

(1995) 07 CAL CK 0028**Calcutta High Court****Case No:** C.O. 11943 (W) of 1995

Tapan Kumar Biswas

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: July 17, 1995**Acts Referred:**

- Constitution of India, 1950 - Article 136, 226
- Customs Act, 1962 - Section 124

Citation: (1996) 53 ECC 9**Hon'ble Judges:** S.B. Sinha, J**Bench:** Single Bench**Judgement**

S.B. Sinha, J.

July 17, 1995.

- The contours of natural justice is in question in this writ application. Before adverting to the said question, the fact of the matter may be noticed in brief.
- A vehicle was seized by the Customs Department. Occupier of the said vehicle, upon interrogation named the petitioner who is the Superintendent of Central Excise and Customs as one of the persons responsible for alleged violation of the provisions of the Customs Act and alleged illegal use of the said vehicle. A notice dated 28.6.1994 u/s 124 of the Customs Act was served upon the concerned persons including the petitioner which is contained in Annexure "A" to the writ petition.
- The said notice also contained statements of fact. It was categorically stated therein:-- "The written reply in this show-cause notice should be submitted within 30 (thirty) days from the date of its issue to the Additional Collector Customs (Prev.), West Bengal, Calcutta, M.S. Building, 5th Floor, Customs House, 15/1, Strand Road, Calcutta - 700 001. If they so desire, they may on any working day during the next 30 days inspect and make copies of statements and documents cited in this notice

relevant to this case either personally or through their accredited person by prior appointment. Their written reply should be accompanied by documentary evidence, if any, in support of the same." The petitioner neither filed his show-cause within the aforementioned period nor took any steps to inspect the documents.

4. The petitioner, however, by a letter dated 16.5.1995 prayed as follows:

In the premises, the Id. Additional Collector may be graciously pleased to accord necessary permission and be also further pleased for making necessary arrangement for cross-examination of the aforesaid persons including the Departmental Officers for the sake of meeting the ends of justice and fair play.

5. By an order dated 31.5.1995 as contained in Annexure "C" to the writ petition, the petitioner was asked to submit his written statement and it was also communicated to him that this request for cross-examination of the witness was rejected by the Assistant Collector of Customs. The petitioner by his letter dated 8.6.1995 requested that a copy of the D.R.I.-I without divulging the names of the person furnishing information and copies of the affidavits of Samir Sarkar, driver of the Car WNF 6099 and Karunamoy Pal upon the affixing red light on the said car, be served on him. By the letter dated 14.6.1995 as Annexure "E" to the writ application the petitioner's prayer for giving a copy of D.R.I.-I was rejected. With regard to supply of the copies of the affidavits it was stated: "Regarding your prayer for copies of affidavit, this is to inform you that the said affidavit were prepared before the Notary in Bornampur, by Samir Sarkar and Shri Karunamoy Paul in their personal capacity and no copies were submitted by them to this Office. Hence this Office is unable to furnish you copies of the same.

6. The petitioner reiterated his earlier request in his letter dated 22.7.1994 which is contained in Annexure "F" to the writ petition.

7. Mr. Kashi Kanta Maitra, learned Senior Counsel appearing on behalf of the petitioner, inter alia, submitted that from a perusal of the petitioner's representations as contained in Annexures "B", "D" and "F" to the writ application and noticed hereinabove, it would be evident that there has been a gross violation of the principles of natural justice.

8. Mr. Maitra contends that the impugned notice is entirely illegal being violative of the principles of natural justice and in support of his aforementioned contention, he relied upon the decision reported in 1964 Vol. 8, FLR page 220 and State of Kerala Vs. K.T. Shaduli Yusuff etc.,.

9. Mr. Dutta, learned Counsel appearing on behalf of the respondents, however, submitted that the petitioner is not entitled to cross-examine any witness under the provision of Customs Act. Learned Counsel submits that in a proceeding u/s 124 of the Customs Act, the principles of natural justice have a limited role to play. Learned Counsel points out that in terms of the notice dated 28.6.1994 as contained in

Annexure "A" to the writ application, the petitioner was given an opportunity to inspect all documents cited therein either personally or through accredited agent by prior appointment, but despite the fact that the said notice was served on the petitioner in June, 1994, the petitioner did not file his written statement, but came up with a plea to supply him such documents which cannot be divulged by the Customs Authority, by reason of his aforementioned representations as contained in Annexures "B", "D" and "F" of the writ petition. Learned Counsel contends that the charges against the petitioner were served keeping in view of the fact that he has been *prima facie* found to be aiding and abetting smuggling, although he is a high ranking officer of the Customs Department. Learned Counsel in this connection has relied upon in the cases reported in 1983 ELT 1486(SC) and 1977 CriLJ 67 and AIR 1967 Cal 78.

10. It was further submitted that the petitioner has an alternative remedy under the Customs Act itself as he has a right of appeal before the Commissioner or Appeals and then to Customs, Excise Gold (Control) Tribunal and in some limited cases, the petitioner can also file an application under Article 136 of the Constitution of India before the Supreme Court. Learned Counsel in this connection relied on the cases reported in Dalchand Vs. Municipal Corporation, Bhopal and Another, and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,

11. Section 124 of the Customs Act reads thus:

124. Issue of show cause notice before confiscation of goods, etc.-- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person:

- (a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
- (b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
- (c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in Clause (a) and the representation referred to in Clause (b) may, at the request of the person concerned be oral.

From the perusal of the aforementioned provision it appears that the same itself in effect and substance lays down the extent of applicability of the principle of natural justice while confiscating any goods or imposing any penalty under the aforementioned provision. In terms of the said provision, the proceedee is not entitled to cross examine any witness.

12. The petitioner had been given the opportunity to inspect the relevant documents by the respondents in terms of the said show cause notice dated 28.6.1994 but he failed and/or neglected to do so. It is surprising that despite the same, the respondents did not proceed in the matter ex parte against the petitioner and waited for such a long time.

13. It is well settled by reason of various decisions of the Supreme Court of India that the applicability of the principles of natural justice may vary from case to case and in some case, by reason of a statute, the principle of natural justice can be excluded.

14. However as indicated hereinbefore Section 124 of the Customs Act itself provides for the extent of application of the principle of natural justice.

15. In Employees Union v. The Management of Bennet Colman and Company reported in 1964(8) F.L.R720, a learned single Judge of this Court while considering a matter of the second departmental proceeding, held that while accepting the statement made by witnesses of the alleged incident, the enquiry officer was liable to divulge the same to the petitioner as the witnesses should be produced for cross-examination by him, and unless the same is done, the procedure is liable to be quashed as laid down by the Supreme Court in the case of [State of Mysore Vs. S.S. Makapur,](#).

16. However, the said decision, in my opinion, is not applicable in the instant case inasmuch as it is well known that the principles of fair play in the departmental proceedings form part of natural justice. In the case reported in [State of Kerala Vs. K.T. Shaduli Yusuff etc.,](#) the Supreme Court was considering a matter under" the Kerala Sales Tax Act. While interpreting the provision of Section 17(3) of the Kerala Sales Tax Act, the Supreme Court held that in terms of the said section and particularly of the proviso appended thereto as the assessee was required to get a reasonable opportunity to prove the correctness or competence of such return, the same would necessarily carry with it the right to examine witness and that would include equally the right to cross-examine witness examined by the Sales Tax Officer.

17. However, the Supreme Court in construing Section 124 of the Customs Act, appears to have taken a different view in Kanungo & Co. v. Collector of Customs, Calcutta and Ors. reported in 1983 LT1486(CAL) wherein it was clearly held that in a proceeding under the Customs Act the proceedees are not entitled to cross-examine the witnesses. In Ashutosh Ghosh and Anr. v. Union of India and Ors. reported in 1977 Crl LJ 67, A.N. Sen, J. (as his Lordships then was) while considering a similar question under the Customs Act also held the principles of natural justice do not extend to the cross-examination of the witnesses.

18. Similarly in a case reported in [Kishanlal Agarwalla Vs. Collector of Land Customs,](#) a Division Bench comprising of P.B. Mukharji and S.A. Masood, JJ., while considering

a matter under the Sea Customs Act also held that cross-examination of the witnesses is not comprehended under the said provision.

19. The aforesaid decisions, therefore, in clear and unmistakable terms state that whereas a proceedee would be entitled to inspect the relevant documents, they would not be entitled to cross-examine any witness nor would they be entitled to inspect any document which is confidential in nature and cannot be disclosed in the interest of the department.

20. It has been emphasised by Mr. Dutta that D.R.I-I is a confidential document and the contents thereof are not even disclosed to the superior Officers. It is now well settled that the principles of natural justice cannot be put in a straight jacket formula. By reason of a provision of statute, its applicability can be curtailed or excluded. In terms of Section 124 of the Customs Act, the proceedee is only entitled to file a representation. He is also entitled to be heard in the matter.

21. Furthermore the Supreme Court in Ashutosh Ghosh's case has categorically held that a proceedee is not entitled to cross-examine the witnesses. The decision cited by Mr. Dutta having been rendered under the Customs Act must be preferred to the decision cited by Mr. Moitra. The petitioner evidently did not file any show cause despite having been given an opportunity to do so and upon inspection of the relevant document.

22. As held hereinbefore, he is not entitled to cross-examine any witness. He is also not entitled to any copy of D.R.I-I on the basis where of the petitioner may have been implicated as it is evident, the contents of the said document would not be used as against him. Such information for obvious reasons cannot be disclosed. So far as the copies of the affidavits of Shri Samir Sarkar and Shri Karunamoy Paul are concerned evidently they are not going to be used against the petitioner as the said documents are not in possession of the department.

23. In the premises, aforementioned, I am of the view that although the petitioner deliberately did not inspect the other documents but keeping in view of the facts and circumstances of the case and further in view of the fact that any penalty if imposed upon him may not only entail penal consequences, but thereby departmental proceeding may also be initiated against him, I am of the view that before the petitioner is asked to file his written submissions, and be given an opportunity of being heard in the matter, he may be permitted to inspect all such documents which are already on records.

24. Such inspection must be made within a week from date. The prescribed authority, keeping in view of the fact that the confiscation proceeding is pending for a long time, may complete the proceeding at an early date and preferably within a period of 4 weeks from the date of communication of this order.

25. I may, however, observe that although the principles of natural justice are required to be complied with, those who do not inspect the document inspite of opportunity having been given to them and failed to exercise his right in relation thereto, may not be entitled to complain about the violation of the principle of natural justice. It has also to be borne in mind that the principle of natural justice should not be stretched too far as it is well-known that those who are guilty of offence take shelter under the said provision too often.

26. For the views I have taken, it is not necessary it deal with the other questions raised by Mr. Dutta at the Bar. Suffice, however, would be to say that driving the petitioner to take recourse to alternative remedy is a restriction imposed by the High Court upon itself, while exercising its jurisdiction under Article 226 of the Constitution of India. Principles of natural justice, if violated, should not ordinarily be a bar to entertain an application under Article 226 of the Constitution of India despite existence of alternative remedy. The petitioner is directed to render all co-operation in smooth conduct of the proceeding.

27. For the reasons aforementioned, this application is disposed of with the aforementioned observations.

28. Learned Counsel for the parties are permitted to take gist of the order for communication to the authorities concerned who are directed to act on such communication.

29. The certified copy, if prayed for, be given to the parties on priority basis.