

(1997) 03 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 4110 of 1994

Utkal Asbestos Limited

APPELLANT

Vs

Sales Tax Officer and Another

RESPONDENT

Date of Decision : 11-03-1997

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 13(5)

Citation : (1997) 1 OLR 571 : (2003) 133 STC 22

Hon'ble Judges : A. Pasayat, J;A. Deb, J

Bench : Division Bench

Advocate : B.P. Mohanty, N. Paikray, R.P. Kar, A.N. Ray, M.K. Badu and A. Das, for the Appellant; S.C. Lal, Senior Standing Counsel (C.T.), for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—Imposition of penalty u/s 13(5) of the Orissa Sales Tax Act, 1947 (in short, "the Act") by the Sales Tax Officer, Dhenkanal Circle, Angul and confirmation thereof by the Additional Commissioner of Sales Tax, Orissa (hereinafter referred to as the "revisional authority") is the subject-matter of challenge in this writ application.

2. The background facts necessary to be indicated for disposal of the writ application are as follows :

Petitioner, a dealer registered under the Act, was required to pay the admitted tax along with the returns filed. For several periods, including the months of August, 1992 to March 1993, undisputedly there has been default in making payment of admitted tax. Petitioner's plea for not making the payment in time is that most of its transactions were with Government departments and there was non-receipt of payment for long periods which depleted the financial resources of the petitioner and there was unintended default in payment of the admitted tax. Sales Tax Officer imposed penalty at the rate of 50 per cent of amount in arrears u/s 13(5) of the Act.

3. It is urged that there was no mens rea involved and without considering that aspect and without grant of any opportunity, penalty has been levied thereby violating principles of natural justice.

4. Mr. S.C. Lal, learned senior standing counsel for the Revenue submitted that the petitioner is a chronic defaulter and for non-payment of large amount of admitted tax without any plausible explanation, penalty was levied. This is not the first instance penalty was levied. Penalty at the rate of 10 per cent of the amount withheld was levied earlier after due notice, and opportunity. The statute does not provide for any grant of opportunity and there being admitted default, the levy of penalty within the prescribed limit cannot be defaulted.

5. At this juncture it is relevant to take note of Section 13(5) of the Act which is the vital provision. Section 13(5) of the Act reads as follows :

"13. Payment and recovery of tax and penalty.--(1) to (4).....

(5) If any amount is not paid by the due date in pursuance of a notice issued under Sub-section (4) the Commissioner may direct that the dealer or the person, as the case may be, shall, in addition, pay by way of penalty a sum not exceeding one-half of the total amount due within thirty days from the date of service of notice upon the dealer or the person in this behalf :

Provided that in the cases of continuing default the penalty may be levied in instalments from time to time so however as not to exceed one-half of the total amount due :

Provided further that--

(a) When the dealer or person, as the case may be, has presented an appeal under Sub-section (1) of Section 23, the Commissioner may, on an application in that behalf filed by such dealer or person within thirty days from the date of receipt by him of the notice under Sub-section (4), in his discretion, stay the recovery of the amount in respect of which such notice has been issued or any portion thereof, for such period and subject to such conditions as the Commissioner thinks fit ; or

(b) when the dealer or person, as the case may be, has presented an appeal under Clause (a) of Sub-section (3) of Section 23, the Commissioner may, on an application in that behalf filed by such dealer or person within sixty days from the date of receipt by him of the appellate order made under Sub-section (2) of the said section, in his discretion, stay the recovery of the amounts due from such dealer or person as a result of such appellate order or any portion thereof for such period and subject to such conditions as the Commissioner thinks fit :

....."

6. Records reveal that on February 18, 1993 demand was raised in terms of Section 13(4)(a) of the Act. The outstanding amount for the period from February, 1992 to July, 1992 was Rs. 47,68,671. Penalty at the rate of 10 per

cent was levied. Show cause notice in terms of Section 13(5) was issued on June 30, 1993 for the month of March, 1993. By the order dated July 31, 1993, as indicated above, 50 per cent of the outstanding amount on Rs. 16,81,557 was levied as penalty amounting to Rs. 8,40,779. Same related to the months August, 1992 to March, 1993.

7. The question is whether penalty could have been levied without grant of opportunity. It is urged by the learned counsel for the Revenue that the provision nowhere stipulates for any notice. We do not find any substance in the plea. Even if, it is accepted that there is no specific requirement principles of natural justice mandated it.

8. Natural justice is another name for common sense justice. Rules of natural justice are not codified canons, but they are principles ingrained into the conscience of men. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

The expression natural justice and legal justice do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law.

The adherence to principle of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties. These principles are well-settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fairplay.

The principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial or quasi-judicial authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

What is meant by the term "principles of natural justice" is not easy to determine. Lord Sumner (then Hamilton., L.J.) in *Rex v. Local Government Board, Ex parte Arlidge* 1914 1 KB 160 : 83 KB 86 described the phrase as sadly lacking in precision. In *General Council of Medical Education and Registration of United Kingdom v. Sapckman* 1943 AC 627 ; 1943 2 All ER 337, Lord Wright observed that it was not desirable to attempt "to force it into any procustean bed" and mentioned that one essential requirement was "that the Tribunal should be impartial" and have no personal interest in the controversy, and further that it should give "a full and fair opportunity" to every party of being heard.

Lord Wright referred to the leading cases on the subject. The most important of them is the *Board of Education v. Rice* (1911 AC 179 ; 80 KB 796, where Lord Loreburn, L.C., observed as follows:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds..... It will, I suppose usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and "fairly listen to both sides", for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial..... The board is in the nature of the arbitral Tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by Mandamus and Certiorari."

Lord Wright also emphasised from the same decision the observation of the Lord Chancellor that the Board :

"Can obtain information in any way they think best always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view."

To the same effect are the observations of the Earl of Selbourne, L.C. in *Spackman v. Plumstead District Board of Works* 1885 AC 229 ; 54 LJ MC 81, where the learned and noble Lord Chancellor observed as follows :

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that "the substantial requirements of justice" shall not be violated. He is not a judge in the proper sense of the word ; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not

given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to "the essence of justice".

Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase "justice should not only be done, but should be seen to be done".

9. The concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

10. Natural justice has been variously defined by different judges. A few instances will suffice. In *Drew v. Drew and Lebura* (1855) 2 Macg. 1.8, Lord Cranworth defined it as "universal justice". In *James Dunbar Smith v. Her Majesty The Queen* 1877 AC 614, 623 JC Sir Robert P. Collier, speaking for the Judicial Committee of the Privy Council, used the phrase "the requirements of substantial justice," while in *Arthur John Spackman v. The Plumstead District Board of Works* 1885 AC 229, 240, Earl of Selbourne, L.C. preferred the phrase "the substantial requirements of justice". In *Voinet v. Barrett* 1985 55 LJ RD 39, 41, Lord Esher, M.R., defined natural justice as "the natural sense of what is right and wrong". While, however, deciding *Hookins v. Smethwick Local Board of Health* 1890 24 QBD 712, 716, Lord Esher, M.R, instead of using the definition given earlier by him in *Voinet v. Barrett* 1985 55 LJRD 39 chose to define natural justice as "fundamental justice". In *Sidon v. Baldwin* 1963 1 WB 539, 578, Harman L.J., in the Court of Appeal countered natural justice with "fair-play in action", a phrase favoured by Bhagwati, J. in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . In *re H.K. (An Infant)* 1967 2 QB 617, 630 Lord Parker, C.J. preferred to describe natural justice as "a duty to act fairly". In *Fairmount Investments Ltd v. Secretary to State for the Environment* 1976 1 WLR 1255, 1265-66, Lord Russell of Willowan somewhat picturesquely described natural justice as "a fair crack of the whip". While Geoffrey Lane, L.J., in *Regina v. Secretary of State for Home Affairs Ex parte Hosenball* (1977) 1 WLR 766, 784

preferred the homely phrase "common fairness".

11. How then have the principles of natural justice been interpreted in the courts and within what limits are they to be confined ? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative processes. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" as stated in (1605) 12 Co. Rep. 114 (Earl of Derby's case), that is, "no man shall be a judge in his own cause". Coke used the form "aliquis non debet esse judex in propria causa quia non potest esse judex et pars (Co. Litt. 1418), that is, "no man ought to be a judge in his own cause, because he cannot act as judge and at the same time be a party". The form "nemo potest esse simul actor et judex", that is, "no one can be at once suitor and judge" is also at times used. The second rule and that is the rule with which we are concerned in this writ petition is "audi alteram partem", that is, "hear the other side". At times and particularly in continental countries the form "audietur et altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely, "qui aliquid statuerit parte inaudita altera setquam licit dixerit, haud aequura facerit", that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right", (See Bosewell's case (1605) 6 Co. Rep. 48-b, 52-a) or in other words as it is now expressed, "justice should not only be done but should manifestly be seen to be done".

12. Judged in the aforesaid background, levy of penalty u/s 13(5) of the Act without grant of opportunity cannot be maintained and is indefensible. The revisional authority has not taken note of this aspect in his revisional order dated March 25, 1994 (annexure 3), though specifically pleaded before him. Accordingly, the writ application is allowed, the order imposing penalty (annexure 1), and the impugned revisional order (annexure 3) are quashed.

There shall be no order as to costs.

A. Deb, J.

13. I agree.