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Court : Kolkata

Decided On : Jul-01-1998

Reported in : 1998(61)ECC488

Judge : Pinaki Chandra Ghose, J.

Appeal No. : Matter No. 1542A of 1995

Appellant : Pratick Kumar Sen

Respondent : Union of India (Uoi) and ors.

Disposition : Application dismissed

Judgement :

Pinaki Chandra Ghose, J.

1. This is an application filed by the writ petitioner challenging an order dated 21st April, 1995 passed by the Respondent No. 3 revoking .the Clearing Agency Licence issued in the name of M/s. Seaking Shipping Agency, Calcutta under Rule 21(b) and (c) read with Rule 23(7) of the Customs House Agents Licencing Regulation, 1984. The said order has been issued for violation of Rules 14, 14(d) and 20(7) of the said Regulations. The said order was passed inter alia for that the writ petitioner and his employee participated in effecting illegal import of integrated circuits, misdeclaring the same as transistors of such lower value at the Air Cargo

Complex, Calcutta.

2. The facts of the ease are as follows:--

On 23rd March, 1994 Directorate of Revenue Intelligence (hereinafter referred to as D.R.I.) seized goods relating to Bill of Entry No. 668. On 29th March, 1994 D.R.I, seized goods relating to Job File No. 21A/13. On April 1st, 1994 D.R.I, conducted searches in the house and office of the writ petitioner and documents were seized. Thereafter, interrogation took place. On 2nd April, 1994 writ petitioner was arrested and was remanded to jail custody by the Chief Metropolitan Magistrate, Calcutta till 16th April, 1994. On 4th April, 1994 Collectorate of Customs suspended the Customs House Agents Licence of the petitioner. On 9th April, 1994 on certain conditions petitioner was released from bail by the Hon'ble High Court. On 29th April, 1994 the petitioner filed the writ application challenging the said order of suspension. On May 2nd, 1994 the said writ application was dismissed for non-prosecution since the writ petitioner withdrew the said writ application. On May 23rd, 1994 the petitioner applied to the authorities for restoration of the licence. On July 7th, 1994 the second writ application was moved infer alia for direction upon the Collectorate of Customs to dispose of the representation filed by the writ petitioner on May 23rd, 1994. The said writ application was disposed of on the same date by his Lordship T. Chatterjee, J. On August 12, 1994 D.R. I., submitted the enquiry report to the Collector of Customs. On September 13th, 1994 petitioner moved a writ application and the said application was disposed of by Her Lordship Mrs. R. Pal, J. extending the time for consideration of the representation of the petitioner within a period of two weeks from the said date. On 14/16th September, 1994 hearing took place before the Collector of Customs and on 26th September, 1994 the said representation was rejected by the Collector of Customs as being premature. On September 27th, 1994 Collector of Customs issued Show Cause Notice to the writ petitioner. On October 20, 1994 the writ petitioner an order was passed by his Lordship N.K. Mitra, J. on the said application. On October 21st, 1994 petitioner was detained under Conservation of Foreign Exchange & Prevention of Smuggling Activities Act. On June 5, 1995 petitioner filed an appeal from the order passed by His Lordship N.K. Mitra, J. before the Division Bench presided over by the Chief Justice and R.

Pal, J.

The Division Bench was pleased to direct to complete the proceedings within the time framed by the Division Bench. In view of that on 31st January, 1995 petitioner filed written statement in defence to Show Cause Notice dated September 27, 1994. On February 1st, 1995 petitioner requested the Enquiry Officer, being the Assistant Collector of Customs, to issue summon for cross-examination to the concerned Appraisers physically checked the said consignment and gave pass out orders. Since the time was expired, in the meantime, on February 21st, 1995 an application was filed for extension of time for submission of the Enquiry Report by a further period of four weeks. On the said application the division Bench was pleased to direct that if witnesses do not choose to appear, it will be up to the Enquiry Officer to complete the Enquiry on the materials available before him. On 21st March, 1995 the Enquiry Officer submitted his Report. The allegation of the writ petitioner that the witnesses required for cross-examination were summoned under Section 108 of the Customs Act, 1962. On April 20, 1995 the petitioner submitted his representation under Regulation 23(7) of Customs House Agents Licencing Regulations, 1984 to the Report of the Enquiry Officer. On April 21st, 1995 the Collector of Customs revoked the licence of the writ petitioner. Thereafter, on August 24th, 1995 the instant writ application was moved for this relief.

4. Mr. Mitra appearing on behalf of the writ petitioner submitted that they have challenged the order revocation on the following grounds:--

(a) The Show Cause Notice dated 27th September, issued by the Collector of Customs has been issued with a closed mind and thereby the guilt of the writ petitioner has been pre-judged;

(b) The authorities in passing the said order dated 21st April, 1995 has acted in contravention of the procedure laid down in Rule 23 of the Customs House Agents Regulation, 1984:

(c) The respondents, in holding the said enquiry and in passing the said impugned order have acted m violation of the principles of natural justice;

(d) Report of the Enquiry Officer on the basis of the impugned order was passed, acted on the basis of suspicion and conjecture and proceeded with the object of somehow finding the writ petitioner guilty with a view to revoke his Clearing Agency Licence.

He relied upon the judgments reported in--

79 CWN 39 State of West Bengal v. Sati Prosad Roy

1980 2 CHN 35 Bimala kcuiLa Mukherjee v. State of West Bengal and Ors.

1984 2 CHN 185 Subrata Bhattachanja v. Bharat Process & Mechanical Engineers and Ors.

1993 2 CHN 103 State Bank of India v. Tapan Kumar Das.

and submitted that when the Show Cause Notice has been issued in a closed mind the Courts have holding for consideration the language used in the Show Cause Notice if the Courts come to the conclusion that the Officer concerned had a closed mind at the stage of even framing the charge, the Court would come to the conclusion that the authorities have pre-judged the issue, which will vitiate the Show Cause Notice and all proceedings based thereon.

5. He further submitted that the Regulation 23(4) has got two parts; (a) the Customs House Agent has been granted right to cross-examine any person examined in support of the ground forming the basis of the proceedings and, (b) where the Assistant Collector of Customs declined to examine any person, when called upon by the Customs House Agents to do so, on the ground that his evidence is not relevant or material, he shall give his reasons in writing for so doing.

6. He further submitted that the Show Cause Notice will indicate that the evidence of Ashoke Durani and V.N. Lekhi form the basis of the Show Cause Notice proposing to revoke the Customs House Agent's Licence of the writ petitioner. The statements of these persons recorded under Section 108 of the Customs Act were of heavily relied upon in support of the grounds in the Show Cause Notice. These

statements were recorded in the earlier proceedings in connection with the suspension of the Customs House Agent's Licence.

7. He further submitted that these persons were called to enable the writ petitioner to cross-examine them. He further submitted that no attempt to compel attendance of persons of the said Lekhi and Durani. He further submitted that there is no explanation why their attendance was not secured by serving Summons under Section 108 of the Customs Act, 1962 to give evidence and produce documents. He further submitted that Regulation 23(4) entitles a Customs House Agent to cross-examine the persons examined in support of the ground forming the basis of the proceedings, Reliance upon the statements of Durani and Lekhi in the Show Cause Notice amounts to their examination in support of the ground forming the basis of the proceedings, and hence it was incumbent upon the Enquiry Officer to produce such witnesses for the Customs House Agent viz. the writ petitioner, to cross-examine, such persons. This is statutory right of cross-examine the denial of which amounted to infraction of the Regulations, and, therefore, in invalidity of the entire proceedings.

8. Mr. Mitra further submitted that the principles of natural justice required that if any such person, who has given statement on which reliance was placed in the Show Cause Notice, could not be produced, the evidence of such person should be altogether expunged for the purpose of the Enquiry and the ultimate final order passed by the Collector of Customs. Evidence of a person, who could not be produced for cross-examination, is no evidence at all. In any adjudication proceeding, when the Collector of Customs was acting in a quasi-judicial capacity, if not in a judicial capacity, reliance upon the statement of a person, who could not be produced for cross-examination, inspite of a request to that effect by the Customs House Agent, tentamounts to denial of fair play in action, and therefore a lacuna in the decision making process. In such event the Court in a writ proceeding can be requested to conduct judicial review of the decision of the Authorities, and review the manner in which such decision was made.

In support of his contention he relied upon AIR 1989 SC 997 [State of U.P. and Ors. v. Maharaja Dharmander Prasad Singh etc.)

9. Mr. Mitra also submitted that the very basic right under the regulation to cross-examine the said witnesses to test their veracity and to establish the case of the writ petitioner has been denied and as such the whole proceedings is vitiated and is liable to be set aside. He further submitted that the respondents have acted violation in the principles of natural justice in the following manner:--

The respondents did not allow the writ petitioner to place the facts correctly before the Enquiry Officer.

10. He further submitted that the right to cross-examine as a part to the principles of natural justice which has been recognised in the various decisions of the Supreme Court and the High Court, where it has been held that one of the ingredients a 'reasonable opportunity' to be heard is a right to cross-examine the witnesses called against the charged officer. In support of his contention he relied upon : (1958)IILLJ259SC Union of India v. T.R. Varma, : (1959)ILLJ167SC Khem Chand v. Union of India and Ors. and AIR 1977 SC 1927 Mohammad Giasuddin v. State of Andhra Pradesh. He also relied upon : [1970]3SCR694 The State of Punjab v. Dewan Chuni Lal, : [1981]1SCR746 S.L. Kapoor v. Jagmohan and Ors. : (1984)ILLJ2SC K.L. Tripathi v. State Bank of India and Ors. : AIR 1986 SC180 Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors. (1997) 2 CLJ 497 Sujit Das v. The West. Bengal Board of Secondary Education and Ors.

11. Mr. Bhaskar Gupta, Learned Senior Counsel appearing on behalf of the respondent authorities submitted that several writ petitions (totally 4 in sumber) were successively filed by the writ petitioner challenging the suspension order and the connected proceedings, All the said writ applications have already been disposed of.

12. Mr. Gupta submitted that, the Show Cause Notice was issued, there is no challenge in this writ application nor any relief has been asked for by the writ petitioner in this writ application and as such the writ petitioner should not be allowed to urge the said point at this stage. He further submitted that there is no challenge to the Show Cause Notice in the 4th writ petition which was filed on 20th October, 1994. He further submitted that the principles of constructive res judicata contained in Section 11 of the Code of Civil Procedure equally applying to the writ

proceedings as it has been held in the case of Daryao v. State of U.P. AIR 1961 SC 1457.

13. He further submitted that the Show Cause Notice was replied by the writ petitioner and the proceedings were held which resulted in the impugned order. Mr. Gupta submitted that it is necessary to distinguish the stages in which the proceedings were held against the writ petitioner. Stage-I is the pre-show cause stage of preliminary enquiry where the D.R.I. Authorities were making enquiries to find out the facts relating to the importation. It was at this stage that summons under Section 108 of the Customs Act, were issued to Nikhil Chakraborty, (the employee of the writ petitioner) Pratick Kumar Sen (the writ petitioner himself), Asoke Kumar Durani and V.N. Lekhi. Asoke Durani made his statements on 31st March, 1994 and 1st April, 1994 before the D.R.I. at Calcutta.

14. Pratick Sen and Nikhil Chakraborty made their statements before the D.R.I., Calcutta at about the same time. V.K. Lekhi made statements under Section 108 of the Customs Act before the D.R.I., Bombay on the 5th and 6th of April, 1994.

15. The relevant parts of Section 108 of the Customs Act are reproduced below:

Section 108. Power to summon persons to give evidence and produce documents--

(1) Any gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods...

(3) All persons so summoned shall be bound to attend either in person or by any authorised agent, as such officer may direct: and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined of make statements and produce such documents and other things as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure 1908 (5 of 1908), shall be applicable to any requisition for attendance under this

section.....

Stage II is the procedure for suspending or revoking licence which is contained in Regulation 23.

Regulation 23(3) is as, follows:--The Assistant Commissioner of Customs shall, in the course of inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings and he may also put any question to any person tendering evidence, for or against the Customs House Agent, for the purpose of ascertaining the correct position.

Regulation 23(4) is as follows:--

The Custom House Agent shall be entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings and where the Assistant Commissioner of Customs declines to examine any person on the grounds that his evidence is not relevant or material, he shall record his reasons in writing for so doing.

Therefore it is clear that the under Regulation 23, if any person is examined in support of the grounds, then only the Customs House Agent is entitled to cross-examine him. The Agent cannot claim a right to demand production of a person of his choice for cross-examination.

16. Nikhil Chakraborty, the employee of the writ petitioner was cross-examined on behalf of the petitioner. The question of permitting the petitioner to cross-examine the appraiser does not arise in view of the Regulation 23(3) and 23(4). He further submitted that there is no denial by the writ petitioner that the goods were misdeclared. He further submitted that as required under Regulation 23(4) the Assistant Collector of Customs in his enquiry Report has recorded cogent and elaborate reasons for not allowing cross-examination of the Collector and the Appraisers and there has been no challenge to these reasons. He further submitted that no prejudice has been caused to the writ petitioner. He further drew my attention to the copy of the charge which has been, filed by them to show that

the Customs Authorities. Several attempts have been made by the customs authorities to bring Lekhi and Durani to give evidence, but they did not come. Mr. Gupta also drew my attention to several dates when the said attempts were made by the authorities. He further submitted that . there has been full compliance of the Regulation with the provisions of Regulation 23.

17. Mr. Gupta submitted that the right to cross-examine is not a part of the principles of natural justice, it is procedural justice. Where the statute or regulations expressly provide for cross-examination then only and to that extent only cross-examination has to be allowed. It is not a part of the general principle or a part of natural justice that cross-examination must be allowed whenever asked for. If the Collector were to covert himself as a regular Court of Law hearing formal cross-examination and applying the Evidence Act and the Civil and Criminal Procedure Codes in this manner as a Court of Law. then it will be physically and literally impossible for him to function as the Collector of Customs. In support of his contention he cited the following judgments:--

(i) AIR 1967 Cal 80 Kishanlal Agarwala v. Collector of Customs;

(ii) AIR 1967 SC 122 State of J & K v. Bakshi Gulam Mohammad;

(iii) AIR 1972 SC 2136 Kanugo & Co. v. Collector of Customs, Calcutta;

(iv) AIR 1984 SC 273 K.L. Tripathi v. State Bank of India;

(v) AIR 1976 SC 1686 H.C. Sarin v. Union of India.

18. He further submitted that full, fair and reasonable opportunity was given to the writ petitioner to deal with the case made against him including all the materials in support thereof. He further submitted that there has been no breach of the principle of natural justice.

19. Mr. Gupta further submitted that two orders dated 5th of January, 1995 and 21st of February. 1995 passed by the Division Bench of this Hon'ble Court in the fourth writ petition of the writ petitioner are relied upon.

20. By this order dated 21st of February, 1995, the Division Bench extended the period for submission of enquiry report in terms of Regulation 23(5) by a further period of four weeks. It was specifically directed that if the witnesses did not choose to appear before the enquiry officer it would be open to him to complete the enquiry on the materials available before him.

21. This order dated 21st February, 1995 was not appealed against and the same was binding on the parties. The Appeal Court directed the Assistant Collector to act on the materials which were before him. He could not ignore any part of the materials, including in particular the statements of Lekhi and Durani recorded under Section 108 of the Customs Act at the time of preliminary investigation.

22. Mr. Gupta also drew my attention to Regulation 20(7) of the said Regulation and submitted that the petitioner who is responsible for all acts and omission of his employees in regard to their employment. The said Regulation provides as follows:--

Regulation 20(7): The Customs House Agent shall exercise such supervision as may be necessary to ensure the proper conduct of any such employees in the transaction of business as agent and be held responsible for all acts or omissions of his employees in regard to their employment.

He further submitted that as a Clearing House Agent, the petitioner is responsible for the acts of his employees. Regulation 20(7) quoted above is clearly attracted in this case. Reference may be made in this connection to the principle of vicavious liability as explained in the case of Headmistress, Govt. Girls High School v. Mahalakshmi AIR 1998 Mad 86 (March issue).

23. He further submitted that in terms of Sub-section (3) of Section 147 of the Customs Act, 1962 when any person is expressly or impliedly authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, such person, shall, without prejudice to the liability of the owner, importer or exporter, be deemed to be the owner, importer or exporter of such goods. In the instant case the petitioner being the Customs House Agent of the importers viz. Shri V.N. Lekhi and A.K. Durani in

respect of their subject consignments he shall be deemed to be the owner and importer of such goods under the aforesaid provisions.

24. As observed by the Supreme Court in the case of K.L. Tripathi v. State Bank of India in AIR 1984 SC 273 that in order to sustain a complaint of violation of the principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused. The petitioner has not been able to establish this. Further, there has been full compliance with Regulation 23 by the Customs authorities. The question of prejudice does not arise.

25. Mr. Gupta also submitted that the two English Cases cited by Mr. Mitra in that orders affecting the part were passed without giving them adequate opportunity of being heard, which obviously violates the principles of natural justice. The said fact is not applicable in the instant case. He further submitted that AIR 1957 SC 882 Union of India v. T.R. Varma is not applicable in the facts and circumstances of this case. He further submitted AIR 1958 SC 300 and AIR 1970 SC 2086 cited by Mr. Mitra, both the cases were on Article 311(2) of the Constitution of India which required 'reasonable opportunity' to be given. There were no Rules, such as this in the said Regulations. He further submitted that the AIR 1977 SC 1627 is an authority for the proposition that the requirements of the Statute will have to be looked at and it has to be seen if such requirements were complied with. AIR 1981 SC 136 has laid down the general principles of the rule of audi alterem partem.

26. He further submitted that Prof. D. smith in the 5th Edition of his book on Judicial review of administrative action has observed that if in a proceeding witness testified orally then if there is no cross-examination, it is procedural unfairness. This does not concern a situation where there are statutory rules relating to cross-examination.

27. Mr. Gupta further submitted that alternative remedy is a bar to move this writ application. This writ application is not maintainable.

28. In reply, Mr. Mitra also relied on an unreported judgment in ITC Case in my opinion which has no application in this instant case, he also submitted that the

judicial review cannot be converted into an appeal. He further submitted that there is nothing wrong in the decision making process. The petitioner was given a fair and reasonable opportunity to meet the case against him. The petitioner has availed the opportunity and he further submitted that there is a right of appeal provided for in Regulation 23(8) of the said Regulation. The petitioner did not avail of this opportunity. The writ petitioner came before this Court after the expiry of the statutory period for preferring the appeal.

29. Mr. Mitra appearing on behalf of the writ petitioner in reply submitted that it has been contended on behalf of the Respondents that the writ application is not maintainable in view of the alternative remedy provided in the Customs House Agents Licencing Regulations, 1984; it has further been contended by the Respondents that under Regulation 23(8) of the said Regulations, the writ, petitioner should have preferred appeal to the Customs & Central Excise Gold (Control) Appellate Tribunal under Section 129A of the Customs Act, 1962, if he had felt aggrieved by the said Order. According to the Respondents, existence of the alternative remedy is a complete bar to the maintainability of the writ petition. Reliance has been placed, in support of the above proposition, on the following decisions:

MR 1983 SC 603 Tilaghur Paper Mills Co. Ltd. and Anr. v. State of Orissa and Anr.;

AIR 1972 SC 2136 Kanungo & Co. v. Collector of Customs. Calcutta and Ors.;

AIR 1976 SC 1986 S. Narayan Iyer v. The Union of India and Anr.

30. It is further submitted that existence of an alternative remedy is not an absolute bar to the maintainability of the writ petition. The Supreme Court has held that the rule of exhaustion of alternative remedy before approaching a writ Court, is a rule of self imposed limitation for exercise of its discretion; a rule of policy and discretion, rather than a rule of law.

AIR 1958 SC 86 State of Uttar Pradesh v. Mahammad Nooh;

AIR 1969 SC 556 Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zilla Parishad

Existence of alternative remedy is not a bar to the maintainability of a writ petition if--

(i) there is a complete lack of jurisdiction in the officer or authority to take the action impugned; or

(ii) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice;

(iii) however, the Supreme Court indicated that the above two exceptions to the normal rule are by no means exhaustive, and beyond them a discretion rests in the High Court to entertain the petition and grant relief, notwithstanding the existence of alternative remedy.

31. The decisions cited on behalf of the Respondents with regard to the maintainability of the writ petition are decisions where writ of Mandamus has been prayed for. However, the Supreme Court in the case of Mohammad Nooh: AIR 1958 SC 86 has stated in no uncertain terms that there, is no rule with regard to Certiorari, as there is with Mandamus, that it would lie only where there is no other equally effective remedy. Provided the requisite grounds exists, Certiorari will lie although a right of appeal has been conferred by a statute. It is to be noted that the above pronouncement was made by the Supreme Court sitting in the Constitution Bench consisting of five learned Judges. The above decision has been followed in numerous decisions of the Supreme Court, including the one reported in : (1993)IILLJ549SC Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co Education) Higher Secondary School and Ors.) where at page 2163 the observations of S.R. Das C.J. in Mohammad Nooh's case has been quoted and followed.

32. Lastly, the point of maintainability of the writ petition was urged on behalf of the respondents at the admission stage, and the question was argued out in extenso. It was contended on behalf of the respondents that the writ petition should not be

admitted at all and should be rejected in limine, since the writ petitioner has come to the Writ Court without exhausting remedies provided in the statute by way of appeal. H this objection has been upheld, the writ petition would not have been admitted at all. However, after discussing the respective contentions, Altamas Kabir, J. by His Judgment and order dated 24th August. 1995 admitted the writ petition and gave directions for filing the affidavits. Once the writ petition has been admitted and the matter has been heard out extensively on merit, it would not be proper to allow the respondents to reagitate the issue of the existence of alternative remedy. AIR 1971 SC 33 L. Hriday Narayan v. Income Tax Officer, Barieilly. In AIR 1965 SC 1321 Municipal Council Khurai and Anr. v. Kamal Kumar and Anr. the Supreme Court held that though the High Court could have refused to entertain an objection under Article 226 of the Constitution in view of the existence of an alternative remedy, the High Court had chosen to exercise discretion in favour of the writ petitioner and had gone into the merits of the controversy, and therefore, it would not be right for the Supreme Court to interfere with the exercise of that discretion, unless it was satisfied that the action of the High Court was arbitrary and unreasonable. The question of an alternative remedy is not only now barred by the principles of res judicata, but ought not to be entertained also on the ground of abuse of the process of Court, the same question, having been raised earlier, is being raised vexatiously over and over again.

33. After considering all the facts and circumstances of this case and the arguments put forward before me at the bar, I have no hesitation to accept the contention put forward by Mr. Gupta before me and it appears to me that the writ petitioner has got ample opportunity to vindicate his grievances before the appropriate Forum. It further appears that no case has been made out by the writ petitioner for violation of natural justice. Pursuant to the order passed by the Division Bench, the proceeding has to be concluded and in fact concluded by the concerned authorities within the time framed by the Division Bench, no appeal was preferred by the writ petitioner from the said order. After completion all the proceedings the writ petitioner cannot at this stage challenge the Show Cause Notice. There is no case made out in the writ petition for challenging the same.

34. By reason of the premises this writ application must fail. There will be no order as to cost.

35. All parties are to act on a signed copy of the Operative part of this Judgment on the usual undertaking.

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