

**SUPREME COURT OF INDIA**

Kothari Filaments

Vs.

Commissioner of Customs (Port) Kolkata

C.A.No.7307 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

16.12.2008

**JUDGMENT**

**S.B. Sinha, J.**

1. Leave granted.

2. Appellant No.2 is a proprietary concern of the First Appellant which is importer of various items of goods including Lithopone. Appellant No.1 placed an order for import of 21.5 MT of Lithopone 28-30% (pigment), with Texpo International, Hong Kong. The said item is used in manufacture of paint. It is a freely importable item. When the goods arrived at the port, a bill of entry for 21.5 MT of Lithopone was filed. The requisite custom duty after assessment was paid. However, on physical verification, out of the imported items 400 bags of 25 kg. each contained in a yellow coloured substance suspected to be 'Tetracycline HCL BP 93', a chemical used for making medicines was found wherefor an import licence was required to be obtained.

3. A search and seizure was carried out and on examination, it was found that 189 poly bags out of 860 poly bags contained a white coloured chemical and the remaining 671 poly bags contained a yellow coloured chemical. The estimated value of the mis-declared item was estimated at Rs.1,02,97,166/-.

4. A notice under Section 124 of the Customs Act, 1962 (for short, 'the Act') was issued on appellants on 8.3.2000 asking them to show cause as to why the consignment said to be valued at Rs.63,32,018.60 CIF should not be confiscated under Section 111(d) and 111(m) of the Act, 1962 and as to why the importers and their agents should not be punished in terms of Section 112(a) and (b) thereof. Cause was further directed to be shown as to why the appellants attempted evasion of custom duty amounting to Rs.38,16,729.40 resulting from mis-declaration of the imported goods should not be directed to be paid and as to why the said amount shall not be recovered along with interest.

5. Appellants in their cause shown pursuant thereto contended that their foreign supplier had sent 10 MT of Tetracycline by mistake. The mistake was accepted by the exporter M/s Texpo International in a letter dated 25.10.2000. The correspondences between the parties were placed before the authority to show that no penal action, as was proposed, should be taken against them.

6. By reason of an order dated 29.12.2000, however, the goods were not only directed to be confiscated but also a penalty of Rs.5,00,000/- was imposed on the company. A personal penalty of Rs.1,00,000/- was imposed on Appellant No.2.

7. An appeal preferred thereagainst before the Customs, Excise and Gold Control Appellate Tribunal, Calcutta was dismissed by an order dated 19.4.2002. A writ petition was filed thereagainst which by reason of the impugned judgment has been dismissed.

8. Mr. J.K. Srivastava, learned counsel appearing on behalf of the appellant, submitted that before the impugned order was passed by the authorities of the Customs Department, admittedly an enquiry was conducted at various places. However, the documents collected during the said enquiry were not supplied to them although reliance was placed thereupon and, thus, the principles of natural justice have been violated.

9. Mr. P.V. Shetty, learned senior counsel appearing on behalf of the respondent, on the other hand, urged that in the peculiar facts and circumstances of this case, it was not necessary to comply with the principles of natural justice as the mistake on the part of the exporter was accepted.

10. Indisputably declaration was made in regard to the import of Lithopone. It is also not disputed that a part of the imported items contained Tetracycline HCL.

11. We may furthermore place on record that the consignment has since been sent back to the exporter. Despite the same, as noticed hereinbefore, redemption fine as also other penalties have been imposed. The show cause notice is a detailed one. It is stated therein that through departmental source, overseas enquiries had been carried out.

12. The information which was gathered during the said overseas enquiry through departmental source, however, was not final and conclusive. Be that as it may, concededly, no document pertaining thereto was supplied or was shown to the appellant. Commissioner of Customs, however, in its order dated 29.12.2000 made liberal use of the said information, stating:

"In the meantime, through departmental source the overseas enquiry was carried and it was partly ascertained that the exporting company Texpo International of 57 Wyndham St. 5th Floor, Hong Kong does exist which is registered with the business register Hong Kong. This is a partnership concern. However, the relationship between Indian Importers M/s. Kothari Filaments and the Belgium company Lok Hauk Food and Texpo International Hong Kong could not be verified. Regarding

verification of genuineness of documents produced by Texpo International Hong Kong and attested by Indian Chambers of Commerce revealed that the attestation of documents by them was made in normal course they neither verified the contents of the documents nor undertake any responsibility for the contents of the documents attested. Evidences to this effect cannot be disclosed at this juncture since the enquiry is yet to be completed."

Inter alia, relying on or on the basis of the result of the said purported enquiry, it was held:

"On overseas enquiry, as is evident from paras 27 and 28 of the show cause notice that there exists a firm in the name and style of M/s. Lok Hauw Fook in Belgium. But this firm is not engaged in the business of Tetracycline. It is only a restaurant. The proprietor of the firm also stated that some mischievous elements have made use of their letter heads to wrongly implicate them. This overseas enquiry at least establishes the fact that the goods were in fact not meant for the Belgium importer. Moreover, the matter of stacking of Tetracycline along with Lithopone also would lead anybody to conclude that Tetracycline was mixed up with Lithopone in such an intermingled fashion that it would be evident to conclude that Tetracycline is meant for concealment."

13. The question which arises for consideration is as to whether the impugned order was passed in violation of the principles of natural justice. Before, however, we advert to the said question, we may notice the stand taken by the respondents herein in their counter affidavit before this Court, which is in the following terms:

"In the paragraphs 27 and 28 of the Show Cause Notice, sufficient indications have been given as regards the outcome of the overseas enquiry. Although the documents were not given to them, the initial burden was upon the appellants to show their bona fide mistake. Unless sufficient materials are placed by the appellants showing that it was a mistake on the part of the foreign exporter to send wrong items and the conclusion of the overseas enquiry was wrong, the Customs authority has no liability to disclose their materials. The position would have been different if the initial onus was upon the customs authority to prove mala fide intention of the appellants and in such case, it could be legitimately argued by the appellants that in absence of disclosure of documents they were unable to controvert the veracity of such documents."

14. Does the show cause notice make enough indication in regard to the nature of enquiry as also the conclusions thereof is the question?

"In our opinion, it does not. Paragraph 27 of the show cause notice clearly demonstrates that the contents of the document were not verified. It had categorically been stated that as the enquiry was yet to be completed, disclosure of the evidences was not permissible. Despite the fact that the result of such overseas enquiry was not

conclusive, as noticed hereinbefore, liberal use thereof was made by the Commissioner of Customs in his order. The Commissioner of Customs was conscious of the fact that the result of the enquiry was not conclusive one way or the other. It is one thing to say that denial to supply the documents collected in the said enquiry has a statutory backing but it is another thing to say that use thereof was to be made without supplying the copies thereof.”

15. The statutory authorities under the Act exercise quasi-judicial function. By reason of the impugned order, the properties could be confiscated, redemption fine and personal fine could be imposed and in the event an importer was found guilty of violation of the provisions of the Act. In the event, a finding as regards violation of the provisions of the Act is arrived at, several steps resulting in civil or evil consequences may be taken. The principles of natural justice, therefore, were required to be complied with.

16. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply.

17. This aspect of the matter has been considered in *Rajesh Kumar & Ors. v. Dy. CIT & Ors.*<sup>1</sup> wherein this Court held :

"In any event, when civil consequences ensue, there is hardly any distinction between an administrative order and a quasi judicial order. There might have been difference of opinions at one point of time, but it is now well-settled that a thin demarcated line between an administrative order and quasi-judicial order now stands obliterated {See *A.K. Kraipak and Ors. v. Union of India and Ors.*<sup>2</sup> and *Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore and Anr.*<sup>3</sup> and *S.L. Kapoor v. Jagmohan and Ors.*<sup>4</sup>}.

Recently, in *V.C. Banaras Hindu University v. Shrikant*<sup>5</sup>, this Court stated the law, thus:

‘An order passed by a statutory authority, particularly when by reason whereof a citizen of India would be visited with civil or evil consequences must meet the test of reasonableness’.

It was observed :

"Justice, as is well known, is not only be done but manifestly seem to be done. If the assessee is put to notice, he could show that the nature of accounts is not such which would require appointment of special auditors. He could further show that what the assessing officer considers to be complex is in fact not so. It was also open to him to show that the same would not be in the interest of the Revenue.

In this case itself the appellants were not made known as to what led the Deputy Commissioner to form an opinion that all relevant factors including the ones mentioned in Section 142(2A) of the Act are satisfied. If even one of them was not satisfied, no order could be passed. If the attention of the Commissioner could be drawn to the fact that the underlined purpose for appointment of the special auditor is not bona fide it might not have approved the same. "

In *S.L. Kapoor v. Jagmohan & Ors.*<sup>6</sup>, this Court observed:

"18. In *Ridge v. Baldwin and Ors.*<sup>7</sup> @ 68, one of the arguments was that even if the appellant had been heard by the watch committee nothing that he could have said could have made any difference. The House of Lords observed (at p. 68) :

"It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the respondents would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the watch committee the case is not so clear. Certainly on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course." {See also *M/s. Kishinchand Chellaram v. The Commissioner of Income-tax, Bombay City II, Bombay*<sup>8</sup>}

18. In view of the aforementioned settled legal principles, there cannot be any doubt whatsoever that the principles of natural justice have been violated in this case.

19. For the views we have taken, the impugned judgment cannot be sustained. It is set aside accordingly. The matter is remitted to the Commissioner of Customs for consideration of the matter afresh. The Commissioner, in the event, intends to rely on the said documents, may supply the relevant copies thereof or at least allow the appellant to inspect the same.

20. Appeal is allowed with the aforementioned directions with costs. Counsel's fee assessed to Rs.25,000/-.

<sup>1</sup>(2007) 2 SCC 181    <sup>2</sup>(1969) SCC 262    <sup>3</sup>AIR 1970 SC 2042    <sup>4</sup>(1980 4 SCC 379  
<sup>5</sup>2006 (6) SCALE 66    <sup>6</sup>(1980 (4) SCC 379    <sup>7</sup>1964] AC 40    <sup>8</sup>AIR 1980 SC 2117