M/S Dharampal Satyapal Ltd vs Dy.Commr.Of Cen.Exc.& Ors on 14 May, 2015

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Bench: Rohinton Fali Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4458-4459 OF 2015
(ARISING OUT OF SLP (C) NOS. 37108-37109 OF 2012)

M/S. DHARAMPAL SATYAPAL LTD.	.....APPELLANT(S)	
VERSUS		
DEPUTY COMMISSIONER OF CENTRAL EXCISE, GAUHATI & ORS.	.....RESPONDENT(S)	

J U D G M E N T

A.K. SIKRI, J.

Leave granted.

Union of India, vide Memorandum dated December 24, 1997, unveiled a new industrial policy for the North-Eastern region. In the said policy, in order to give stimulation to the development of industrial infrastructure in the North-Eastern region, the said region was made tax free zone for a period of ten years giving incentives to those who wanted to establish industries in that region. Pursuant thereto, the Notification dated July 08, 1999 was issued granting new industrial units that had commercial production on or after December 24, 1997 and certain types of industrial units that increased their installed capacity after that date, exemption on goods cleared from units located in growth centres and integrated infrastructure centres.

The aforesaid Notification was issued under the provision of Central Excise Act, 1944 as well as Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. However, on December 31, 1999, another Notification was issued whereby exemption of central excise was withdrawn in respect of goods falling under Chapter 21.06 (pan masala) and Chapter 24 (tobacco and tobacco substitutes, including cigarettes, chewing tobacco etc.).

This withdrawal Notification was challenged by the appellant by filing the writ petition in the High Court of Gauhati. The learned Single Judge dismissed the writ petition. However, appeal preferred by the appellant was allowed by the Division Bench vide judgment dated December 03, 2012. In nutshell, the High Court held that the principal of Promissory Estoppel shall apply and once a promise was given by the Union of India assuring that no such duty would be charged for a period of ten years, it was not open for the Union of India to withdraw the same. Challenging that judgment, Union of India filed petitions for special leave. Leave was granted and the petitions were registered as Civil Appeal Nos. 8841-8844 of 2003.

After the filing of the aforesaid appeals, certain subsequent events took place. It so happened that vide Section 154 of the Finance Act, 2003 (hereinafter referred to as the 'Act of 2003'), withdrawal of the benefit was effected from retrospective effect. Effect thereof was to withdraw the benefit given under the Notification issued earlier. Validity of Section 154 was questioned and the issue was considered by this Court in R.C. Tobacco Private Ltd. & Anr. v. Union of India & Anr.[1] This Court upheld the constitutional validity of the aforesaid provision and repelled the challenge so laid. The effect was to disentitle the appellant and other similarly situated from getting any such benefit by virtue of Section 154 of the Act of 2003 and knocking down the basis of the judgment of the High Court, which lost its validity on the aforesaid ground.

So far so good. The grievance of the appellant and other similarly situated industries for not extending the benefit of Notification dated July 08, 1999 is buried down. However, after notifying Section 154 of the Act of 2003, which had nullified the effect of Notification No. 32 of 1999 retrospectively thereby annulling the effect thereof altogether, respondent No.1 herein passed recovery order dated June 03, 2003 for recovery of a sum of ?2,93,43,244 (rupees two crores ninety three lakhs forty three thousand two hundred and forty four only) from the appellant, which was the benefit that had been drawn by the appellant for the period November 1999 till February 2001 in terms of the Notification No. 32 of 1999. By another order dated June 06, 2003 issued by respondent No.1, the appellant was directed to pay the excise duty for the said period for which the benefit had been availed. He also rejected the pending claim of refund for the period from March 2001 till May 31, 2003. These recovery orders were challenged by the appellant by filing appeal before the Commissioner (Appeals). Along with the appeal, the appellant also filed an application for interim order seeking stay against the pre-deposit. On this application, orders dated March 31, 2004 were passed by the Commissioner (Appeals) directing the appellant to deposit entire duty amount within a period of thirty days. This order of pre-deposit was challenged by the appellant by filing four writ petitions in the High Court of Gauhati. The learned Single Judge of the High Court, however, dismissed these writ petitions vide orders dated May 18, 2004. The appellant carried this issue of pre-deposit to a higher forum in the form of writ appeals before the Division Bench of the said Court. Interim orders dated June 11, 2004 were passed in the writ appeals directing the Commissioner (Appeals) not to dismiss the appeals preferred by the appellant before him for non-deposit of the duty amount. In other words, interim stay against the pre-deposit was given. The Commissioner (Appeals) heard the appeals and passed the orders dated June 15, 2005 deciding the appeals in favour of the appellant. He held that issuance of show-cause notice was mandatory before a valid recovery of demand could be made from the appellant and, thus, remitted the matter to the adjudicating authority. After this final order was passed by the Commissioner (Appeals), writ

appeals of the appellant before the Division Bench were disposed of as infructuous in view of the fact that the Commissioner (Appeals) had passed an order on merits and, therefore, no cause survived which required further adjudication in those appeals.

Insofar as the order of the Commissioner (Appeals) is concerned, both the appellant as well as the Revenue felt aggrieved thereby. The appellant was not satisfied with the order of remand and the nature of relief granted even after accepting that issuance of show-cause notice was mandatory before passing a valid recovery of demand. The respondents were aggrieved of the order passed on merit holding that show-cause notice was mandatory. Therefore, both the appellant as well as the Revenue filed appeals aggrieved against the order dated June 15, 2005 passed by the Commissioner (Appeals). The Customs Excise & Service Tax Appellate Tribunal (for short 'CESTAT') decided these appeals vide common order dated My 28, 2007. It reversed the orders of the Commissioner (Appeals), which resulted in allowing the appeal filed by the Revenue and dismissing the appeal preferred by the appellant. A perusal of the judgment of the CESTAT would reveal that it has primarily referred to the judgment of this Court in R.C. Tobacco and held that the matter stood concluded by the said judgment. The appellant challenged the order of CESTAT by filing Central Excise Tax Reference No. 1 of 2008 before the High Court of Gauhati. This Reference was dismissed by the High Court on December 01, 2011 on the ground of res judicata holding that orders dated May 18, 2004 passed by the Single Judge dismissing the writ petitions of the appellant had attained finality. The appellant preferred Review Petition seeking review of the said order, which has also been dismissed by the High Court on June 05, 2012. In the present appeals, the appellant has challenged both the orders dated December 01, 2011 passed in the Tax Reference as well as the order dated June 05, 2012 passed in the Review Petition.

From the brief narration of the background facts mentioned above, it is apparent that the frontal attack of the appellant against the recovery orders passed by the respondents is premised on the plea that no such recovery proceedings could be initiated without a show-cause notice under Section 11-A of the Excise Act. The appellant has also taken a plea in these appeals that order of the Single Judge at pre-deposit stage could not operate as res judicata on merits and, therefore, dismissal of the Tax Reference by the High Court, and consequently the Review Petition, is clearly erroneous and the High Court should have gone into the merits of the issue decided by CESTAT.

As noted above, CESTAT has decided the case against the appellant on the ground that issue now raised is covered by the judgment of this Court in R.C. Tobacco (supra). As pointed out, in R.C. Tobacco (supra), this Court has already upheld the validity of Section 154 of the Act of 2003 thereby taking away the benefit of Notification No. 32 of 1999 retrospectively insofar as excisable goods falling under Chapter 24 are concerned. Conscious of the position that judgment in R.C. Tobacco (supra) stares at the face of the appellant, Mr. Soli Sorabjee, learned senior counsel who appeared for the appellant, has also made an endeavour to show that the said judgment in R.C. Tobacco (supra) is in clear conflict with earlier three Judge Bench judgment of this Court in M/s. J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India[2]. Thus, following three issues have arisen for consideration in these appeals:

(a) Whether order of the Single Judge at pre-deposit stage can operate as res judicata on merits?

(b) Whether recovery proceedings can be initiated without show-cause notice under Section 11A of the Excise Act, which is mandatory?

(c) Whether there is a conflict between the three Judge Bench judgment in J.K. Cotton (supra) and R.C. Tobacco (supra)?

First issue is the basis for the judgment of the High Court.

For answering this issue, it would be necessary to take into account the complete implication thereof with reference to the nature of recovery orders passed by respondent No.1, challenge thereto before the Commissioner (Appeals) and interim order of pre-deposit passed by the Commissioner (Appeals) on March 31, 2004 as also the nature of challenge which was laid by the appellant against the said order of pre-deposit in the writ petitions filed in the High Court, which were dismissed by the learned Single Judge on May 18, 2004.

By virtue of Notification dated July 08, 1999, the appellant was granted refund of the duty deposited in cash up to February 2001. After the enactment of Section 154 of the Act of 2003, recovery order dated June 03, 2003 was passed for recovery of the aforesaid amount which had been refunded to the appellant. Simultaneously, another order dated June 06, 2003 was issued asking the appellant to pay duty on the ground that such goods were no more exempted from payment of duty. In the appeals which were filed by the appellants before the Commissioner (Appeals) challenging the aforesaid orders, the Commissioner passed interim orders dated March 31, 2004 directing the appellants to pay the amount demanded by the aforesaid orders. This order dated March 31, 2004 of the Commissioner (Appeals) reflects that the Commissioner went into various issues raised by the appellant on the basis of which it was pleaded by the appellant that it had a good case on merits and, therefore, condition of pre-deposit be waived. Apart from the contention that no show-cause notice was given before passing those orders, it was even argued that by making the retrospective amendment in the form of Section 154 of the Act of 2003, the only effect was to validate the earlier actions but no demand of refund of any amount could be made and no refund of the amount already paid could be claimed. It was also argued that the matter of recovery of amounts was pending consideration of Central Board of Excise and Customs (CBEC) as well as in the Gauhati High Court. All these issues were considered by the Commissioner (Appeals), who gave his prima facie view thereupon observing that the appellants did not have strong prima facie case on merits resulting into the direction to deposit the entire amount within thirty days.

The appellant had filed writ petitions against the aforesaid order of the Commissioner (Appeals) with the prayer that the direction of the Commissioner (Appeals) to deposit the entire amount within thirty days be set aside and the prayer of pre-deposit of the appellant be accepted. No doubt, while arguing for this relief, the appellant had raised various contentions on the merits of the case in its endeavour to demonstrate that it had a good case on merits. It is also borne from the record that the learned Single Judge, while dismissing the writ petition, dealt with these issues, which touched

upon the merits of the main issue. That is the reason that the order dated May 18, 2004 of the learned Single Judge dismissing the writ petition of the appellant runs into 37 pages. Nevertheless, we find that the observations which were made by the learned Single Judge on the issues raised were only prima facie in nature and the prime focus of the judgment rested on the core issue, namely, whether the direction of the Commissioner (Appeals) directing the appellant to make deposit of the amount as a pre-condition for hearing of the appeal was sustainable or not. The writ petition was dismissed affirming the said order. Therefore, any observations made by the learned Single Judge, which were tentative in nature, could not be taken into consideration by the Division Bench in the impugned judgment, thereby dismissing the Reference, invoking the principle of res judicata. The order of the learned Single Judge dismissing the writ petition was challenged before the Division Bench and the Division Bench passed interim orders in the writ appeals not to dismiss the appeals preferred by the appellant for non-deposit of the duty. In this backdrop, appeals were heard and appellant even partly succeeded. After the order of the Commissioner (Appeals) dated June 15, 2005 deciding the appeals partly in favour of the appellant, the writ appeals which were pending before the Division Bench had become infructuous and disposed of as such without going into the merit of the order passed by the learned Single Judge. This is yet another reason to hold that the order of the learned Single Judge could not be treated as res judicata.

Having regard to the aforesaid position, we heard the instant appeal on merits, namely, on the issue as to whether it was mandatory to issue show- cause notice making an order of recovery. The Commissioner (Appeals) has held it to be mandatory and this order of the Commissioner (Appeals) has been set aside by the CESTAT. The Reference petition against the order of CESTAT, though wrongly is dismissed on the ground of res judicata, the impugned order shows that it has mentioned that such show-cause notice was not mandatory as held by the learned Single Judge by order dated May 18, 2004.

Learned senior counsel appearing for the appellant as well as learned Attorney General agreed that in this situation this Court may decide the aforesaid issue finally. It is for this reason that we have heard counsel for the parties at length on this aspect of the matter.

The neat submission made by Mr. Soli Sorabjee on behalf of the appellant was that the impugned demand of the Assistant Commissioner was in the nature of adjudication whereby the amount demanded in the order dated June 06, 2003 was crystallized and, therefore, there could not have been demand for recovery of the stipulated amount without issuing notice to the appellant and giving the appellant herein right of hearing. He also submitted that merely because vires of Section 154 of the Act of 2003 were upheld by this Court in R.C. Tobacco (supra) could not be a ground to dispense with the aforesaid mandatory requirements of principles of natural justice. His further submission was that 'no prejudice' principle adopted by the CESTAT amounted to erroneous approach. He sought to draw a fine distinction in this behalf by contending that the Authority passing the order could not presume that prejudice would not be caused to a person against whom the action is contemplated and on that presumption dispense with the mandatory requirement of issuance of the notice. According to him, such a doctrine could be applied only by the courts while dealing with such issues where it is found that the action of the Authority was violative of principles of natural justice, the Court could still choose not to remit the case back to the concerned Authority

if it finds that it will be a futile exercise.

As a pure principle of law, we find substance and force in the aforesaid submission of Mr. Sorabjee. No doubt, the Department was seeking to recover the amount paid by virtue of Section 154 of the Act of 2003 which was enacted retrospectively and the constitutional validity of the said Section had already been upheld by this Court in R.C. Tobacco (supra) at the time of issuance of notice for recovery. Further, no doubt, the effect of the said amendment retrospectively was to take away the benefit which was granted earlier. However, the question is whether before passing such an order of recovery, whether it was necessary to comply with the requirement of show-cause notice? The appellant wanted to contend that Section 11A of the Excise Act was applicable, which requires this procedure to be followed. Even if that provision is not applicable, it is fundamental that before taking any adverse action against a person, requirement of principles of natural justice is to be fulfilled. This Court in Collector of Central Excise, Patna & Ors. v. I.T.C. Limited & Anr.[3] has held that show-cause and personal hearing is necessary before saddling an assessee with additional demand. It is also trite that when a statute is silent, with no positive words in the Act or Rules spelling out need to hear the party whose rights or interests are likely to be affected, requirement to follow fair procedure before taking a decision must be read into statute, unless the statute provides otherwise.

What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable and inextricable part of the doctrine of principles of natural justice?

Natural justice is an expression of English Common Law. Natural justice is not a single theory – it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'. Moral naturalism captures the essence of commonsense morality – that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi- judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of

a 'reasoned order'.

Though the aforesaid principles of natural justice are known to have their origin in Common Law, even in India the principle is prevalent from ancient times, which was even invoked in Kautilya's 'Arthashastra'. This Court in the case of Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.[4] explained the Indian origin of these principles in the following words:

> "Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam – and of Kautilya's Arthashastra – the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system".
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> Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it 'jura naturalia', i.e. natural law.
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> The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.
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> This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as 'hearing the other side'. Prof. D.J. Galligan[5] attempts to provide what he calls 'a general theory of fair treatment' by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasizing that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not

working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham[6], who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

"On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved." Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject matter of fair treatment. However, that aspect need not be dilated.

Allan[7], on the other hand, justifies the procedural fairness by following the aforesaid principles of natural justice as rooted in rule of law leading to good governance. He supports Galligan in this respect and goes to the extent by saying that it is same as ensuring dignity of individuals, in respect of whom or against whom the decision is taken, in the following words:

"The instrumental value of procedures should not be underestimated; the accurate application of authoritative standards is, as Galligan clearly explains, an important aspect of treating someone with respect. But procedures also have intrinsic value in acknowledging a person's right to understand his treatment, and thereby to determine his response as a conscientious citizen, willing to make reasonable sacrifices for the public good. If obedience to law ideally entails a recognition of its morally obligatory character, there must be suitable opportunities to test its moral credentials. Procedures may also be though to have intrinsic value in so far as they constitute a fair balance between the demands of accuracy and other social needs: where the moral harm entailed by erroneous decisions is reasonably assessed and fairly distributed, procedures express society's commitment to equal concern and respect for all." It, thus, cannot be denied that principles of natural justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that

procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms.

It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural jsutice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

De Smith[8] captures the essence thus - “Where a statute authorises interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on plainest principles of natural justice”.

Wade[9] also emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power. In Cooper v. Sandworth Board of Works[10] the Court laid down that: '...although there is no positive word in the statute requiring that the party shall be heard, yet justice of common law would supply the omission of Legislature”. Exhaustive commentary explaining the varied contours of this principle can be traced to the judgment of this Court in Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.[11], wherein the Court discussed plenty of previous case law in restating the aforesaid principle, a glimpse whereof can be found in the following passages:

“20. The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: In A. K. Kraipak v. Union of India, (1969) 2 SCC 262 : (1970) 1 SCR 457, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi- judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on

the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.

21. In Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256, the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

22. In Institute of Chartered Accountants of India v. L. K. Ratna, (1986) 4 SCC 537, Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 (Bhopal Gas Leak Disaster Case) and C. B. Gautam v. Union of India, (1993) 1 SCC 78, the doctrine that the principles of natural justice must be applied in the unoccupied interstices of the statute unless there is a clear mandate to the contrary, is reiterated." In his separate opinion, concurring on this fundamental issue, Justice K. Ramaswamy echoed the aforesaid sentiments in the following words:

"61. It is now settled law that the proceedings must be just, fair and reasonable and negation thereof offends Articles 14 and 21. It is well settled law that principles of natural justice are integral part of Article

14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision.

The enquiry report constitutes fresh material which has great persuasive force or effect on the mind of the disciplinary authority. The supply of the report along with the final order is like a post mortem certificate with putrefying odour. The failure to supply copy thereof to the delinquent would be unfair procedure offending not only Arts. 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice." Likewise, in C.B. Gautam v. Union of India & Ors.[12], this Court once again held that principle of natural justice was applicable even though it was not statutorily required. The Court took the view that even in the absence of statutory provision to this effect, the

authority was liable to give notice to the affected parties while purchasing their properties under Section 269-UD of the Income Tax Act, 1961. It was further observed that the very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell leads to the conclusion that before such an imputation can be made against the parties concerned they must be given an opportunity to show-cause that the under valuation in the agreement for sale was not with a view to evade tax. It is, therefore, all the more necessary that an opportunity of hearing is provided.

From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the Court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in A.K. Kraipak's case (supra) that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In the case of Maneka Gandhi v. Union of India & Anr.[13] also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In Maharashtra State Financial Corporation v. M/s. Suvarna Board Mills & Anr.[14], this aspect was explained in the following manner:

> "3. It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straight-jacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law: All will depend on facts and circumstances of the case." In the case of East India Commercial Company Ltd., Calcutta & Anr. v. The Collector of Customs, Calcutta[15], this Court held that whether the statute provides for notice or not, it is incumbent upon the quasi-judicial authority to issue a notice to the concerned persons disclosing the circumstances under which proceedings are sought to be initiated against them, failing which the conclusion would be that principle of natural justice are violated. To the same effect are the following judgments:
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> a) U.O.I. & Ors. v. Madhumilan Syntex Pvt. Ltd. & Anr.[16]
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> b) Morarji Goculdas B&W Co. Ltd. & Anr. v. U.O.I. & Ors.[17]
>
> c) Metal Forgings & Anr. v. U.O.I. & Ors.[18]

d) U.O.I. & Ors. v. Tata Yodogawa Ltd. & Anr.[19] Therefore, we are inclined to hold that there was a requirement of issuance of show-cause notice by the Deputy Commissioner before passing the order of recovery, irrespective of the fact whether Section 11A of the Act is attracted in the instant case or not.

But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason – perhaps because the evidence against the individual is thought to be utterly compelling – it is felt that a fair hearing 'would make no difference' – meaning that a hearing would not change the ultimate conclusion reached by the decision-maker – then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corporation[20], who said that a 'breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court dos not act in vain'. Relying on these comments, Brandon LJ opined in Cinnamond v. British Airports Authority[21] that 'no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'. In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the Courts. Even if it is found by the Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that order passed is always null

and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is always the same, viz., the test of prejudice or the test of fair hearing.

In Managing Director, ECIL (supra), the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various questions posed, had to say as under qua the prejudice principle:

> "30. Hence the incidental questions raised above may be answered as follows:
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> xx xx xx
>
> (v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-

furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice." So far so good. However, an important question posed by Mr. Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in the case of General Medical Council v. Spackman[22]. This Court also spoke in the same language in the case of The Board of High School and Intermediate Education, U.P. & Ors. v. Kumari Chittra Srivastava & Ors.[23], as is apparent from the following words:

"8. The learned counsel for the appellant, Mr. C.B. Aggarwal, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed." In view of the aforesaid enunciation of law, Mr. Sorabjee may also be right in his submission that it was not open for the authority to dispense with the requirement of principles of natural justice on the presumption that no prejudice is going to be caused to the appellant since judgment in R.C. Tobacco (supra) had closed all the windows for the appellant.

At the same time, it cannot be denied that as far as Courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in the case of Managing Director, ECIL (supra) itself in the following words:

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/ Tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/ Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as it regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment." Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in R.C. Tobacco (supra).

To recapitulate the events, the appellant was accorded certain benefits under Notification dated July 08, 1999. This Notification stands nullified by Section 154 of the Act of 2003, which has been given retrospective effect. The legal consequence of the aforesaid statutory provision is that the amount with which the appellant was benefitted under the aforesaid Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in R.C. Tobacco (supra). Likewise, even the officer who passed the order has no choice but to follow the dicta in R.C. Tobacco (supra). It is important to note that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by 'useless formality theory'.

In Escorts Farms Ltd. (Previously known as M/s. Escorts Farms (Ramgarh) Ltd.) v. Commissioner, Kumaon Division, Nainital, U.P. & Ors.[24], this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms:

"64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India." Therefore, on the facts of this case, we are of the opinion that non- issuance of notice before sending communication dated June 23, 2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality.

With this we advert to the last submission of Mr. Sorabjee that the judgment in R.C. Tobacco (supra) (which is a two Judge Bench decision) is in conflict with the three Judge Bench judgment in J.K. Cotton (supra). This argument is not even open to the appellant for the simple reason that the judgment in J.K. Cotton (supra) was specifically taken note of and discussed in R.C. Tobacco (supra). Paragraph 13 of the judgment in R.C. Tobacco (supra) would reflect that the appellant therein had specifically relied upon the judgment in J.K. Cotton (supra) in support of the

submission that retrospectivity was harsh and excessive since there is, in fact, a retrospective imposition of excise duty. It was also argued that justification of such retrospective imposition of tax must be overwhelming and no such overriding consideration had been disclosed. The submission went to the extent of pleading that if the appellant is called upon to pay the excise duty now it will cripple its unit. More pertinent was another submission, which is relevant for our purpose, that the demand which was raised could not be sustained as it was made without issuing any show-cause notice and was in contravention of Section 11A of the Act. In support of this view, few judgments, including J.K. Cotton (supra), were relied upon. The Court, however, did not find any merit in the aforesaid submissions and dealt with the issue as under, duly taking note of the judgment in J.K. Cotton (supra):

"40. In J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India, (1987) Supp. SCC 350, relied upon by the petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been 'removed' within the meaning of Rule 9(1) thereby making such intermediate products dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11-A. The decision is distinguishable. The circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was unquestionably different from those present in the case before us. What we have to consider here is whether the benefit granted in 1999 could be withdrawn in 2003. Besides, the Court in J.K. Cotton Spg. & Wvg. Mills Ltd. case rejected the contention of the Union of India that Section 51 of the 1982 Finance Act by which the amendments were made to Rules 9 and 49 overrode the provisions of Section 11-A saying: (SCC p. 363, para 32) "if the intention of the legislature was to nullify the effect of Section 11-A,.. the legislature would have specifically provided for the same." Similarly our decision in National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India, (2003) 5 SCC 23 which dealt with an amendment to Section 80-P(2)(a)(iii) of the Income Tax Act, 1961 noted that: (SCC p.35, para 29) "The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provisions authorizes the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred".

In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11-A would not apply." 40A) In the aforesaid scenario, when the Court was conscious of the principle laid down in J.K. Cotton (supra) and explained the same in a particular manner while deciding the appeal in R.C. Tobacco (supra), it cannot be argued that the judgment in R.C. Tobacco (supra) runs contrary to J.K. Cotton (supra).

For all these reasons, the appeals are dismissed.

.....J. (A.K. SIKRI) .....J. (ROHINTON FALI NARIMAN) NEW DELHI;

MAY 14, 2015.

(2005) 7 SCC 725 [2] (1987) Supp SCC 350 [3] (1995) 2 SCC 38 [4] (1978) 1 SCC 405 : AIR 1978 SC 851 [5] On 'Procedural Fairness' in Birks (ed), the Frontiers of Liability (Volume One) (Oxford 1994) [6] A Treatise of Judicial Evidence (London 1825) [7] 'Procedural Fairness and the Duty of Respect', (198) 18 OJLS 497 [8] Judial Review of Administrative Action (1980), at page 161 [9] Administrative Law (1977), at page 395 [10] (1863) 14 GB (NS) [11] (1993) 4 SCC 727 [12] (1993) 1 SCC 78 [13] (1978) 1 SCC 248 [14] (1994) 5 SCC 566 [15] AIR 1962 SC 1893 [16] (1988) 3 SCC 348 [17] (1995) Supp 3 SCC 588 [18] (2003) 2 SCC 36 [19] 1988 (38) ELT 739 (SC) :: 1988 (19) ECR 569 (SC) [20] (1971) 1 WLR 1578 at 1595 [21] (1980) 1 WLR 582 at 593 [22] 1943 AC 627 [23] (1970) 1SCC 121 : AIR 1970 SC 1039 [24] (2004) 4 SCC 281