(1961) 06 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Order No. 87 of 1958

Palriwala Brothers Limited APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 21-06-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 6 Rule 14, Order 6 Rule 15
Constitution of India, 1950 — Article 226
Public Health Act, 1875 — Section 258
Railways Clauses Consolidation (Scotland) Act, 1845 — Section 3
Sea Customs Act, 1878 — Section 167(3), 167(8), 182, 3

Citation : (1962) 2 ILR (Cal) 187

Hon'ble Judges : Bose, C.J;D. Mookerjee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Bose, C.J.—This is an appeal from an order of P.B. Mukharji, J., dated December 23, 1957, dismissing an application under Article 226 of the Constitution of India asking for Writs in the nature of Mandamus and Certiorari for cancellation of an order of imposition of penalty under the provisions of the Sea Customs Act made by an Additional Collector of Customs on June 28, 1956.

2. The Appellant is a public joint stock company having its registered office at No. 14, Netaji Subhas Road, Calcutta and carries on business inter alia as general merchants and exporters of various goods and commodities and ft was at all material times the Managing Agent of a company known as Shree Shew Sakti Oil Mills Ltd. having its factory and godown at No. 153, Upper Circular Road, Calcutta. In the first half of February, 1956 the Appellant was served with 13 several notices to show cause bearing Nos. S37-255/55P (Part I) to S37-255/55P (Part XIII). Three of such notices are dated February 7, 1956, two of them are dated February 8, 1956, another three of such notices are dated February 10, 1956, two others are dated February 11, 1956 and the remaining three are dated February 14, 1956. It is alleged that besides these 13 notices, another notice to

show cause, dated February 8, 1956, bearing No. S37-255/55P (Part) "ALCA" was also served on the Appellant. In the last mentioned notices which was issued under the signature of Shri S.K. Srivastava, who described himself as the Assistant Collector of Customs and Superintendent, Preventive Service, it was stated that the Appellant who had a licence to export only 25 tous of sesame seeds had actually shipped on board the ship S.S. "ALCA" 500 bags of Indian sesame seeds which were found on weighment at Genoa to contain 47 tons 18 cwt. 3 qr. 25 lbs. as against the declared weight in the Bill of lading of 25 tons 8 cwt. 3 qr. 13 lbs. and this shipment of the goods in excess of the weight permitted by the licence contravened the provisions of the Sea Customs Act, the Import and Export Trade Control Act and the Foreign Exchange Regulations Act. Accordingly, the notice called upon Palriwalla Brothers Ltd. and three persons, S.N. Palriwala, G.S. Palriwala and G.N. Palriwala, to submit an explanation in writing along with all the original or certified copies of the documentary evidence on which they wanted to rely in support of the explanation within a week from the date of the notice, and they were also called upon to show cause why penal action should not be taken against them u/s 167(3)(8) of the Sea Customs Act, The notice further required the said persons to state whether they wished to be heard in person before the case was decided. Warning was also given in the said notice that if the written explanation was not submitted in time or the persons against whom the notice had been issued did not appear before the undersigned when the case was fixed for hearing, the case might be decided on the basis of evidence on record without any further notice to them. The receipt of this notice hearing No. 837-255/55P (Part) "ALCA", dated February 8, 1956, is disputed by the Appellant. But the Appellant admits that the other 13 notices to show cause had been duly received by the Appellant company and they had given Hue replies in respect of such notices. It appears however that on March 6, 1956 Shri S.K. Srivastava, the Assistant Collector of Customs and Superintendent, Preventive Service, wrote a letter to the Appellant company, the material portion whereof is as follows:

To

Messrs. Palriwala Bros. Ltd. No. 14, Netaji Subhas Road, Calcutta.

Sub.: Contravention of the provisions of the Sea Customs Act and Export Trade Control Act and the F.E.R.A. shipment of 600 bags of Indian sesame seeds on board s.s. "Alca" under cover of S/Bill No. E490 (AP) of 26-8-55.

Please refer to the office Show Cause Memo. No. S37-255/55P (Part) "Alca" dated 8-2-56.

It is noticed that no reply to the above Show Cause Memo, has so far been received from you. You are hereby directed to submit the same within 3 days from date failing which the case will be decided ex parte.

Sd. S.K. Srivastava

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3. On receipt of this letter the Appellant on March 8, 1956 wrote in reply stating that all the notices to show cause that had been actually received by the company had been replied to by them and if no reply had been sent to any other notice that had been sent, the company was sorry for that, and the Appellant company further asked that copies of the shipping bills and other documents and papers which were in the possession of the Custom and Export Control Authorities concerned, be supplied to them and they also asked for inspection of the original papers and documents in connection with the same. It was further pointed out in this letter that on receipt of the copies of the documents the company would make such representation as they might be advised. The case of the Respondents is that on receipt of the letter of March 8, 1956 Shri S.K. Srivastava had written in reply a letter dated May 17, 1956 by which inspection of the shipping bills was offered on May 19, 1956 at the office of the Rummaging Inspector, Custom House, Calcutta, and the Appellant company was asked to make their final submissions by August 22, 1956 and it was pointed out that if the Appellant company failed to turn up for inspection of the documents or to submit final submissions within the time mentioned, the case would be adjudicated without further reference to the Appellant company on the basis of the evidence on record. The case of the Appellant company, however, is that no such letter was received by them at any time. It appears that thereafter on June 28, 1956 Shri S.K. Srivastava, who had in the meantime become the Additional Collector of Customs, purported to make an order in respect of the alleged contravention of the Sea Customs Act and other Acts, in respect of the said 500 bags of Indian Sesame seeds on board S.S. "ALCA" under cover of shipping bill No. E490 (AP) of August 26, 1956 for which the alleged notice to show cause bearing No. S37-255/55P (Part) "ALCA", dated February 8, 1956, had been issued. By the said order the Additional Collector of Customs imposed a personal penalty of Rs. 22,000 on the Appellant company and the order further directed the said penalty to be deposited in the Custom House Treasury within a week from date. But although this order was issued on June 28, 1956 it was despatched by the office of the Additional Collector of Customs on the July 2, 1956 and was received by the Appellant company on July 4, 1956. The grievance of the Appellant company is that as no notice to show cause dated February 8, 1956 was received by them and as no date for hearing of this case had been fixed by the Custom authorities nor any proper opportunity to make representations against the alleged notice had been afforded to the Appellant company and as Mr. S.K. Srivastava was himself the prosecutor and the Judge in the said case and he had all along a bias against the Appellant the order passed by Shri S.K. Srivastava on June 28, 1956 is invalid and inoperative being in violation of the principles of natural justice and the fundamental principles of judicial procedure.

4. A preliminary objection has been raised on behalf of the Respondents to the effect that the petition under Article 226 of the Constitution is not properly signed and verified. The contention is that Manindra Bhusan Banerjee who has

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described himself as the Export Superintendent of the Appellant company in the verification clause and has signed and affirmed the petition, had act produced any letter of authority or power of attorney to show that he is competent to sign and verify the petition on behalf of the company and in the absence of any such authority the petition is defective and the application is not maintainable. Now under Order 29, Rule 1 of the CPC pleadings in suits by or against a corporation may be signed and verified on behalf of the corporation by the Secretary or any Director or other Principal Officer of the Corporation who is able to depose to the facts of the case. It has been held in certain cases that the provision is merely permissive and not mandatory. See Calico Printers Association Ltd. v. A.A. Karim and Brothers ILR (1930) 55 Bom. 153 : A.I.R. (1930) Bom. 566. In this Bombay case Beaumont, C.J. after construing Order 6, Rule 14 of the Code observed at p. 567:

The company therefore can always authorise some person to sign on behalf of the company. If the company does not choose to do that then it can act under Order 29, Rule 1, i.e., it can rely on that Order as in fact constituting an agent to sign without the necessity of giving any express authority. In that way order 29, is read as merely permissive and not mandatory. In point of form it is clearly permissive and not mandatory.

5. But in two decisions of the Calcutta High Court it has been held that the fitness of the person purporting to verity must be proved by affidavit (See also Chapter VII, Rule 8 of the Original Side Rules). In the case of Sreenath Banerjee v. East Indian Railway Company ILR (1894) 22 Cal. 268 a written statement was signed as "The East Indian Railway "Company, by their constituted attorney and Agent Richard "Gardiner", and in the verification Richard Gardiner was described as "Agent of the Defendant company". Sale, J. after referring to Section 435 of the old Code which corresponds to Order 29, Rule 1 of the present CPC observed:

As therefore the law itself enables a principal officer of a Corporation to verify a plaint or a written statement it is not in my opinion necessary that permission for that purpose should be obtained, but it should be shown in cases to which Section 435 applies that the person purporting to verify a written statement is a principal officer of the Defendant company or Corporation and is able to depose to the facts of the case. If a plaint or a written statement contains a statement to that effect, the verification in the usual form would probably be sufficient. There is no such statement appearing in the written statement now presented for admission. The description in the verification is itself not verified nor if that description alone were verified, could it be assumed that he was a principal officer of the Defendant company and able to depose to the facts of the case. That evidence in the case of these written statements must therefore be supplied by affidavit and on that being done, the written statement may be presented to the Registrar for admission (pp. 269-270).

6. In the other Calcutta case of International Continental Couscous Compagnie v. Mehta and Company (1927) 31 C.W.N. 1030 where in a suit by a company the

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plaint was signed and verified by a constituted attorney and principal officer of the company but was not accompanied by an affidavit as to his fitness to verify the plaint, it as held by Buckland, J. after construing the relevant rule of the Original Side and order 29, Rule 1 and order 6, Rule 15 of the CPC that according to the well established practice of this Court the competence of the officer to verify the plaint must be supported by an affidavit. This point arose for decision before the learned Judge in an undefended case and the learned Judge passed a decree in favour of the Plaintiff subject to the necessary affidavit being filed. In the footnote of this case at pages 1031-1032 another case decided by Buckland, J. is reported (Mahindra Chandra Nandy v. Velji Mulji) and in this case also the necessity of an affidavit of competency to verify was emphasised and the plaint was returned to the attorney presenting it for compliance with the Rule.

7. I find that in the case before us an affidavit of competency to verify has been filed along with the presentation of the petition. This, as has been laid down in the Calcutta cases already referred to, is in proper compliance with the rule of this Court and the relevant provisions in the Code. The petition therefore is properly signed and verified and the learned trial Judge is not right in his finding on this point. The resolution authorising Manindra Bhusan Banerjee to sign and verify pleadings and petition on behalf of the company has also been produced before us at the hearing of the appeal, and we therefore hold that there is no substance in the preliminary objection and it must be overruled.

8. The next point that arises for consideration is whether any notice to show cause dated February 8, 1956 calling upon the Appellant company to submit an explanation in respect of the alleged contravention of the Sea Customs Act and other Acts relating to the consignment of 500 bags of Sesame seeds was served on the Appellant. At the hearing before us the postal acknowledgment receipt signed by the Appellant company has been produced and it is clear therefrom that the Notice had duly reached the Appellant company. It further appears that on March 6, 1956 Srivastava had written a letter to the Appellant company in which the fact that a notice dated February 8, 1956 had been sent to the company and that no reply had been received in respect of such notice is specifically mentioned and in the reply which the Appellant sent on March 8, 1956, not only there is no positive denial of the receipt of such notice but all that is stated is that "as far as we remember we had received 13 show "cause letters from you numbering between Part I to Part XIII "and we think that-we replied to all of them....

At any rate if reply to some part No. has been omitted we are "sorry for the same"'', and inspection is asked for in respect of the relevant documents concerning the shipping bill and documents on the basis of which the conclusion as to contravention has been arrived at and copies of such documents were also asked for, out no copy of the alleged notice to show cause was specifically asked for.

9. In the trial Court after this postal acknowledgment was produced the Learned

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Counsel appearing for the Appellant (Petitioner) did not press this point any further. Before us also after the postal acknowledgment was produced no attempt was made by the counsel for the Appellant to challenge its genuineness or to offer any explanation about it. We have therefore no hesitation in holding that the learned trial Judge''s finding on this point is correct and this notice to show cause did reach the Appellant company. But it appears that for some unknown reasons the Appellant company failed to submit an explanation to the notice to show cause and to contest the adjudication proceedings.

10. The principal contention raised on behalf of the Appellant is that the order of imposition of the penalty was made in violation of one of the fundamental principles of judicial procedure which requires that persons entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter. It is argued that Srivastava who was a prosecutor could not be a Judge in the cause. In other words to quote the words of Lord Hewart, C.J. "His two-fold position was a manifest "contradiction". In support of this contention reliance has been placed on behalf of the Appellant on a large number of decisions of which some may be dealt with in detail. The first case to which reference may be made is that of Queen v. Lee 9 Q.B.D. 394. In this case the Sanitary Committee of the Town Council at Borough of Wakefield who was the local authority under the Public Health Act, 1875 passed a resolution directing the Town Clerk to prosecute one Benjamin Shaw for exposing for sale meat unfit for human consumption contrary to the provisions of the Act. At the hearing of an information laid in pursuance of this resolution Shaw was convicted before four Justices of the Borough who imposed a penalty of ? 5 on him together with costs. One of the Justices was a member of the Sanitary Committee and had been present at the meeting at which the resolution was passed. u/s 258 of the Public Health Act, 1875 no Justice of the Peace could be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority. Field, J. however held that Section 258 of the Public Health Act had not the effect of enabling a person to act as prosecuter and Judge in the same matter and observed as follows:

There is no warrant for holding that, where the Justice has acted as a member by directing a prosecution for an offence under the Act, he is a sufficiently disinterested person as to be able to sit as a Judge at the hearing of the information I am of opinion that the Rule must be made absolute, but this being a criminal matter the Court has no power to give costs.

11. Thus the Rule which was obtained for a Sanitary Committee to bring up and quash the conviction, was made absolute on the ground that the Justice who was a member of the Sanitary Committee had by directing a prosecution disqualified himself from acting as a Justice of the Borough in the case of Mr. Shaw.

12. The next case which may be referred to is that of Leason v. General Council of Medical Education and Registration 43 Ch. DIV. 366 at p. 384 where Lord Justice Bowen laid down the following proposition:

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As the Lord Justice has said nothing can be clearer than the principle of law that a person who has a judicial duty to perform disqualified himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial judge. If he is an accuser he must not be a Judge, *** But it must be in all cases a question of substance and of fact whether one of the Judges has in truth also been an accuser.

13. Then again in the case of Allinson v. General Council of Education and Registration (1894) I.Q.B. 750 at p. 758 Lord Esher in explaining Leeson''s case made the following observations:

The question is not, whether in fact he was or was not biased. The Court cannot inquire into that. There is something between these two propositions. In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.

14. The next case to which reference may be made is that of Law v. Chartered Institute of Patent Agents (1919) 2 Ch. 276. In this case one John Arthur Law who was elected as a Fellow of the Chartered Institute was charged with disclosing a secret naval invention. The matter was referred by the Council of the Defendant Institute to the Discipline Committee of the Institute who formulated certain allegations against Law and then applied under Rule 19 of the Register of Patent Agent Rules for a Committee of the Board of Trade with a view to securing the erasure of the Plaintiff''s name from the register of Patent Agents. This procedure ultimately failed and the Council of the Institute then proceeded against Law under Rule 32 of the Chaster upon the same, allegation Eve, J. at p. 289 made the following observation:

Each member of the Council in adjudicating on a complaint there under is performing a judicial duty and he must Bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. No more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of reasonable man a suspicion of that person''s impartiality, those circumstances are themselves, sufficient to disqualify although in fact no bias exists. One such circumstances which has always been held to bring about disqualification is the fact that the person whose impartiality is impugned has taken part in the proceedings, either by himself or his agent, as prosecutor or accuser.

15. The next case which may be, referred to is that of From United Breweries Ltd. v. Justices of Bath (1926) A.C. 586 which is a decision of the House of Lords and Viscount Cave, L.C. at p. 590 states as follows:

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My Lords, if there is one principle which forms an integral part of the English Law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense be called courts, have to act as judges of the rights of others.

16. The case of Franklin v. Minister of Town and Country Planning 1948 A.C. 87 is the next decision which may be usefully referred to. This is a decision of the House of Lords and Lord Thankerton dealt with the question of bias at p. 103 in the following manner:

My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute. As Lord Cranworth L.C. says in Ranger v. Great, Western Railway Company "a judge ought to be, and is supposed to be, indifferent between the parties". He has or is supposed to have no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent.

17. Viscount Cave thereafter refers to the case of Rex v. Sussex Justices, where Hewart, C.J. pointed out that: a long line of cases, shows that it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seemed to be done. Our attention was also drawn to a decision off the Supreme Court in the case of the The State of Uttar Pradesh Vs. Mohammad Nooh, where Das, C.J. pointed out that in departmental trials the enquiring officer cannot act as a witness and as a Judge. The learned Chief Justice after referring to the fact that one Mr. Bhalla who presided over the enquiry had also given evidence, observed:

We find ourselves in agreement with the High Court that the rules of natural justice were completely discarded and all cannons of fair play were grievously violated by Sri B.N. Bhalla continuing to preside over the trial.

18. The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings the authority empowered to decide the dispute between opposing parties must be one without bias towards one side

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or other in the dispute.

19. Attention of this Court was also drawn to The Queen v. Meyer (1875) I.B.D. 173 and Eckersby v. Mersey Docks and Harbour Board (1894) 2 Q.B.D. 667 at p. 671 but it is not necessary to deal with these cases in detail.

The learned trial Judge has in deciding this point rested his finding on the principle of law as enunciated in the American case of Federal Trade Commission v. Cement Institute 333 U.S. : 92 Law. Ed. 1010 and other allied cases. In this case an order of the Federal Trade Commission which required cement manufacturing and as association formed by them to cease and desist from acting in concert in pricing their goods on a multiple basing point system was challenged inter alia on the ground that the Commission was disqualified by bias because of its expression of opinion, in reports to congress based on ex parte investigation that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Federal Anti-Trust Act and that it was a denial of due process. Black J. found that the reports which the Commission made to Congress and the President were statutory reports required to be made u/s 6 of the Trade Commission Act, and though in the course of making such reports the Commission had made ex parte investigation and had formed an opinion as a result of such investigation that did not necessarily mean that the minds of its member were irrevocably closed on the subject of the Respondents'' basing point practices. The members of the cement industry who were participants in the hearing before the Commission were free to point out by testimony, by cross-examination of witnesses and by arguments conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities and in fact they did produce voluminous evidence on the point. So they had not suffered any prejudice. Moreover according to the learned Judge the objects or purposes of the Trade Commission Act would be defeated if the entire membership of the Commission was held to have been disqualified by reason of formation of the opinion. The Act did not make any provision for such a contingency and there was no alternative agency available which could hold hearings, make findings and issue cease and desist orders in proceeding against unfair trade practices. Now although this is the American view expressed on the point at issue it appears to us that the principle laid down in English law is based on sound sense of justice and natural equity, and should be followed in preference to the view expressed in this American case. It is true that Black, J. felt impelled by the doctrine of necessity to come to the conclusion that he did, but so far as the provisions of the Sea Customs Act are concerned the power of making adjudications as to the confiscation and penalty is conferred on several persons mentioned in Section 182(a) of the Act read with Section 3(c) thereof and there is nothing to indicate that besides Mr. S.K. Srivastava no other person competent to deal with the case of the Appellant was available at the material time. It appears that in fact one Rangaswami who was the Additional Collector of Customs had heard and decided on May 22, 1956 three other cases in which the

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Appellant and its Directors were involved although the notice to show cause had been issued in those cases under the signature of Srivastava as the Assistant Collector of Customs.

20. Now the further question that arises for consideration is whether there are circumstances to show that there was likelihood of bias in the mind of the adjudicating authority, Mr. Srivastava. Our attention has been drawn to a report of Mr. Srivastava, dated November 21, 1955, which was submitted before the Chief Presidency Magistrate and which contains the following statement made by him. "It appears that the Petitioner and others "are instrumental in cheating and evading large amount of "commodities and exporting goods unauthorisedly." Then again in the petition affirmed on January 25, 1956 Shri Srivastava stated that "it appears that the representatives of the opposite "party''s company were responsible for deceiving the Government "over lacs of rupees on custom duties by bringing into existence "forged documents and licences obtained fraudulently... "and have made themselves liable to be dealt with under the said "Acts." The facts stated in this petition are verified as true to knowledge. Further in his affidavit in a criminal revision application being Cr. Rev. Case No. 124 of 1956 where he was the Petitioner it was stated by Mr. Srivastava in para. 10 ''''Petitioner''s firm made the shipments in the names of other "persons so as to be out of any trouble and it is the policy of "the opposite party firm to act in this manner so that they could "always remain behind the screen." But it is to be noted that this statement is verified as a submission believed to be true. In the affidavit of Srivastava affirmed on May 3, 1956 in Criminal Revision Matter No. 571 of 1956 similar allegations as made in the affidavit of January 25, 1956 are repeated. Further in the affidavit affirmed on May 28, 1956 in the same Criminal Revision Case he suggests that "the offences committed by the "Appellant and others were of a serious nature" It also appears that Srivastava gave evidence against the Appellant in the criminal case filed by the State on complaint made by Mr. Srivastava on May 23, 1956 u/s 6 of the Imports and Exports Control Act in which serious allegations of conspiracy to cheat the Government were made. The learned trial Judge has been of the view that Srivastava was merely stating facts and doing his duties enjoined by the statute and there is no reason to suppose that he had prejudged the case of the Appellant or that his mind had been "irrevocably closed" before he made the adjudication order. Now although there is considerable force in the reasonings of the learned trial Judge it appears to us that if the words, acts and conduct of Srivastava are judged in the light of the principles laid down in the English cases, it is difficult to say that there was no "real likelihood of bias" in the mind of Srivastava. Can it be said that Srivastava is free from all suspicion of bias or prejudice? In my view the answer must be in the negative. It is true that most of these statements were made in connection with other cases of contravention of the Sea Customs Act and other Acts but the nature of the statements made as to the Appellants being parties to a conspiracy to cheat the Government and as to their pursuing a systematic policy of defrauding the Government and evading payment of custom-duties

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indicates clearly that Srivastava had come to form an opinion about the alleged objectionable or criminal nature of the business activities pursued by the Appellant company and its Directors, or at least there was a likelihood of a bias in the mind of Srivastava.

21. Mr. Kar, the Learned Counsel for the Respondents, has relied on the principle of waiver in answer to the plea of bias taken on behalf of the Appellant for challenging the validity of the order of imposition of the penalty. It is contended by the Learned Counsel that if the Appellant had any real grievance on the score of bias one would expect that as soon as the notice to show cause dated February 8, 1956 had been served upon the Appellant company and as soon as it was found from the concluding portion of the said notice that the Appellant company was required by the said notice to appear before the undersigned on the date fixed for hearing, the company would at once have come forward with the objection that Srivastava under whose signature the said notice was issued was disqualified by reason of his interest or bias in hearing the matter and in adjudicating in respect of the question of confiscation or imposition of penalty for the contravention of the provisions of the Sea Customs Act and the other Acts. It is pointed out that as the Appellant did not raise any objection at that stage they are precluded by reason of the doctrine of waiver from agitating the question of bias after the decision has been given against them. In support of this argument the Learned Counsel has relied on the case of Wakefield Local Board of Health v. The West Riding and Grimsby Railway Company L.R.I. Q.B. 84. In this case Cockburn, C.J. stated as follows:

I can not think that it was intended to make interest an absolute disqualification. Had it been intended to confine jurisdiction to a non-interested justice and to render an interested justice absolutely incompetent, notwithstanding both parties might consent and intend to waive the objection, a positive enactment to this effect would have been inserted. To read this definition in the way Mr. Temple contends for, would produce the absurdity that a justice by virtue of his commission, if he became interested, would cease to be a justice, that never could have been intended. I am therefore of opinion that, although Colonel Smyth may have been interested so as to incapacitate him from acting, yet as the parties were aware of the objection and waived it, he had jurisdiction to make the order; and nothing is clearer than that having thus waived the objection of interest, and taking the chance of a decision in their favour, the parties can not afterwards raise it.

22. The learned Chief Justice in construing Section 3 of the Railway Clauses Consolidation Act which enacted that "justice" shall mean "a justice acting for the county and, etc., in which the matter requiring the cognizance of such justice shall arise, and "who shall not be interested in the matter" made the said observations that I have already quoted.

23. Mr. Kar also referred to Marshall''s book '''Natural Justice" at P. 51 (1959 edition) were certain extract from the judgments in the case of R.V. Byles v.

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Parte Hollidgs (1912) 108 L.T. 270 : (1912) 108 L.T. 270 are set out. In that case the proposition laid down was as follows:

When a case is heard before a court of summary jurisdiction the Defendant or his solicitor must take objection to the presence on the bench of toy justice who lis alleged to have an interest in the subject matter of the case, if he is aware of the existence of such interest, before the merits of the case are gone into. If the Defendant or his solicitor fails to take such objection and the Defendant is afterwards convicted, he can not then come to the Divisional Court and obtain a writ of certiorari to quash the conviction on the ground that one of the justices had an interest in the matter which was before the Court of summary jurisdiction. His failure to take the objection is fatal.

24. The Learned Counsel for the Appellant does not dispute the correctness of the propositions laid down in the decisions to which I have referred, but it is submitted by him that as question of waiver is a question of fact and as there is no pleading of this waiver in the affidavit-in-opposition and no point as to waiver was raised before the trial court, the Respondents should not be allowed to agitate this question for the first time before this Court of Appeal inasmuch as if such a plea had been taken in the affidavit-in-opposition the Appellant might have stated fates in answer to such plea in their affidavit-in-reply for effectively destroying the effect of such plea. We think there is good deal of force in this contention of the Learned Counsel for the Appellant. As pointed out by the Judicial Committee in the case of Edridga v. Sethna (1933) L.R. 60 IndAp 368 at p. 375 the plea of waiver bring a question of fact has to be specifically pleaded and a issue raised on such plea. As this was done in the present case, the Respondents in our view cannot be allowed to fall back on this plea for the purpose of defeating the contentions as to the bias of the adjudicating the authority who had made the order of confiscation in the present case.

25. The Learned Counsel for the Appellant has also pointed out that if the plea of waiver had been specifically taken in the affidavit-in-opposition they could have shown by pleading facts and circumstances that there is no scope for the court in making any inference of waiver in the present case inasmuch as the Appellant company and its directors had in answer to the other 13 notices to show cause pointedly raised the question that Srivastava being a person who had already made up his mind about the charges mentioned in the notice and being completely biased, had disqualified himself from judicially determining the charges against the Appellant. A copy of the letter dated February 17, 1956 raising the question of bias was placed before us at the hearing. The Learned Counsel also drew our attention to the decision of the Supreme Court in the case of Manak Lal Vs. Dr. Prem Chand, .

26. In this case the Supreme Court has observed that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objections. The

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Supreme Court came to the conclusion that in the case before them the party knew all the material facts, was conscious of his right to take the objection to the constitution of the Tribunal but there was deliberate failure to raise the objection on the grounds of bias and this created an effective bar of waiver against him. But in the case before us the plea of waiver cannot be allowed to be raised nor can any such inference be drawn against the Appellant.

27. Mr. G.P. Kar raised a further contention that the Sea Customs Act is a self-contained code and relied on the decision of the Judicial Committee in the case of Secretary of State v. Mask and Company (1940) L.R. 67 IndAp 222 for the purpose of showing that it was not open to the Appellant in view of the provisions for appeal and revision contained in the Sea Customs Act to have recourse to Article 226 of the Constitution. But it is to be noted that in that very case the Judicial Committee has pointed out that where the Customs authorities do not act in conformity with the fundamental principles of judicial procedure, the jurisdiction of the Civil Courts is not excluded (page 236). So this contention of Mr. Kar is not of any assistance to the Respondents in the present case. Our attention was also drawn to the case of C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, but in that case there was no question of violation of the principles of natural justice or of the fundamental principles of judicial procedure. In that case an order of assessment of income tax from which an appeal Jay to the Appellate Tribunal being an order made under the Act, was sought to be challenged not by preferring an appeal, but by a proceeding under Article 226. It was held that such a course was not permissible.

28. The our view Shri S.K. Srivastava should not have acted as the adjudicating authority in respect of the matter in question and the order passed by him on June 28, 1956 imposing penalty of Rs. 22,000 cannot stand being made in violation of the fundamental principle of judicial procedure.

29. In the result the appeal is allowed. The judgment and order of the learned trial Judge are set aside, and a Writ of Certiorari do issue quashing the order of Shri Srivastava, dated June 28, 1956. The Respondents, however, will be at liberty to proceed against the Appellant in respect of the matter in question in accordance with law. We make no order as to costs of this appeal. Parties will bear their own costs of the trial court. Certified for two counsel.

Debabrata Mookerjee, J.

30. I agree.

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