a view to make an attempt of evasion of tax in respect of such goods. The Check-post Officer may presume but this presumption is a rebuttable presumption as has been specifically provided under Sub-section (7) may presume, until the contrary is proved.

Sub-sections (11) and (12) of Section 45-A of the Act of 1994 specifically provides that after taking into consideration the explanation, if any, of the transporter and after giving him an opportunity of being heard, if the Check-post Officer is satisfied, for reasons to be recorded in writing, with the explanation and the statement of the transporter, he shall discharge the notice and release the goods and if the Check-post Officer is not so satisfied he shall record his findings accordingly giving reasons therefore and he shall pass an order imposing such penalty. From a bare reading of the aforesaid two provisions, it is clear that the aforesaid provisions provide complete guideline that how the enquiry shall be conducted. This specifically speaks about consideration of the explanation ; giving him an opportunity of being heard ; recording the satisfaction by the Check-post Officer and also for recording the reasons therefore in writing and also the recording of the statement of the transporter as well as his explanation. The compliance of the aforesaid provisions by the Check-post Officer is also mandatory in nature. These provisions show that he has to consider the explanation and the statement of the transporter and after his satisfaction, findings are to be recorded alongwith the reasons. A conjoint reading of the provisions of aforesaid Sub-sections of Section 45-A clearly provide a status of a quasi-judicial authority to the Check-post Officer, who will hold enquiry in the matter. In cases where penalty is to be imposed, the nature of those proceedings is also quasi-criminal proceedings. Therefore, as per the well-settled principles of law, the aforesaid provisions mandate for full-fledged enquiry into the matter. In the words "after giving him an opportunity of being heard" a full-fledged enquiry is contemplated which includes giving a proper show cause notice ; disclosing adverse documents and materials which is being relied ; taking explanation and documents ; recording of statement, if necessary evidence ; and also providing an opportunity to cross-examine and thereafter to record findings based on reasons and for doing so provide a reasonable opportunity of hearing by following principles of natural justice. In succeeding paras I have dealt this question very elaborately.

After hearing learned Counsel for the parties and after perusal of the record and order-sheets maintained by the Assistant Commissioner, it reveals that in this case the respondent has acted in hot haste. On May 30, 2003 he directed to issue show cause notice for hearing on June 11, 2003 and June 2, 2003 he recorded the presence of the representative, who had gone to make some enquiries and treating his presence as service of notice and his participation in the enquiry, passed the impugned order on June 6, 2003 and June 13, 2003. Though he issued notices, annexures "P/2" and "P/3", but no date has been marked on the aforesaid notices, on which date they were issued. He fixed the date of June 11, 2003 for reply of showcause notice but even before that date he passed the order without waiting for the filing of the reply by the petitioner. Aforesaid show cause notices annexures "P/2" and "P/3" also do not satisfy the requirements of valid notice as laid down under the law. On June 11, 2003 the petitioner filed reply, but the same was not taken on record yet he passed another order on June 13, 2003. Even the Check-post Officer has not written any order-sheet after June 6, 2000. Sub-section (10) of Section 45-A provides that ordinarily fifteen days" time, from the date of service of notice, should be provided to reply the show cause notice which is one of the mandatory provisions, but clearly the respondent has not followed this mandatory provision and passed the order in hot haste even without following the due process of law as well as rule of natural justice and providing opportunity of hearing to the petitioner, which made the justice hurried is justice buried.

As argued by learned Counsel for the petitioner, it is to be examined in this case whether proper notice was issued or not and what constitutes a proper show cause notice. A proper notice must specify allegation, contain sufficient particulars so that party may know what is required to be answered. Vague notice cannot be treated as proper notice. Recently in the case of Commissioner of Sales Tax and Others Vs. Subhash and Company, , under the Madhya Pradesh General Sales Tax Act, 1958, their Lordships of the Supreme Court had occasion to consider the question of improper service of notice and its consequence on the question of reasonable opportunity of being heard and has held that the following principles emerge in such situation which are required to be followed :

- (i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given.
- (ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard.
- (iii) If prejudice has been caused by non-issue or invalid service of notice the proceedings would be vitiated. But irregular service of notice would not render the proceedings invalid ; moreso, if assessee by his conduct has rendered service impracticable or impossible.
- (iv) In a given case when the principles of natural justice are stated to have been

violated, it is open to the appellate authority in appropriate cases to set aside the order and require the assessing officer to decide the case de novo.

Thus, whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and, therefore, proceedings are left open, and a direction of de. novo proceedings by an order of remand, was proper.

Subhash and Company v. Commissioner of Sales Tax, (2001) 3 MPLJ 634 reversed.

Under the principles of natural justice, the basic law on the subject is rule of Audi Alteram Partem (No one should be condemned unheard) or audiatur et altera pars (Hear the other side). No doubt the Indian courts have also followed the principles of natural justice in. the quasi-judicial proceedings and the Indian courts are also following the decision rendered in the case of Ridge v. Baldwin (1963) 2 All ER 66, in which the Lord Atkin evolved the test that a body is required to determine questions affecting the rights of subjects ; the body has the duty to act judicially. The duty to act judicially is an ingredient which if the test is to be satisfied must be present.

When a lis between the authority and a subject exists and when a lis is contemplated by a statute, a duty to act judicially has also to be expressly conferred by that statute, and if not so conferred, it may be readily inferred from the manner of disposal provided therein.

In Halsbury's Laws of England, Volume II, pages 56-57, a lis contemplated by statute is visualised in the following words :

Thus, if, in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, if at some stage of the proceedings leading up to the decision, there was something in the nature of a lis, then in the course of such consideration and at that stage the body would be under a duty to act judicially.

The justice is secured to the citizens of this Republic by a solemn resolution as per the preamble to our Constitution. It is to be noted that the Constitution regulates not only the function of the judiciary but of every quasi-judicial administrative authority and also of every organ of the Government. It is now well-settled that a quasi-judicial authority and quasi-criminal proceedings must record its reasons in support of its order and must disclose the allegations and all material relied upon and must provide an opportunity of hearing to the affected party to rebut the allegations, by filing evidence oral or documentary and if any such evidence, documentary or oral, is filed, it is the duty of the authority to consider while recording finding thereon. In the case in hand the statute provided that before recording findings and passing order, opportunity of hearing is to be given to the party concerned. It has been consistently held by their Lordships of the Supreme Court right from the case of Province of Bombay Vs.

Kusaldas S. Advani and Others, that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. A quasi-judicial authority is bound by the rule of hearing. In the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, their Lordships of the Supreme Court has held that even in an administrative proceeding which involves civil consequences, the doctrine of natural justice must be held to be applicable and that reasonableness in any decision is subject to the brooding omnipresence of reasonableness as per Article 14 of the Constitution of India.

Admittedly, the concept of natural justice mainly consists in two rules -- (i) the rule against bias ; and (ii) the rule of hearing party. The rule for hearing means the giving of an opportunity to the person for controverting, contradicting or explaining the material allegations relied upon in making an order against him, and for that purpose it initially includes the disclosure of all materials, whether documentary or oral, which are collected or otherwise brought on record for consideration in arriving at the conclusions against him. The rules of natural justice are infringed only when such undisclosed material prejudicial to his view is relied upon. The disclosure of a material which is either not prejudicial to his view, or, if prejudicial, is not relied upon, is, however, not necessary. Therefore, the conclusion is that each allegation, information, report, record or statement which has a vital role in arriving at the conclusion against the person proceeded against forms an evidence and in that case the rules of natural justice require that a copy thereof be given to the party and he should be given an opportunity to rebut the same by filing reply, explanation, documents and evidence, even to the extent to cross-examine the person concerned.

The concept of fair hearing is having four essential elements, viz., (i) notice of hearing ; (ii) opportunity for hearing ; (iii) impartiality of the Tribunal ; and (iv) an orderly course of procedure. It is well-settled now that even an Administrative Tribunal must act in good faith, must have regard to relevant considerations and must act in bona fide with a sense of responsibility in discharge of its duties. Therefore, when a particular Tribunal is clothed with power to determine a lis, acting as a quasi-judicial authority having power to impose the penalty, is required to follow the procedure laid down under the law, to follow the principles of natural justice, to follow the rule of hearing, to act fairly, judicially without any bias and to decide the matter impartially in accordance with the law and as per procedure laid down for the same.

Considering the doctrine of "acting fairly", their Lordships of the Supreme Court in the case of *Management of M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and Others*, has stated :

Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just

decision either in promoting the interest or affecting the rights of persons. To use the time-hallowed phrase "that justice should not only be done but be seen to be done" is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure.

It is also well-settled that a quasi-judicial Tribunal particularly functioning under a taxing enactment should see that every possible step is taken to ensure that the person aggrieved is fully equipped with the material so as to object to the proposals of assessment made by the taxing officer. In the case of *T.A. Kuppuswami Chettiar and Co., Bhavani Vs. The State of Tamil Nadu*, it has been held that the opportunity should be really effective. An effective, real or fair opportunity is the object of the assessment. In the case of *Rampiyari Khemka Vs. Commissioner of Income Tax, West Bengal and Others*, it has been held that a notice u/s 33-B of the Income Tax Act was served to revive the assessment of the assessee. In that notice, the reasons given for revision of assessment were that on certain enquiries the existing assessment was found erroneous and prejudicial to the interest of Revenue. Though the assessee remained absent, it was held that the failure on the part of the Commissioner to disclose the particulars of the information he obtained as a result of the enquires was in violation of the rules of natural justice. It was pointed out that the absence of the assessee could make no difference in the situation, since the allegations of fraudulent conduct or the interpolation of record, etc., which were the basis of a decision against the assessee, were never brought to his notice and it was found that this action was against the principles of natural justice. The decision was fully followed later in the case of *Smt. Bagsu Devi Bafna Vs. The Commissioner of Income Tax and Others*, . In the case of *M. Appukutty v. Sales Tax Officer* [1966] 17 STC 380, the Kerala High Court observed that arbitrary decision can also, therefore, result in violation of the principles of natural justice which is a fundamental concept of our jurisprudence.

In the case of *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another*, , their Lordships of the Supreme Court in the matter of Income Tax has held that :

We are definitely of the opinion that, on the relevant date when the order was passed, that is to say, August 24, 1977, the order was a nullity because it was in violation of the principles of natural justice. See in this connection, the principles enunciated by this Court in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, as also the observations in *Administrative Law* by H. W. R. Wade, 5th Edition, pages 310-311, that the act, in violation of the principles of natural justice or a quasi-judicial act in violation of the principles of natural justice, is void or of no value, in *Ridge v. Baldwin* (1964) AC 40 and *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, the House of Lords in England has made it clear that breach of natural justice nullifies the order made in breach. If that is so, then the order made in violation of the principles of

natural justice was of no value.

Undisputedly, imposition of penalty is a quasi-criminal proceeding and the same cannot be imposed without holding enquiry and without following the due process of law as well as the principles of natural justice and without providing an opportunity of hearing to the party concerned. It is an admitted position under the law that the question of imposition of penalty depends upon the nature of the breach committed by the party concerned. In this connection in the case of *Hindustan Steel Ltd. v. State of Orissa* reported in [1970] 25 STC 211, in the matter of Orissa Sales Tax Act, their Lordships of the Supreme Court has held that :

...penalty may be imposed for failure to register as a dealer : Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

It is clear that in this case the respondent authority, who was required to function as a quasi-judicial authority, has not followed the rule of giving of an opportunity of hearing to the party before imposing penalty and has not fairly determined the question of imposition of penalty. If the record of the Check-post Officer, is examined in the light of the aforesaid principles, discussed above, it would be clear that the Check-post Officer though issued showcause notices to the party to appear on June 11, 2003 but without following the procedure laid down under the law and without providing an opportunity of hearing, passed the orders on June 6, 2003 in utter violation of the rule of *audi alteram partem* and also in violation of the principles of natural justice. He recorded the presence of the agent on June 2, 2003, without notice to him and without verifying that the person concerned may not have any knowledge of the matter, placed reliance on his appearance alone. From the aforesaid fanciful procedure adopted by the concerned officer, it goes to show that he has not followed the procedure laid down under the law before imposing penalty. He has also not provided opportunity of hearing before passing the order. Therefore, it is clear that the order has been passed in utter violation of the principles of natural justice, rules of procedure and rules of fair play and thus violated the fundamental maxims as

has been quoted in the first para of this order. It is the cardinal rule of justice that justice should not only be done, but be seen to be done. It is to be remembered that the aforesaid maxims form part of law and justice as they are based on age-old rule of reasons and having universal acceptance.

Now coming to the preliminary objection raised by the respondent about the maintainability of the petition on the ground of availability of alternative remedy. When the order is illegal and per se void, no doubt the same can be examined under writ jurisdiction because it directly affects the validity of the order and the question of exercise of jurisdiction by the authority which clearly attracts the cause for issuing writ of certiorari. It is not only because the decision of the Tribunal is void but it is because the authority concerned has violated the statutory provisions of law and principle of natural justice and has not exercised jurisdiction vested in it under the law. Therefore, this Court can examine the legality of the order both under Article 226/227 of the Constitution of India. In view of this, it is not necessary to examine that whether alternative remedy of appeal or revision was available to the petitioner or not, as has been argued by the parties. I am not satisfied with the arguments advanced by the learned Government Advocate for respondent that on June 2, 2003 representative of the petitioner appeared and in this case proper opportunity of hearing was given to the petitioner. Looking to the record of the Check-post Officer, I am also not convinced with this line of argument of the learned Government Advocate for respondent that the penalty has been imposed after following due process of law and the notices were legal. On the contrary from the aforesaid discussions, it is clear that the impugned orders passed by the authority have been passed in utter violation of the provisions of Section 45-A of the Act of 1994 and also violating the basic rules of natural justice and also without hearing the petitioner. There is a clear-cut violation of the basic principles of law that no one should be condemned unheard or order is per se illegal and void if opportunity of hearing is not provided to the party concerned.

In view of the aforesaid long discussions on the due process of law, principles of natural justice and acting fairly and the procedure laid down under the Act it emerged that in a case where penalty is to be imposed by the check-post authority, a full-fledged enquiry is necessary in compliance of the provisions of law. Therefore, as per the mandate of law, the Check-post Officer is required to issue showcause notice, ensure that it is served on the affected party personally ; provide reasonable time to file reply, explanation and to produce documents and thereafter provide opportunity of hearing to the party concerned ; to rebut presumption about evasion of tax, and also an opportunity to explain and show cause the reasons for failure to furnish the relevant declaration form at the time, it was required to be produced before the Check-post Officer or for seizure of goods and vehicles ; only thereafter the Check-post Officer should examine the reply, explanation and the documents produced by the party and if necessary record evidence and hold an enquiry into the matter and thereafter record findings thereon after following the principles of natural

justice and due process of law. If the Check-post Officer wants to rely on some materials or documents against the party concerned, it is also his duty to disclose the same by supplying the copies thereof to the party concerned. Under the mandate of law ; unless fair procedure ; and principles of natural justice are followed effectively, it cannot be said that the Check-post Officer has acted fairly and has followed the law or applied his judicial mind. The rule of opportunity of hearing and following the principles of natural justice and fair procedure under due process of law is not merely an empty formality but it is the mandate of law and justice which is required to be followed by the Check-post Officer before imposing any penalty. It is to be remembered that observing fair procedure in the enquiry is the antithesis of arbitrariness and unreasonableness.

In this particular case, I have examined the matter from all corners and in view of the aforesaid discussions, I find that the orders (annexures "P/8" and "P/9") passed by the respondent are not only contrary to the provisions of law but on the face of it they are void and contrary to the principles of natural justice and fair procedure, therefore, they are liable to be set aside and accordingly they are set aside.

Consequently, this petition is disposed of with a direction to the concerned authority to hold a de novo enquiry into the matter, to issue clear and specific showcause notice to the petitioner assigning the reason that why such heavy penalty is being proposed and thereafter to provide fifteen days time, as has been laid down under the law, for submitting the reply and documents and thereafter to adjudicate the showcause notice after enquiry and providing reasonable opportunity of hearing to the petitioner. It is expected that the authority concerned shall act judicially, independently and unbiasedly, make a fair assessment of the matter. It is further directed that the authority concerned may also consider the applications for releasing the goods and vehicle on supurdagi after taking adequate security, if any, in accordance with law if they have done so in other matters and have released the goods and vehicles of the other parties following the rule of equality before law. It is further directed that in case the prayer of releasing goods and vehicles, is declined, the respondent shall make adequate arrangements for the safe protection of the seized property into the proper custody so that the petitioner may not suffer any losses. It is further expected that the respondent shall complete the aforesaid exercise expeditiously say within 30 days from the date of the communication of this order looking to the attachment and custody of perishable goods in this rainy season. It is also expected that the petitioner shall also co-operate in quick disposal of the enquiry. Parties to bear their own costs. Record be returned.