Faceless ITAT - Whether Denial of Oral Hearing is in Violation of Principles of Natural Justice

Dr. Ashok Saraf, *Senior Advocate*

Natural justice demands that the person who is directly affected by an administrative action should be given prior notice of what is proposed so as to enable him to make a representation on his behalf, to appear at a hearing or enquiry if it is to be held and to meet effectively the points raised. The requirement of audi alteram partem has two elements:

1. An opportunity to make a representation must be given.
2. Such an opportunity must be adequate.

Thus people likely to be affected by action or inaction of any authority should have opportunity to have their say. Lord Hewart of Bury once said, "essential to the proper administration of justice is that every party should have an opportunity of being heard, so that he may put forward his own views and support them by argument, and answer the views put forward by his opponents." In *Charan Lal Sahu v. Union of India, (1990 1 SCC 613*, the Apex Court observed that justice, it ought to be noted, is a psychological yearning in which men seek acceptance of their viewpoint before the forum or the authority enjoined or obliged to take a decision before affecting their right.

The importance of audi alteram partem in a judicial system was reiterated by the Apex Court in *P.N. Eswara Iyer v. Registrar, Supreme Court of India, (1980) 4 SCC 680*, by holding as under:

"We must make it perfectly plain, right at the outset, that audi alteram partem is a basic value of our judicial system. Hearing the party affected is too deeply embedded in the consciousness of our constitutional order."

In the context of fair hearing, it is of interest to note that the requirements of natural justice are met only if opportunity to represent is given in view of the proposed action and to make opportunity of representation effective, materials relied upon by an authority should be furnished to an aggrieved person. When an order is not "appealable" or "revisable" under any statute, it casts even a greater responsibility and obligation on the authorities exercising powers under the statute at least to give a hearing to the party likely to be adversely affected by the order. The denial of opportunity of hearing in such a case offends seriously against fair play of action.

Fair hearing has two justiciable elements. The first is that an opportunity of hearing must be given; and the second is that the opportunity must be reasonable. In *Mineral Development Ltd. v. The State of Bihar, AIR 1960 SC 468,* the Apex Court held that the concept of "reasonable opportunity", is an elastic one and is not susceptible of easy and precise definition. The Apex Court further held that what is reasonable opportunity under one set of circumstances need not be reasonable under different circumstances. A realistic view has to be taken while determining whether the opportunity given was reasonable or not.

When the word "hearing" or the words "opportunity to be heard" are used in legislation, it normally always denotes a hearing at which oral submissions and evidence may be tendered. In the absence of a clear statutory guidance on the matter, it is to be noted that the one who is entitled to the protection of the audi alteram partem rule is prima facie entitled to put his case orally, but in a number of contexts, the Courts have held natural justice to have been satisfied by an opportunity to make written representations to the deciding body.

Recently in the Finance Bill, 2021, it has been proposed to make the Income Tax Appellate Tribunal (ITAT) to be faceless by amending section 255 of the Income Tax Act, 1961. As per section 255 (5) of the Income Tax Act, 1961, it is the Appellate Tribunal that has the power to regulate its own procedure and the procedure of benches thereof in all the matters arising out of the exercise of its powers or discharge of its functions including places at where benches shall hold their sittings.

After the proposed amendment by the Finance Bill, 2021 to make the ITAT faceless, a debate is going on as to whether not giving an opportunity of personal hearing before the Tribunal is a violation of the principles of natural justice and contrary to the safeguards guaranteed by the Constitution of India in Article 14 to 21. In this context, it has become imperative to examine as to whether oral hearing is necessary in every case and as to whether denial of oral hearing shall result in the violation of the principles of natural justice.

Speaking with reference to the quasi judicial tribunal, the Apex Court in *MP Industries v. Union of India, AIR 1966 SC 671*, held as under:

> *"It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed Rule 55 of the Rules, quoted supra, recognizes the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal."*

Oral hearing is not necessary in every case. Whether an oral hearing would be necessary would depend upon the nature of the enquiry, nature of facts involved, circumstances of a case and the nature of deciding authority. There is no right to an oral hearing unless such a hearing is expressly prescribed or unless the context indicates that without such a hearing, the person cannot adequately present his case. The question of personal hearing is one of discretion and not of jurisdiction. Where matters are complicated and fresh materials are brought on record, personal hearing should be given. In *Assam v. Gauhati Municipal Board, Gauhati, AIR 1967 13928*, where under the Assam Municipalities Act, 1957, the State Government could supersede a municipal board if in its opinion it was not competent, it was held that it was enough that the government issued a notice and gave an opportunity to the board to explain and there was no necessity to give a personal hearing. In the Court's opinion, the Board had been given adequate opportunity of being heard and the absence of an oral hearing did not vitiate the Government's decision.

No doubt oral hearing does not always constitute the Doctrine of natural Justice, and cannot be claimed as a matter of right in all matters but the requirement of oral hearing must be insisted upon as a matter of public policy, namely, to prevent not only a perverse decision but also to secure a decision which is not vitiated by well meaning ignorance or carelessness due to absence of oral hearing. Personal hearing, as held by the Apex Court in *GN Rao v. Andhra Pradesh State Road Transport Corporation, AIR 1959 SC 308*, enables a party appearing at such hearing to persuade the authority concerned by reasoned arguments to accept his point of view by removing the authority's doubt and by answering the authority's question.

The Apex Court in *P.N. Eswara Iyer (Supra)* held that the normal rule of judicial process is oral hearing and its elimination an unusual exception. The Apex Court further held that justicing is an art even as advocacy is an art. It was held that no judicial "emergency" can jettison the vital breath of spoken advocacy in an open forum and there is no judicial cry for extinguishment of oral argument altogether. The Apex Court, in the said judgment, held as under:

> *"The possible impression that we are debunking the value of oral advocacy in open court must be erased. Experience has shown that, at all levels, the bar, through the spoken word and the written brief, has aided the process of judicial justice. Justicing is an art even as advocacy is an art. Happy interaction between the two makes for the functional fulfilment of the court system. No judicial "emergency" can jettison the*

vital breath of spoken advocacy in an open forum. Indeed, there is no judicial cry for extinguishment of oral argument altogether."

Justice Harlan of the United States Supreme Court has insisted that oral argument should play a leading part. It is not "a traditionally tolerated part of the appellate process" but a decisively effective instrument of appellate advocacy. He rightly stresses that there are many Judges "who are more receptive to the spoken than the written word". He hits the nail on the head when he states:

"For my part, there is no substitute, even within the time-limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.

The Apex Court in **P.N. Eswara Iyer** (Supra) endorsed the conclusion of Justice Harlan of the United States Supreme Court on oral arguments which was as under:

"Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American Bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a proforma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through."

In the aforesaid landmark judgment of the Apex Court in **P.N. Eswara Iyer (Supra)**, the Apex Court held that among the methods of persuasion, the power of the spoken word cannot be sacrificed without paying too high a price in the quality of justice especially in the Supreme Court litigation. Maybe, that the brief is valuable; indeed, a well prepared brief gives the detailed story of the case; the oral argument gives the high spots. The Apex Court referred to the observation of George Rossman in American Bar Association Journal, January 1959, Vol. 45, No. 1, P. 676, wherein it was held as under:

"The oral argument can portray the case as a human experience which engulfed the parties but which they could not solve. Thus, the oral argument can help to keep the law human and adapted to the needs of life. It typifes the Bar at its best."

The Apex Court in **P.N. Eswara Iyer** (Supra), held that the value of oral submission need not be under-rated nor written briefs over-rated. In the aforesaid case, the Apex Court was dealing with the denial of oral hearing while considering a review petition before the same Court and in that context, the Apex Court held that in the dynamics of hearing, orality does play a role at the first round, but at the second round in the same Court is partly expendable. The Court held that romance with oral hearing must terminate at some point and nor can it be made a sacred cow of the judicial process. While emphasising that oral advocacy is a decisive art in promoting justice, the Apex Court made a distinction between the first hearing and the review petition before the same Court. While the necessity of oral hearing at first hearing was emphasised by the Apex Court, the Apex Court held that in view of practical differences and ever increasing work load, in case of second opportunity by way of review petition before the same Court, oral hearing may be avoided.

The aforesaid decision of the Apex Court can therefore be understood that in first hearing before any Court, oral hearing is a must but in case of second hearing like a review petition before the same Court, oral hearing may be avoided.

"The opportunity to be heard", observed the U.S. Supreme Court, "must be tailored to the capacities and circumstances of those who are to be heard. Written submissions are an unrealistic option for most recipients who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipients to mould his arguments to the issues the decision makers appear to regard as important. Particularly, when credibility and veracity are at issue, as they must be, in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."

It is well known in modern times that increasingly greater powers have been conferred upon the statutory authorities in administrative or quasi judicial functioning. With such greater powers being conferred, decisions are being taken which largely affect citizens in every sphere of life. A decision on a

question without an oral hearing, whether such hearing is demanded or not, will be an unfair decision. The *Queen's Bench Division decision in R. v. Immigration Appeal Tribunal, (1977) 2 All ER 602*, quashed a deportation order on the ground that there was no oral hearing given to the affected person and observed that if the applicant had had an oral hearing before the Tribunal, on the hearing of his appeal, further matter could have been advanced on his behalf and thereby the applicant has been deprived of the said opportunity. Judicial justice, with the procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise.

The ITAT is a final fact finding authority. Being the final fact finding authority, it becomes more important and necessary that oral hearing is allowed to the parties. The first appeal before the Commissioner of Income Tax has already been made faceless and no oral hearing is allowed. In case the ITAT is made faceless and no oral hearing is allowed, the assessee shall have no opportunity to contradict any factual things by making oral submission before the Tribunal. In our own legal jurisprudence, both pleadings and oral submissions have got equal importance and one cannot take place of another. The entire legal system depends on the art of pleading and of advocacy. For taking a fair decision, it becomes all necessary to give an oral hearing to the party affected by the decision in question and as such a requirement of oral hearing is implicit in the concept of fairness in quasi judicial functioning and administration. Deciding of an appeal by the ITAT on the basis of written submission without offering an opportunity of oral hearing will certainly suffer from the vice of unfairness.

The cry 'That isn't fair' is to be found from the earliest days on any action not based on fairness. The common expectation of mankind would be that a decision should be reached and a power should be exercised fairly in accordance with the principles of natural justice. Whenever an authority acts contrary to this fundamental expectation, it acts unfairly and in derogation of common and universal expectation.

The desire for speedy disposal cannot be at the cost of fairness. Speedy disposal of cases does not mean that one should decide the cases in violation of principles of natural justice and fairness. After all, the motto is that justice is not only to be done but also must be seen to have been done. In case an aggrieved person is not given an opportunity to fully explain his case by denying him oral hearing, he shall always have a feeling that justice has not been done to him as he was not given adequate an fair opportunity to explain his case.

In view of the above, the decision to deny oral hearing at the income tax appellate stage needs to be reconsidered as otherwise the same shall not only be in violation of the principles of natural justice but the same shall also suffer from the vice of unfairness.

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