(1961) 08 MP CK 0004

Madhya Pradesh High Court

Case No: M.P. No. 216 of 1959

Malkhan Singh		APPELLANT
	Vs	
Inspector Central Excise		RESPONDENT

Date of Decision: Aug. 2, 1961

Acts Referred:

- Central Excise Rules, 1944 - Rule 151
- Central Excises and Salt Act, 1944 - Section 9

Citation: (1961) JLJ 1185

Hon'ble Judges: P.V. Dixit, C.J; K.L. Pandey, J

Bench: Division Bench

Advocate: J.M. Thakar and A.L. Halve, for the Appellant; H.L. Khaskalam, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.L. Pandey, J.
This petition under Articles 226 and 227 of the Constitution is directed against certain proceedings taken under the Central Excises and Salt Act, 1944 (hereinafter called the Act). These proceedings were initiated for an alleged contravention of Rule 151 of the Central Excise Rules (hereinafter called the Rules) framed under the Act and culminated in an order dated 6 July 1959 by which the Assistant Collector, Central Excise, Jabalpur (respondent 3), held that a part of the tobacco contained in 327 bags stocked in the petitioner''s private bonded warehouse was clandestinely removed and replaced with inferior stuff and directed the petitioner to pay Rs. 30,319/13/- as duty and Rs. 250/- as penalty. The above-mentioned 327 bags of tobacco were also thereby forfeited but there was a direction that, if the petitioner paid a fine of Rs. 500/- within 3 months from the date of the order, the tobacco would be regarded as duty paid and returned to him. The petitioner prays for (i) a

writ of certiorari to quash the proceedings taken against him, including the show-cause notice dated 17 November 1958 and the order dated 6 July 1959; (ii) two writs of mandamus, one directing the authorities concerned to refund the duty and the penalty which the petitioner was obliged to pay under protest and to release the confiscated tobacco and another directing them to forbear from recovering excise duty on goods neither removed nor intended to be removed from his bonded warehouse and (iii) a write of prohibition restraining them from taking any action in pursuance of the notice dated 17 November 1958 and the order dated 6 July 1959.

2. The petitioner is a tobacco merchant who, under the name and style of Nirpatsingh Malkhansingh, manufactures and sells Gudakhu (tobacco used in indigenous smoking pipes). For the purpose of his business, he purchases tabacco, which he stocks in his own bonded warehouse. Since he holds a licence in respect of the warehouse, he is required to pay duty only on the tobacco actually removed from it. On 6 February 1958, the Inspector of Central Excise, Jabalpur (respondent 1), and the Deputy Superintendent of Central Excise, Jabalpur (respondent 2), visited the petitioner''s warehouse and seized therefrom 327 bags of tobacco (Annexure B). A statement (Annexure C) then made by the petitioner was also recorded. When the petitioner repeatedly requested for release of his tobacco, the respondents 2 and 3 asked him to pay the full duty and 20 per cent of the ex duty value of the tobacco as provisional fine and penalty (Annexures G and H). Then, by a notice dated 17 November 1958, the petitioner was intimated that he had substituted crushed stalks in place of the original varieties, which he had removed from the 327 seized bages to the extent mentioned in the notice in contravention of the Rules, and was called upon to show cause why a penalty should not be imposed and the tobacco be not confiscated for infraction of Rule 151 and why the duty payable under Rule 160 be not recovered for surreptions removal of tobacco from his warehouse. Thereupon, the petitioner made enquiries and learnt that, in the course of investigation, the authorities had recorded the statements of certain persons. He asked for and obtainad copies of those statements. Since he was being repeatedly pressed for submitting his answer to the notice, he filed his reply dated 7 April 1959 (AnnexureM) only to say, firstly, that he could not be compelled to make any statement implicating himself in contravention of Article 10 (3) of the Constitution and, secondly, that he could not also be required to enter upon his defence before the case against him was fully established. He, therefore, requested that the evidence and material on which the proceedings were taken against him be disclosed to him. This was not done and his further request for copies of the Chemical Analyser''s reports relating to examination of the samples of tobacco sent to him was also refused.

3. Being dissatisfied with the manner in which the authorities were proceeding against the petitioner, he filed Miscellaneous Petition No. 88 of 1959 in this Court claiming a writ of certiorari to quash the notice dated 17 November 1958 and other appropriate reliefs. On 28 April 1959, that petition was summarily dismissed as

premature, Bhutt C. J. and Sharma J. however observed:

The show cause notice (Annexure I) is only intended to give an opportunity to the petitioner to avoid prosecution, which may result in penalty being imposed and the goods being confiscated. Had the issuing authority the power to punish the petitioner, the notice would offend Article 20 (3) of the Constitution. However reading Section 9 of the Central Excise and Salt Act, 1944, it appears that the penalty cannot be imposed without a regular prosecution in a Court of law. To such a case, the decision in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, or in Brijbhushan vs. State (1957 JLJ 631) or State vs. Ramkumar Ramgopal (1957 JLJ 595) does not apply.

As regards Calcutta Motor and Cycle Co. Vs. Collector of Customs and Others, there the challenge was to the provision of the Sea Customs Act by which a party could be compelled to give evidence and to produce documents as a preliminary step to his being prosecuted. Here, there is no such compulsion, and the petitioner is free not to tender any evidence or document which might incriminate him. That decision, therefore, does not apply to the present case.

As regards seizure, it took place long ago viz. on 6-2-1958. It also appears that the petitioner has submitted to the seizure and taken the goods in his custody under a supradnama. In these circumstances, it would not be proper to exercise the powers under Article 226 of the Constitution to question the validity of the seizure at this late stage.

4. The petitioner then sent his reply dated 30 April 1959 (Annexure P) by which he denied that he had infringed Rule 151 and urged that the material or evidence on which the allegation of contravention of the Rule was based, was not disclosed to him. Thereupon, the respondent 3 passed the impugned order dated 6 July 1959. Being aggrieved by that order, the petitioner filed the present petition and also appealed against it. During the pendency of this petition and the appeal, the petitioner was compelled to pay Rs. 30,319/13-as duty and Rs. 250-as penalty. Also, since the confiscated tobacco was being put to sale, we ordered on 21 December 1959 that the sale would be stayed on condition that the petitioner deposited Rs. 500-without prejudice to any of his contentions in support of this petition. Subsequently by an order dated 9 January 1961, the Collector of Central Excise, Nagpur, dismissed the departmental appeal.

5. Before we deal with the merits of the petition, two preliminary questions arise for consideration. The first is that the petitioner, who had the remedy of an appeal u/s 35 of the Act and a revision application against the appellate order u/s 36 of the Act, could not be permitted to invoke the extraordinary jurisdiction of this Court. We are unable to accept this contention. In The State of Uttar Pradesh Vs. Mohammad Nooh, their Lordships observed:-

There is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule or law and .....the superior Court will readily issue a certiorari in case where there has been a denial of natural justice before a Court of summary jurisdiction.

In this connexion, we may also refer to Colonal Lal Rampal Singh vs. State of Madhya Pradesh 1961 JLJ 32 FB wherein it was laid down that the existence of an alternative remedy was not an absolute bar to the issue of a writ or direction under Article 226, though it may be taken into consideration in the exercise of the jurisdiction thereunder. We are further of opinion that, after there was an unsuccessful departmental appeal, a revision u/s 36 of the Act is not an equally efficacious remedy.

6. The question relating to territorial jurisdiction is easily answered. It is true that the departmental appeal was dismissed by the Collector of Central Excise, who has his office at Nagpur outside the limits of this Court''s jurisdiction. But we are of opinion that, since the appeal was dismissed without setting aside or modifying the original order dated 6 July 1959, there was no merger and the jurisdiction of this Court to deal with that order remained unaffected. The authority for this view will be found in J. H. Oil Mills vs. Assistant Collector, Central Excise 1961 JLJ 59, which relies inter alia upon two decisions of the Supreme Court. The State of Uttar Pradesh vs. Mohammad Nooh (cit. sup.) and Sita Ram Goel Vs. The Municipal Board, Kanpur and Others, .

7. On the strength of the observations made in Miscellaneous Petition No. 88 of 1959, one of the grounds raised in the petition is that the petitioner could not be penalized save by a regular prosecution in a criminal Court. Since the petition was dismissed as premature, the observations relied upon should be regarded as obiter. We are further of opinion that the contention is not well-founded. Section 9 of the Act, which provides for punishment of certain offences with imprisonment upto six months or with fine upto two thousand rupees or with both, is in its cope expressly restricted. So far as contravention of Rules is concerned, only a rule made u/s 37 (2) (iii) relating to prohibition of transit of excisable goods is within the mischief of the Section. In regard to other Rules, the relevant provisions are contained in Sections 33 and 37 which are as under.

33. Where by the rules made under this Act anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged-

(a) without limit, by a Collector of Central Excise;

(b) up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assitant Collector of Central Excise:

Provided that the Central Board of Revenue may, in the case of any officer performing the duties of an Assistant Collector of Central Excise reduce the limits indicated in clause (b) of this Section, and may confer on any officer the powers indicated in clause (a) or (b) of this Section.

37. (1) The Central Government may make rules to carry into effect the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may-

....

(3) In making rules under this Section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated."

The material rules are Rule 151 and Rule 160 which read as follows:

151. If the owner of goods warehoused, or the warehouse-keeper, by himself or by any person in his employ or with his connivance, commits any of the following offences namely:-

(a) Opens any of locks or doors of a warehouse which is required by these Rules, or by any general or special order of the Central Board of Revenue or the Collector, to be locked or makes or obtains access into such a warehouse except in the presence of an officer acting in his duty as such or

(b) after the approval of a warehouse, makes any alterations therein or addition thereto without the previous consent of the Collector; or

(c) warehouses goods in, or removes goods from, a warehouse otherwise than as provided by these Rules; or

(d) privately removes or conceals any goods either before or after they are warehoused;

he shall be liable to a penalty which may extend to two thousand rupees, and all goods warehoused, removed, or concealed in contravention of this rule shall be liable to confiscation.

160. If any goods are removed from the warehouse without permission, or if any goods are not removed from the warehouse within the period during which such goods can be left or are permitted to remain in a warehouse under Rule 145, or if any goods are lost or destroyed otherwise than as provided in Rules 143, 147 or 149, or are not accounted for to the satisfaction of the proper officer, that officer may thereupon demand and the owner of the goods shall forthwith pay, the full amount of duty chargeable thereon, together with all rent, penalties, interest and other

charges payable on account of the goods.

Since these two Rules are not covered by Section 9 of the Act and the authorities administring the provisions of the Act have been expressly given by Section 33 thereof the power of adjudication in regard to the liability under the Rules of anything to confiscation and of any person to a penalty, the initiation of proceedings against the petitioner for these purposes must be regarded as sanctioned by the Act and the Rules made thereunder. Having thus clarified the position, we consider it unnecessary further to dwell on this point which was not pressed before us.

8. Another contention of the petitioner, as appearing from his petition is that the respondents 1 and 2, who seized the tobacco, were not empowered so to do. In view of Appendix III to the Rules and the notification No. 4/56 dated 31 October 1956 (Annexure VII), which give the power of seizure to the two respondents, we find this contention to be unsubstantial.

9. The petitioner''s further grievance is that, even before he was adjudged to be guilty of contravention of Rule 151, he was asked to pay, as a Condition precedent to the release of his tobacco, the full duty and 20 percent of the ex-duty value as provisional penalty. In our opinion, having lawfully seized the tobacco and being under no duty to release it, the respondents were not unjustified in attaching these conditions, when, by way of a concession to the petitioner, they agreed to release his tobacco which was liable to be confiscated.

10. It is next urged that in this matter the authorities were bound to Act in a quasi judicial manner and that they failed to do so in that they disregarded the well established principles of natural justice. In our opinion, this contention is well-founded and must be accepted. We have already quoted Section 33 of the Act which empowers the Authorities to adjudge penalty and confiscation. Although there is in the Act or the rules made thereunder no explicit provision for determination of the matter as an issue resembling a lis inter partes, we are of the view that here the duty to act judicially in accordance with the rules of natural justice arises by implication from the effect of the exercise of the power upon the rights of individuals. Provisions similar to those in the Act relating to adjudication of penalty and confiscation, without any explicit obligation to follow a judicial process or a process analogous to it, occur in the Sea Customs Act, 1878. Even so, the Supreme Court repeatedly held that an order of confiscation or payment of penalty under that Act was not a mere administrative or executive act but was really a quasi-judicial act. F.N. Roy Vs. Collector of Customs, Calcutta, ; Leo Roy Frey Vs. The Superintendent, District Jail, Amritsar and Another, ; Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others, and Amba Lal vs. Union of India AIR 1951 SC 264. In the last-mentioned case, Subba Rao J observed.
This Court has held that a Customs Officer is not a judicial tribunal and that a proceeding before him is not a prosecution. But it cannot be denied that the relearn

provisions of the Sea Customs Act and the Land Custom Act are penal in character. The appropriate customs authority is empowered to make an inquiry in respect of an offence alleged to have been committed by person under the said Acts, summon and examine witnesses, decide wheather an offence is committed, make an order of confiscation of the goods in respect of which the offence is committed and impose penalty on the person concerned, see Ss. 168 and 171 A of the Customs Act, and Ss. 5 and 7 of the Land Customs Act. To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except in so far as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply. If so, the burden of proof is on the Customs Authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence.

11. Not that the Authorities charged with the duty of administering the Act were entirely oblivious to the true nature of the proceedings taken thereunder. Section 37 (2) (xx) of the Act makes provisions for the Central Government to authorise the Central Board of Revenue "to provide, by written instructions, for supplemental matters arising out of the Rules framed thereunder. Pursuant to the authority so given, the Board of Revenue issued instructions in regard to which it directed as follows:

these instructions are supplemental to, and must be read in conjunction with, the Central Excise Act and Rules. They are applicable throughout India and should not be departed from without strong reason, to be recorded in writing by the officer concerned, and reported at once to his immediate superior.

The relevant instructions relating to departmental adjudications are as under:

When prosecution in respect of an offence is not ordered, the imposition of a penalty and the confiscation of the goods must be considered. The offender should invariably be given an opportunity to explain his action". (Para 232 of the Departmental Instructions on Tabacco Excise Duty).

Para 232-B(2): (a) While it is not necessary to follow the full court procedure in departmental adjudications, officers must observe the principles of natural justice in adjudicating cases; for example, before a punishment is awarded it should be seen that the party has a full opportunity to explain the charges that were levelled against him and that he had knowledge of the evidence that is used against him. No case should therefore be decided without the issue of a show-cause notice, and, if the party requests for a hearing, without giving him an opportunity to do so. There should be evidence on the file to show that these requirements have been observed. A note of the defence taken up by the offender and the evidence put forth during the hearing must also be recorded on the file by the adjudicating officer.

(b) There is no objection to legal representatives appearing in departmental adjudication; but formal cross-examination of witnesses should not be necessary. If there are any points for clarification, the adjudicating officer can himself take up these, and have them clarified from the witnesses.

As far as they go, these instructions issued under a provision of the Act recognise the true character of the proceedings leading to imposition of penalty and confiscation of goods. To the extent to which they are not in accordance with the rules of natural justice, we are of opinion that they are bad.

12. In view of what we have already said, the proceedings under the Act by which persons are adjudged guilty of contravention of the Rules, penalties are imposed and goods Confiscated must be regarded as quasi-judicial proceedings involving an obligation to follow the rules of natural justice.

13. The learned Government Advocate has however urged that the rules of natural justice were in this case duly observed. We do not agree and would show in a moment that the Rules were clearly not observed. It is well-established that the rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, that he should be given the opportunity of cross-examining the witnesses examined by that party and that no material should be relied on against him without giving an opportunity of explaining them: Phulbari Tea Estate Vs. Its Workmen, . In the instant case, witnesses were not examined in the presence of the petitioner and he was he was not given an opportunity to cross-examine them. Indeed, the respondent 3 acted only upon the statements of some persons which were recorded during the investigation. Further, he relied upon the Chemical Analyser''s reports which were not made available to the petitioner even when he asked for them. In this situation, there can be no question that the rules of natural justice were not followed in the enquiry. It is, however argued that, since the petitioner admitted the relevant facts in his statement (Annexure C), it was unnecessary to hold any enquiry. With out intending to pronounce any concluded opinion on the document, we are not inclined to read it as an admission of contravention of Rule 151. That being so, the duty to hold a formal enquiry in accordance with the rules of natural justice remained unaffected Jagdish Prasad vs State of M. B. AIR 1961 SC 1070. Having regard to the infirmities we have noticed in the enquiry held by the respondent 3, we are clearly of the view that the order impugned cannot be sustained.

14. The learned counsel for the petitioner further urged before us that, since there was no basis for proceeding against the petitioner, the show-cause notice should also be quashed. We must decline to adjudicate upon the sufficiency or otherwise of the material on which the proceedings were legally initiated for the simple reason that the process leading to the issuance of the show-cause notice is not subject to judicial review.

15. The petition succeeds and is allowed. The impugned order dated 6 July 1959 is quashed. The respondents shall refund to the petitioner the duty and the penalty recovered by them in pursuance of that order. They shall bear their own costs and pay those of the petitioner to whom the security amount shall also be refunded. Hearing fee Rs. 200-.