

V.K. Thampi Vs. Collector of Central Excise

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Court : Kerala

Decided On : Jun-19-1989

Reported in : 1991LC272(Kerala); 1989(24)LC445(Kerala); 1990(48)ELT13(Ker)

Judge : K.S. Paripoornan and; K.A. Nayar, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 11A, 11A(1), 35G(1) and 35G(3); Central Excise Rules, 1944 - Rules 9(2), 52A, 52A(5), 173Q, 226 and 233A; Code of Civil Procedure (CPC)

Appeal No. : O.P. No. 1730 of 1989-S

Appellant : V.K. Thampi

Respondent : Collector of Central Excise

Advocate for Def. : P.V. Madhavan Nambiar, Adv.

Advocate for Pet/Ap. : C.K.S. Panicker,; K.K. Dinesan and; C.C. Thomas, Adv

Judgement :

K.A. Nayar, J.

1. The petition is for a direction to the second respondent to state the case and to refer to this Court the questions of law raised by the petitioner in paragraph 17 of the petition as follows :-

1. Whether, on the facts and in the circumstances of the case, is not the exparte order under appeal liable to be set aside and the appellant given a fresh opportunity to file his written representation to the show cause notice, as the failure to submit the written representation in time was not due to any fault on the part of the appellant, but, if at all, was the result of the fault committed by his counsel?
2. Whether, on the facts and in the circumstances of the case, is not the order under appeal bad for non-compliance with Rule 233-A of the Central Excise Rules, 1944 by which a duty is cast on the respondent to afford the person proceeded against a reasonable opportunity of being heard, over and above the opportunity of making a representation in writing?
3. Whether, in the facts and circumstances of the case, is not the order under appeal liable to be set aside for non-application of mind on the part of the respondent before issuing the show cause notice and the final order?
4. Whether, in the facts and circumstances of the case, is not the order under appeal liable to be set aside for non consideration of relevant materials while adjudicating the case against the appellant and other?
5. Whether, on a perusal of the order under appeal can it be said that the respondent has complied with the provisions of Rule 173Q of the Central Excise Rules, 1944 inasmuch as the respondent has ordered the confiscation of the land, building, plant, machinery etc. used in the manufacture, storage etc.?
6. Whether, in the facts and circumstances of the case, has not the Appellate Tribunal gone wrong and acted without jurisdiction in sustaining that part of the order under appeal which was directed against M/s. Vitco Rubber Industries, Kizhakkambalam, Alwaye, and setting aside only the other part of the order under appeal which was directed against the appellant?
7. Whether, in the facts and circumstances of the case, is not the order under appeal incompetent and liable to be set aside for violation of the maximum nemojudex in re sua inasmuch as the adjudicating authority (respondent) was

responsible for sanction order No. 3/86-87 dated 4-4-1986 distributing advance cash rewards to the various officers who participated in the detection/investigation of the case relating to M/s Vitco Rubber Industries, Kizhakkambalam and thereby prejudging the issues arising for adjudication?

2. The petitioner is the Proprietor of Vitco Rubber Industries, Kizhakkambalam engaged in the manufacture of tread rubber which is an excisable commodity. On 3-8-1985 the Officers of the Central Excise Wing at Cochin visited the petitioner's factory and verified the stock and account of tread rubber. They also seized the registers and files kept there. The petitioner's residence was also raided and seized certain records. Thereafter a show cause notice dated 29-1-1986 was issued to the petitioner. After referring to the facts relating to search and seizure and also the facts ascertained from the record seized, the petitioner was required to show cause to the Collector of Central Excise Cochin-31 as to why duty amounting to Rs. 17,47,091.53 should not be demanded on the goods cleared during the period from 8/81 to 8/85 from the petitioner under Rule 9(2) of the Central Excise Rules, 1944 read with the proviso to sub-section (1) of Section 11A of the Central Excises and Salt Act, 1944. The petitioner was also directed to show cause as to why the tread rubber seized from the premises of Sri. Narayanankutty weighing 441 Kgs. should not be confiscated and penalty should not be imposed on the petitioner under Rule 9(2), 52(A), 173Q and 226 and also why the land, building, plant, machinery, materials etc. should not be confiscated under Rule 173Q of the Central Excise Rules, 1944. The show cause notice mentioned about 44 items of records having been relied upon to come to the conclusion. These documents were not furnished to the petitioner. The petitioner's case is that he engaged an Advocate Sri. N. Rajasekharan Nair to defend the case and the said counsel sent a letter on 3-3-1986 enclosing the vakalath and requesting to supply the documents. On 10-2-1986 the Advocate had accepted the vakalath and informed the petitioner that he would be filing the vakalath before the first respondent with a request to furnish copies of the relevant documents to him for preparing the reply to the show cause notice. Since the petitioner did not hear anything from his Advocate for a period of about 3 weeks, he made enquiries with his Advocate as to whether the copies of the documents were received by him from the First respondent. He was informed by the Advocate that there was no

response from the Department and that he was awaiting the reply from the respondent. While so, on 21-5-1986, the petitioner received another letter dated 13-4-1986 from the 1st respondent directing him to file the reply within 7 days, failing which, it is stated, ex parte orders would be passed. The petitioner's contention is that immediately he went to the residence of the Advocate to inform him about the aforesaid communication and to instruct him to do what was necessary in the matter. At that time the Advocate was not available and therefore the petitioner entrusted the letter with an inmate of the house requesting him to hand over the same to the Advocate. Immediately on his return after a few days the petitioner again went to the house of the Advocate and explained to him as to what had transpired during his absence from Cochin. The Advocate sent a registered letter on 20-6-1986 to the first respondent recalling his earlier letter for the documents and again requesting him to supply the document as early as possible. But on 5-7-1986 his Advocate received a letter dated 30-6-1986 from the first respondent informing him that his letter dated 3-3-1986 was not received by the first respondent and that the first respondent has already passed an order on 19-6-1986. The order says that the show cause notice sent to the petitioner was received by all concerned on 31-1-1986 and no reply was received and further chance was given to them by registered letter dated 13-5-1986 which was also received by all parties on 20/21st May, 1986. In that letter dated 13-5-1986 it was mentioned that if the reply to the show cause notice was not received within 7 days, the case will be decided ex parte. But as no reply was received the officer confirmed the demand proposed in the show cause notice viz. a duty of Rs. 17,47,091.53 on the goods cleared during the period from 8/81 to 8/85 under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Central Excises and Salt Act, 1944; a penalty of Rs. 5,00,000/- under Rule 9(2) 52(A), 173Q and 226 and an order of confiscation under Rule 173Q of the Central Excise Rules, confiscating the land building, plant, machinery etc. used in the manufacture, storage etc. with an option to redeem the same on payment of fine of Rs. 50,000/-. The tread rubber to be seized is also confiscated under Rule 173Q with an option to redeem the same on payment of fine of Rs. 5,000/- within one month from the date of receipt of this order and further a penalty of Rs. 1,000/- on Sri. Narayanankutty under Rule 52A(5) and also on the petitioner an amount of

Rs. 2,000/- by way of penalty were imposed. Since the order is an appealable order, the petitioner filed an appeal before the second respondent. An affidavit dated 6th July, 1986 sworn to by N. Rajasekharan Nair, Advocate, was also produced before the Appellate Tribunal. In the affidavit it is stated that the petitioner met him on 10-2-1986 with a copy of the show cause notice for the purpose of defending his case in the adjudication proceedings and he accepted the vakalath on 10-2-1986. He prepared a letter addressed to the Collector of Central Excise, Cochin-31, requesting to furnish the relevant documents which he sent along with the vakalath by post. He did not get any reply from the Department. But when he was at Madras in the 3rd week of May, 1986 his client called on his residence at Kaloore, Cochin and after his return the petitioner again met him when he advised him to wait till the documents were received. Thereafter, the Advocate sent another letter dated 20-6-1986 by registered post to the Collector of Central Excise requesting him to furnish the copies of the documents. But on 1-7-1986 the petitioner came to the Advocate and told him that the final order was passed on 19-6-1986. The Advocate has sworn that there was no laches or omission or negligence on the part of the petitioner in not submitting the reply to show cause notice within the stipulated time and the delay occurred on account of the reasons stated in the affidavit. The Tribunal referred to the affidavit of the Advocate but the same was rejected on the ground that the residence of the Advocate who was originally engaged by the petitioner was only 3 to 4 Kms. away from the office of the Collector of Central Excise and if no reply was received from the office of the adjudicating authority the petitioner could have found out as to why there was no response to his communication. Thereafter perusing the records, the Tribunal came to the conclusion that the quantum of duty has been correctly arrived at on relevant date referred to by the adjudicating authority in the impugned order. The Appellate Tribunal reduced the penalty to Rs. 2 lakhs and also reduced the quantum of fine from Rs. 50,000/- to Rs. 25,000/-. The quantum of fine of Rs. 5,000/- levied in lieu of confiscation of the tread rubber under seizure was confirmed. Since the petitioner is a proprietary concern and the petitioner its sole proprietor thereof, the imposition of a separate penalty on the petitioner for Rs. 2,000/- was not called for and that was cancelled.

3. Aggrieved by the said decision the petitioner filed an application to refer the questions of law specified herein above under Section 35G(1) of the Central Excises and Salt Act, 1944. By order dated 17-10-1988 the Tribunal rejected the application holding that the applicant was given adequate opportunity of being heard and the finding on this aspect being finding of fact, no questions of law arise for reference. It is, thereafter the petitioner approached this court to refer the questions of law formulated herein above under Section 35G(3) of the Act.

4. We heard counsel on behalf of the petitioner, Shri C.K.S. Panicker and Shri P.V. Madhavan Nambiar, Central Government Pleader on behalf of the respondents.

5. The main question of law raised related to the violation of the principles of natural justice. As held by the Supreme Court in the decision reported in *Sawai Singh v. State of Rajasthan* - (1986) 3 S.C.C. 454 it is not possible to lay down any rigid rules as to which principle of natural justice is to be applied. There is no such thing as technical natural justice. The requirements of natural justice depend upon the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter to be dealt with and so on. The concept of fair play in action which is the basis of natural justice must depend upon the particular lis between the parties. Rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood.

6. Admittedly the impugned order adversely affects the petitioner. It has resulted in civil consequences. The petitioner has entrusted the matter to an Advocate and at all times he approached the lawyer and he acted upon bonafide according to advise of his lawyer. His Advocate also filed an affidavit before the Tribunal. It has been held in *R. v. Diggines* (1985) 1 A.E.R. 1073 that :-

'Where an applicant was denied a hearing by a Tribunal through no fault of the applicant or the Tribunal but because of the fault of the applicant's advisors, there was nevertheless a breach of the audi alterant pattern rule which entitled the applicant to judicial review of the Tribunal's decision if it was adverse to the applicant'.

This decision has been followed in a recent decision in *R. v. Secretary of State Ex. p. Al Mehdawi* (1989) 1 A.E.R. 777. It was held :

'Since the respondent had been deprived of a hearing by the adjudicator solely because of his solicitor's negligence the decision-making process was fundamentally flawed by a breach of the rules of natural justice even though neither the respondent himself nor the adjudicator were at fault.' ,

Even though the matter arose under the Code of Civil Procedure in the decision reported in *Rafiq v. Munshilal*, 1981 S.C. 1400 : 1981 (3) S.C.R. 509, it was held by the/Supreme Court thus :-

'It is not proper that an innocent litigant, after doing everything in his power to effectively participate in his proceedings by entrusting his case to the Advocate, should be made to suffer for the inaction, deliberate omission or misdemeanour of agent. For whatever reason the Advocate might have observed himself from the Court, the innocent litigant could not be allowed to suffer injustice for the fault of his Advocate'.

7. Of course, before the Tribunal the party is represented by counsel. But the post-decisional hearing by way of appeal cannot afford an adequate remedy for a procedural defect of absence of a pre-decisional hearing. If the petitioner had opportunity to peruse the records and file written objection, according to the petitioner, the adjudicating authority might have drawn a different conclusion. We will also refer to the decision reported in *Institute of Chartered Accountants v. L.K. Ratna* (1986) 4 S.C.C. 537 for the proposition that post-decisional hearing by way of appeal will not cure the defect of absence of pre-decisional hearing.

8. In the light of the above observations, *prima facie*, it appears to us, the question as to whether the approach and conclusion of the Appellate Tribunal is justified in law requires further scrutiny. At this stage, all that is necessary, is that this court should be satisfied that a question of law which may be supported by reasonable argument, arises out of the Appellate Order of the Tribunal. In this case, we are so satisfied. Further 133 requires that no order confiscating any property or imposing any penalty on any person shall be made unless a written notice stating the

grounds on which it is proposed to be confiscated etc. is given. Apart from such show cause notice a reasonable opportunity of making a representation in writing within such time as may be specified in the notice against the grounds of confiscation also had to be given. It is the contention of the petitioner that even urgent notice stating the grounds was given, reasonable opportunity for hearing has not been given. In the circumstances, we are of the view that the correctness of the decision of the Appellate Tribunal requires a deeper probe. Out of the seven questions raised above, we are satisfied that four questions numbered as Question Nos. 1, 2, 5 and 7 above are on the facts and circumstances of this case, substantial question of law, which necessarily arise out of the order of the Appellate Tribunal.

9. We, therefore, direct the second respondent to state the case and refer to this Court question Nos. 1, 2, 5 and 7 formulated hereinabove, for decision. This shall be done within two months from the date of receipt of a copy of this order.

The original petition is disposed of as above.

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