
(1990) 05 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 4614 of 1989

Ellenberric Steels Ltd.

APPELLANT

Vs

Regional Dev. Commr. for Iron and Steel

RESPONDENT

Date of Decision : 09-05-1990

Acts Referred:

Constitution of India, 1950 — Article 19(1), 299
Imports and Exports (Control) Act, 1947 — Section 3, 4A

Citation : (1992) 59 ELT 242

Hon'ble Judges : A.M. Bhattacharjee, J

Bench : Single Bench

Advocate : Bholanath Sen and Sudhir Mehta, for the Appellant; N. Debnath, for the Respondent

Judgement

A.M. Bhattacharjee, J.—The Imports and Exports (Control) Act, 1947 empowers the Central Government to prohibit, restrict or otherwise control, imports and exports. In exercise of the powers conferred by Sections 3 and 4A of that Act, the Imports (Control) Order, 1955 has been issued, Schedule I whereof contains the list of articles of which imports are controlled. The import of such items is prohibited except - (a) under and in accordance with a licence or customs clearance, or (b) when they are covered by the Savings Clause 11 of the Order, or (c) when they are covered by an Open General Licence, subject to such conditions as may be stipulated therein.

2. The Import and Export Policy for the period April, 1988 to March, 1991, declared by the authority concerned, is published by the Ministry of Commerce in two Volumes, Volume I containing the Imports and Exports Promotion Policy and Volume II contain the policy and procedure in respect of Items under Export licensing. As would appear from paragraph 1(2) of Chapter I of Volume I, the Government reserves the right to make amendments/changes in this Policy, which may become necessary in public interest from time to time during the above period of three years. But such Amendments etc. will have to be notified,

as usual, by means of public notices/amendment orders etc. issued by the Chief Controller of Imports and Exports from time to time and it is provided further that the provisions contained in these two Volumes "are subject to such amendments or changes as and when notified."

3. The facts, material for the purpose of the case, lie in a narrow compass and the question involved is also a short one. The petitioner company is a Small Scale Industry Unit provisionally registered with the Directorate of Cottage & Small Scale Industries of the Government of West Bengal. As would appear from paragraph 60, Chapter V of Volume I, the petitioner is eligible for availing of the Open General Licence for import if the Sponsoring Authority has certified it for the purpose. As would appear from Volume II, being the Hand Book of Procedure, Appendix II-R, the Director of Industries of the concerned State is the Sponsoring Authority and it is not disputed that the petitioner has been duly sponsored. It has also not been disputed that the petitioner is Actual User (Industrial), as defined in Paragraph 6(3) of Chapter I of Volume I and is accordingly entitled to import the articles and materials as listed in Appendix 6, List 8, Part I under Open General Licence. The materials required and sought to be imported by the petitioner come under Item No. 849(i), being "non-alloy steel with carbon less than 0.6% uncoated cold rolled strips/coils/sheets in seconds/ defectives condition of thickness 0.27 mm and thinner."

4. The conditions governing Imports under Open General Licence are noted in Appendix 6 - Volume I, pages 165-171, and one such condition being No. 31 (at page 169) is hereunder:-

"In the case All NON-ALLOY STEEL AND ALLOY STEEL ITEMS, importable under Open General Licence, the eligible importers - Actual Users (Industrial) and others - shall be required to register their import contracts with the Development Commissioner for Iron & Steel, Calcutta or with any of his regional offices, within thirty days from the date of entering into any such contract, or, the date of shipment of goods, whichever is earlier. Imports shall be made only after the connected contracts have been stamped by the registering office of the Development Commissioner for Iron & Steel, as evidence of such registration. For this purpose, two copies of the contract should be lodged with the registering office of the Development Commissioner for Iron & Steel and they will return one copy to the importer duly stamped on each page for production to the Customs at the time of clearance of goods. At the time of registration of a subsequent contract, the eligible importer should also furnish a statement indicating the progress made in import and utilisation/disposal of the imported material in respect of the contracts earlier registered for information/record of the registering authority."

5. The case of the petitioner is that it duly applied to the Regional Development Commissioner for registration of import contracts by its letter dated 16th May, 1989, enclosing therewith two copies of each such contract. But the latter, by his letter dated 27th June, 1989 (Annexure E to the petition) informed the petitioner

that its "request for registration of import contracts "could not be acceded to" as "it has been decided by the office of the Development Commissioner for Iron & Steel, Calcutta, that import of defectives/seconds as per items under SI. No. 849 (i) of Appendix-6, List 8, Part I, will not be allowed for actual use in the manufacture of Galvanised Sheets." After hearing Mr. Bhola Nath Sen, the learned Counsel for the petitioner and Mr. L.N. Chatterjee, the learned Counsel for the respondents and after giving the matter such consideration as it deserves, I am of the view that the stand taken by the Respondents in Annexure E of the petition cannot be countenanced and the order of the Regional Development Commissioner declining registration of the import contracts cannot be maintained and that for more reasons than one.

6. As I have already noted, in accordance with the provisions of the Import and Export Policy, April 1988 - March 1991, declared by the Government, the petitioner is entitled to import defectives/seconds under Open General Licence as per Entry No. 849(i) of Appendix-6, List-8, Part I. If on such declaration/representation being made by the Government, the petitioner has acted thereupon and has entered into the import contracts and has thus altered its position, the representation or declaration would be binding on the Government and the Government would not be entitled to go back upon it and the representation would be enforceable against the Government as a promise, notwithstanding that there is no consideration for such promise and the promise is not recorded in the form of a formal contract as required under Article 299 of the Constitution. This principle, now going by the name of the Promissory Estoppel, though of ancient vintage, was rescued from semi-obscurity in India by the Supreme Court in *Indo-Afghan Agencies* (AIR 1968 S.C. 718). It has thereafter shot into blaze in a later two-Judge Bench decision of the Supreme Court in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, though it received a somewhat jolt in another two-Judge Bench decision of the Supreme Court in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, But the later three-Judge Bench decisions in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, and in *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, have brought it back with renewed effulgence. And it is now settled law that the doctrine of Promissory Estoppel applies against the Government in the exercise of its governmental, public or executive functions and the doctrine of Executive Necessity cannot be invoked to defeat the applicability of the doctrine of Promissory Estoppel. Under the law as it now stands, the Government cannot be released or relieved of its liability to act according to the representation made by it as to its future action.

7. I must, however, note that Mr. Sen for the petitioner has not based his argument precisely on this principle of Promissory Estoppel, the main brunt of his argument being that under the provisions of paragraph 31, extracted hereinbefore, the Development Commissioner has no discretion, but is under an obligation to register the import contracts and as such his order declining the registration of the contract must be struck down. While it is true that absolute

discretion is anathema to our jurisprudence, an absolute obligation is also not to be readily inferred unless the text and the context of a provision in question warrant such inference. But looking at the text of paragraph 31 in the context of the other relevant provisions, I am inclined to accept the contention of Mr. Sen that the respondents were wrong in refusing to register the import contracts of the petitioner. Here are the reasons.

8. The provisions of paragraph 31 only provide that the importers "shall be required to register their import contracts with the Development Commissioner" "within thirty days from the date of entering into such contracts, or the date of shipment of goods, whichever is earlier", without providing as to whether, and if so, under what circumstances, the Development Commissioner may refuse registration. Going by the letters of the provisions, we do not find anything to vest the Development Commissioner with any discretion to register or not to register. If any public functionary is *ex facie* not vested with any discretion, in respect of his public functions, it would be against all canons of construction to invest him with any power to act in his discretion on the ground of any supposed expediency or otherwise.

9. A registering authority may obviously refuse registration of a document on the ground of any formal defect, when the formalities, required to be complied with as conditions precedent, are not complied, e.g. want requisite stamps or certificates and the like. But unless the relevant laws governing the matter provide clearly to that effect, such an authority cannot go into question of the merits of the transaction to which the documents relate. The Development Commissioner may decline registration if, as clearly provided in paragraph 31, the contracts are not presented for registration within the period specified therein or copies in duplicate are not lodged. But otherwise, it is not for the Development Commissioner to decide at that stage, when the goods might have already been shipped about a month back, as to whether the importers are entitled to import and to refuse registration on that score.

10. Notwithstanding our resolve in the Preamble to the Constitution to constitute India into a Socialist State, the right to carry on any private trade or business is still a Fundamental Right guaranteed under Article 19(1)(g) of the Constitution. It has also been an accepted canon of interpretation that if two views are possible of any legal provision, one furthering and the other restricting a fundamental right, the former must wherever possible, be accepted. The mere registration of import contracts, by itself does not entitle one to import. As would appear from the material provisions of paragraph 31 1 renumbered as paragraph 35 of the current year's Export Import Policy. - Ed. an importer is entitled and is rather expected to go ahead with entering into the contract and also even with shipment of goods to be imported, long before the contract is even placed for registration. But non-registration of such contract would obviously affect the "importer's right to carry on his trade and business, as it is provided in paragraph 31 that imports shall be made only after the contracts have been

stamped by the registering office of the Development Commissioner." Therefore, the construction that the registering authority has no discretion to decline registration except for formal defects, will further and facilitate the fundamental right under Article 19(1)(g) to carry on any trade or business and as the relevant provisions of paragraph 31 are reasonably capable of such a construction such construction should be accepted.

11. While registration of contract, by itself, may not entitle an importer to import, non-registration, as already noted, shall affect his right to import. It is no doubt true that under Article 19(g) of the Constitution, reasonable restriction can be imposed on the exercise of such right, but only by clear legislative provisions. The provisions of paragraph 31, assuming them to be law, do not expressly, or even by necessary implication, provide for refusal of registration of contracts, if the requisite formalities are complied with. Therefore, there being no such clear provisions providing for refusal of registration, refusal to register the import contracts would be clearly ultra vires.

12. The reasons put forward by the Regional Development Commissioner in Annexure "E" to the petition dated 27th June, 1989, for declining to register the import contracts is that "it has been decided by the Office of the Development Commissioner for Iron & Steel, Calcutta, that import of defectives /seconds as per Item under Sl. No. 849(i) of Appendix-6, List 8, Part I will not be allowed for actual use in the manufacture of Galvanised Sheets". As already noted, under the provisions of the declared Import and Export Policy, 1988-1991, the petitioner is entitled to import defective/seconds. It is true that, as already noted, and as would appear from paragraph 1(2) of Chapter I of the Import and Export Policy, 1988-1991, (Volume I, Part I), "the Government reserved the right to make amendments/changes in this Policy which may become necessary, in public interest from time to time during the above period". But, as provided therein further, "amendments etc., if any, will be notified, as usual by means of public notices/amendment order etc. issued by the Chief Controller of Imports & Exports from time to time" and that on such notification, the Policy shall stand amended and altered as "the provisions of this Policy Book are subject to such amendments for changes, as and when notified. The respondents have not been able to place on record any such Notification amending or altering the declared Policy.

13. Annexure B, however, makes it clear that the decision not to allow import items under Sl. No. 849(i) as aforesaid, which are allowed under the provisions of the Policy, has been taken "by the office of the Development Commissioner for Iron & Steel Calcutta". I do not know how and whether the "office of the Development Commissioner", or, for that matter, the Development Commissioner himself can take such decision, which virtually amends and alters the Policy itself, and which can only be done by the Government through the Chief Controller of Imports and Exports, and would be effective only on being duly notified. Annexure "E" therefore fails on that score as well.

14. The Writ Petition, therefore, must succeed and is accordingly allowed and the Respondents are commanded to register forthwith the import contracts mentioned in paragraphs 13 and 15 of the Writ Petition being Annexures "D" and "G" thereto and to return the duplicate copies to the Petitioner after necessary stamping and endorsements.

15. The Writ Petition is accordingly disposed of, but without any order as to costs.