

Superintendent (Tech. I) Central Excise, I. D. D. Jabalpur & Others

Vs

Pratap Rai

Civil Appeal No. 363 of 1978

(V. R. Krishna Iyer, Jaswant Singh, R. S. Pathak JJ)

26.04.1978

JUDGMENT

FAZAL ALI, J. -

1. This appeal by special leave is directed against the judgment of the Madhya Pradesh High Court dated 19th November, 1976 by which the High Court quashed the notice dated 27th July, 1972 issued by the Assistant Collector of Customs and also quashed fresh adjudication proceedings started by him under the provisions of the Customs Act (hereinafter referred to as the Act).

2. The appeal lies within a very narrow compass and turns upon the interpretation of the order passed by the appellate authority under Section 128 of the Act. On 27th February, 1969 the respondent Pratap Rai was detained at Jabalpur by the Customs authorities while he was travelling by the Bombay Janta Express. On being searched as many as 23 wrist watches on which no custom duty was paid were recovered from his person. Thereafter adjudication proceedings under Section 122 of the Act were commenced by the Assistant Collector of Customs which culminated in the order of the Assistant Collector dated 30th June, 1969 by which the watches were seized and ordered to be confiscated. A penalty of Rs. 250 was levied on the respondent under Section 112 of the Act. The respondent then carried an appeal to the Appellate Collector under Section 128 of the Act against the order of the Assistant Collector. The Appellate Collector by his order dated 22nd February, 1972 vacated the order of the Assistant Collector mainly on the ground that the Assistant Collector had not complied with the rules of natural justice. The fate of this case depends on the interpretation of the order passed by the Appellate Collector.

3. In order to appreciate the point in issue it may be necessary to extract the relevant portion of the order of the Appellate Collector which runs thus :

The adjudication, therefore, suffers for lack of principle of natural justice, inasmuch as adequate opportunities were not given to the appellant to defend his case. I, therefore, without prejudice, vacate the order of the adjudication passed by the Assistant Collector, Central Excise, Jabalpur.

4. The department appears to have interpreted the aforesaid order as an implied order of remand and issued a fresh notice to the respondent on the 27th July, 1972 and started fresh adjudication proceedings according to the implied direction of the Appellate Collector. Thereafter the respondent filed a writ petition in the High Court of Madhya Pradesh assailing the notice and praying that the proceedings started by the Assistant Collector even after the vacation of the order by the Appellate Collector be quashed. The plea taken by the respondent appears to have found favour with the High

Court which allowed the petition, quashed the notice as also the fresh adjudication proceedings. The appellant obtained special leave of this Court against the order of the High Court and hence this appeal before us.

5. The only point that was contended before us by Mr. E. C. Agrawala appearing in support of the appeal was that the High Court has erred in not properly interpreting the order of the Appellate Collector. According to the learned counsel, a true and plain interpretation of the order of the Appellate Collector would clearly reveal that he had merely vacated the order of the Assistant Collector because it suffered from a technical infirmity and had not barred the commencement of fresh adjudicatory proceedings. Mr. Naunit Lal appearing for the respondent however submitted that there was no clear direction in the order of the Appellate Collector from which it could be inferred that he had remanded the case, and, therefore, there was no jurisdiction in the Assistant Collector to issue a fresh notice or start adjudicatory proceedings against the respondent. In our opinion, the contention of counsel for the appellants appears to be sound and must prevail. A perusal of the order of the Appellate Collector extracted above clearly shows two important facts : (1) that the Appellate Collector has not set aside or vacated the order of the Assistant Collector on merits but has vacated it only on a technical infirmity, namely, the violation of the rules of natural justice and that is why the Appellate Collector has advisedly used the words "without prejudice" in his order, (2) that the Assistant Collector in his order dated 30th June, 1969 had directed confiscation of the watches and imposed a penalty of Rs. 250 and if the Appellate Collector intended to set aside this order completely and irrevocably then he should have passed a consequential order for refund of the amount of the penalty and release of the property confiscated. The fact that no such order was passed by the Appellate Collector clearly shows that he never intended to bar fresh adjudicatory proceedings provided they were conducted according to the principles of natural justice. It seems to us that whenever an order is struck down as invalid being in violation of the principles of natural justice there is no final decision of the case and fresh proceedings are left open. All that is done is that the order assailed by virtue of its inherent defect is vacated but the proceedings are not terminated.

6. In the case of *M/s. Thimmasamudram Tobacco Co. v. Assistant Collector of Central Excise, Nellore Division, Nellore* (AIR 1961 AP 324) while construing the provisions of the Central Excises and Salt Act which was almost on identical terms as the Customs Act, a Division Bench of the Andhra Pradesh High Court observed as follows (AIR p. 325, para 11) :

Assuming that Section 35 of the Central Excise Act does not clothe the appellate authority with power to remand the matter to the officer whose order is appealed against, nothing stands in the way of the Assistant Collector initiating the proceedings afresh, when his order was quashed not on merits but on technical grounds, i.e. for not following either the procedure or the dictates of natural justice. In a case where the flaw in the order appealed against consists of in the non-observance of certain procedure or in not giving effect to the maxim 'audi alteram partem', it is open to the officer concerned to start the procedure once again with a view to follow the rules of procedure and the principles of natural justice.

We find ourselves in complete agreement with the view taken by the Andhra Pradesh High Court and the observations made by Reddy, C.J. who spoke for the Court. It is obvious that in the instant case the Appellate Collector found that the order of the Assistant Collector suffered from a serious procedural infirmity, viz., that it was passed without giving the respondent a proper opportunity of being heard, and, therefore, had to be vacated. In such circumstances, therefore, it cannot be said

that fresh proceedings by complying with the rules of natural justice could not be started against the respondent. The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term "without prejudice" has been defined in Black's Law Dictionary as follows :

Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also, Dismissal Without Prejudice.

Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows :

The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offer, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties - not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'.

7. In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred. It is true that the Appellate Collector does not say in so many words that the case is remanded to the Assistant Collector but the tenor and the spirit of the order clearly shows that what he intended was that fresh proceedings should be started against the respondent after complying with the rules of natural justice. Thus, in our view a true interpretation of the order of the Appellate Collector would be that the order of the Assistant Collector was a nullity having violated the rules of natural justice and having been vacated the parties would be relegated to the position which they occupied before the order of the Assistant Collector was passed. In this view of the matter the Assistant Collector had ample jurisdiction in issuing the notice against the respondent in order to start fresh adjudicatory proceedings in accordance with law.

8. The High Court however strongly relied on two decisions, namely the decision of the Madras High Court in the case of The Collector of Central Excise, Madras v. V. K. Palappa Nadar (AIR 1964 Mad 111) and of the Gujarat High Court in the case of The Marsden Spg. & Co. Ltd. v. L. V. Pol, Superintendent of Central Excise (Tax) (ILR 1965 Guj 240 : 6 Guj LR 350).

9. In the Madras case the order impugned ran as follows (AIR p. 111, para 3) :

Having regard to all the circumstances of the case, the Central Board of Revenue hereby directs, without prejudice to the merits of the case, the order dated 3rd March, 1956 passed by the Collector of Central Excise, Madras shall be vacated.

The High Court while interpreting the order observed as follows (AIR p. 112, para 6) :

After careful consideration of the arguments of the learned Advocate General for the appellant and also of the respondent, we are of the opinion that, in the absence of any specific words in the order of the Central Board of Revenue, it is not possible to spell out from its terms a precise direction for a de novo enquiry, giving jurisdiction to the Collector, for that purpose.

In our opinion, the interpretation put by the Madras High Court does not appear to be correct and is too narrow and does not carry out the object of the Act. The Central Board of Revenue had merely vacated the order without prejudice to the merits of the case which clearly meant that the merits were not decided by it. Secondly, the order impugned in the Madras case does not indicate the ground on which the order was vacated whereas in the instant case the Appellate Collector has expressly stated that the order was vacated because it violated the rules of natural justice. The reason given by the Appellate Collector in the instant case makes all the difference. In these circumstances, therefore, the Madras case being clearly distinguishable as indicated above, we are of the opinion that the view taken by the Madras High Court is of no assistance to the respondent.

10. The case of The Marsden Spg. & Co. Ltd. (supra) is also clearly distinguishable. In that case the impugned order was extracted thus;

Having regard to all the facts of the case and taking into account the contentions put forth by the appellants, I hereby order that the decision of the Superintendent, Central Excise (Tax), Ahmedabad, shall be set aside.

2. The amounts of excise duty and penalty recovered from the appellants in pursuance thereof shall be refunded to them.

Construing this order the High Court observed as follows :

If the appellate order merely annulled the original order without containing any other directions, there was no power in the original tribunal to initiate de novo proceedings and impose a fresh penalty.

It appears that the Gujarat High Court practically adopted the reasonings of the Madras High Court in the case mentioned above, but order impugned in the Gujarat case was clear and explicit and was final and irrevocable. The order clearly shows that it was passed on the merits of the case after taking into account the contentions put forth by the appellant. Secondly, the consequential order, viz., that the amount of excise duty and penalty recovered from the appellants was to be refunded to them which clearly indicated that there was no question of any fresh proceedings being initiated. On the other hand, in the instant case such a consequential order is wholly wanting in the judgment of the Appellate Collector. For these reasons, therefore, the Gujarat case is clearly distinguishable because the order in that case was couched in terms very different from the one we have in the instant case. Thus, on a careful consideration of the facts and circumstances of the present case we are clearly of the opinion that where an order passed in appeal vacates the order of the first tribunal on purely technical grounds and expressly states that it was being passed without prejudice which means an order not on the merits of the case, such an order does not debar fresh adjudicatory proceedings which may be justified under the law. It is necessary for the court interpreting an order of this kind to give full and complete effect to the exact words used by the authorities and not to draw a sweeping conclusion merely from the fact that no explicit direction has been made by the appellate authority. We are unable to agree in this case with the High Court that as no express words

were used in the order of the Appellate Collector remanding the case, the Assistant Collector was not justified in commencing fresh adjudicatory proceedings against the respondent.

11. For these reasons, therefore, we allow the appeal, set aside the order of the High Court and dismiss the writ petition filed by the respondent in the High Court and restore the fresh adjudicatory proceedings started by the Assistant Collector by virtue of the notice dated 27-7-1972. In the peculiar circumstances of this case we make no order to costs.

</html