

(1992) 03 CAL CK 0010
In the Calcutta High Court
Case No : Matter No. 2897 of 1989

Indian Rayon and Industries Ltd.	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 27-03-1992

Acts Referred:

Constitution of India, 1950 — Article 265
Customs Act, 1962 — Section 25(1)

Citation : 96 CWN 1052 : (1992) 40 ECC 73 : (1992) 60 ELT 537

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Samir Chakraborty, instructed by Dube and Co, for the Appellant; Sanjoy Bhattacharjee, for the Respondent

Judgement

Ajoy Nath Ray, J.—This is an application where the Writ Petitioner prays for relief against imposition of higher Customs Duty by reason of change in duty effected by successive Customs Notifications.

2. On the 1st March, 1987 a Notification No. 71 of 1987 was issued exempting basic duty above 25 per cent and totally exempting additional duty.

3. By another Notification dated 13th September, 1988 numbered 246 of 1988 the item Auto Coner Machine was included within the ambit of the Notification No. 71 of 1987, By the said Notification No. 246 of 1988 the exemption regarding the items including the Auto Coner Machine was extended till 31st March, 1990.

4. By a Notification No. 159 of 1988 dated 13th May, 1988 Auxiliary Duty in respect of the exempted items was made nil.

5. The writ petitioners took steps for importation of an Auto Coner Machine from a German Firm, named Carl Myor sometime in the month of February, 1989. The writ petitioners' case is that these steps were taken upon the exemption Notification dated 13th September, 1988 being made applicable to Auto Coner Machines.

6. On the 1st of March, 1989, however, by a Notification issued on that day and numbered 108 of 1989 the Auxiliary Duty in respect of the machine in question was raised from zero per cent to 5 per cent. Also on the same day, i.e., 1st March, 1989 a Notification No. 63 of 1989 was issued raising the upper limit of basic duty leviable from 25 per cent to 35 per cent.

7. In spite of these raised duties, the writ petitioners opened an irrevocable letter of credit with the United Bank of India on the 18th March, 1989. Attempts of the writ petitioners to cancel the German contract without any financial implication were, according to the writ petitioners, not successful either at this time or at any time later.

8. On the 31st March, 1989 the Chief Controller of Imports and Exports issued a Public Notice amending the Import Policy and therein an Auto Coner Machine was taken out of the open general list and was placed in the restricted list whereby a designated licence would be specially necessary for its importation.

9. It is hereafter that the Notification which really affects the writ petitioners came into operation. On 21st April, 1989 Notification No. 143 of 1989 was issued whereby an Auto Coner Machine was completely deleted from exemptions granted under the parent Notification dated 1st March, 1987 numbered 71 of 1987 wherein the Auto Coner Machines were included on 13th September, 1988 by subsequent inclusion as stated above.

10. It is also on record that the goods being the Auto Coner Machine was shipped on 30th April, 1989, that the goods arrived at the Port of Calcutta on the 4th July, 1989 and that the goods were cleared by the writ petitioners upon the warehousing procedure by executing the usual bond, undertaking to pay duty as might be applicable on a later date when the goods would be actually cleared from the warehouse.

11. By an order of the Appeal Court dated 26th September, 1989 goods were cleared upon cash deposit of Rs. 7 lakhs with the 2nd respondent and upon furnishing of Bank Guarantee to the Customs Authorities to the extent of Rs. 4,39,800/-. In case the writ petitioners succeed, the relief today would take the shape of return of the Cash security and discharge of the Bank Guarantee as the goods have already been cleared.

12. Mr. Samir Chakraborty argued the case of estoppel on behalf of the writ petitioners. He said that after 13th September, 1988 when Auto Coner Machine was included in the Notification granting exemption the writ petitioners took steps for import. The value of the machine was above Rs. 28 lakhs and if the exemptions are not allowed, then the additional duty would amount to Rs. 12 lakhs approximately. He said that on the basis of the availability of the exemption, the writ petitioners took steps for import. Such steps for import might not have been taken at all in case an additional burden of Rs. 12 lakhs was foreseen at the time when goods worth Rs. 28 lakhs were decided to be imported.

13. The validity of the Notification No. 143 of 1989 cannot be challenged. It has been competently issued under the powers u/s 25(1) of the Customs Act. The point is whether the removal of the exemption by the said Notification can be made applicable to the writ petitioners.

14. Mr. Sanjoy Bhattacharjee appearing for the respondents has cited, amongst others, a decision of a Delhi Full Bench being the case of Bombay Conductors and Electricals Ltd. and another Vs. K. Chandramouli, Under Secretary to the Govt. of India and others, . In that case the Court succinctly stated how, in the modern day, legislative power to impose tax has tapered off into the region of the executive. Indeed, in areas of Sales-tax, Excise and Customs, Notifications changing the duty or tax applicable come in quick succession. This is unavoidable; as and when economic policy changes, or the needs of business change, appropriate changes in duty or tax would have to be made. Theoretically the change in tax or duty is a subordinate legislative function, but in practice, it takes the shape of an executive function. It is true that under Article 265 of the Constitution, the imposition of revenue is a legislative function, and that subordinate imposition in this regard, below the level of the legislature itself, has to take the shape of subordinate legislation, and cannot be promulgated as an executive order. But in the way the subordinate legislation goes on in these fields of Sales-tax, Excise or Customs, such legislation partakes of a certain day to day hub and activity, which is more of the nature of executive function; it far less resembles the slow deliberation of the Parliament or a State legislature which represent the primary and classic instances of the pure legislative function as such.

15. According to a series of Supreme Court decisions, it is settled law today that the doctrine of promissory estoppel would apply for affording relief in cases of subordinate legislation, at least when such subordinate legislation is, so to speak, of the executive type, i.e. where such legislation comes in almost from day to day, or where the same is concerned with levy of duty or imposition of tax on commercial houses or tradesmen who are continuing with a wide variety and scope of business activity. Mr. Chakraborty has in this regard, in my opinion, correctly relied on the cases of Pournami Oil Mills and Others Vs. State of Kerala and Another, , State of Bihar and Anr. v. Usha Martin Industries Ltd. reported in 1989 (Su) SCC 710 and Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others Vs. Dharmendra Trading Company and Others, .

16. In view of these cases, and hi view of the earlier Supreme Court cases referred to therein, it is settled law today that promissory estoppel will be applicable even against subordinate legislative function in certain areas as indicated above, even though such subordinate legislation, in strict theory, is an exercise of sovereign legislative power through a delegated body.

17. In the case of Indian Rayon Corporation and etc. Vs. Collector of Customs, , Justice Sudhir Ranjan Roy said in His Lordship's Judgment at paragraphs 49, 50 and 51 that there can be no promissory estoppel against exercise of legislative

power by the legislature or by its delegate. With the greatest of respect to the Learned Judge, I am bound to follow the above Supreme Court decisions in preference thereto and accordingly I am unable to follow Justice Roy's decision in this regard. Paragraph 44 of the said Judgment of Justice Roy is reproduced below :-

"Mr. Roy Chowdhury, in this connection referred to the decision of Supreme Court in *Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others*, and drew my attention to the following observations of the Supreme Court at page 2401 of the Report:

The power to impose a tax is undoubtedly a legislative power. That power can be exercised by the legislature directly or subject to certain conditions, the legislature may delegate that power to some other authority. But the exercise of that power, whether by the Legislature or by its delegate, is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a Legislature to enact a particular law. Similarly, no court can direct a subordinate legislative body to enact or not to enact a law, which it may be competent to enact".

18. Indeed the case of *Narinder Chand* quoted from in the above judgment does not militate against the above view of the Supreme Court in other decisions. No court can compel the legislature to enact laws in a certain way either by itself or through subordinate delegates nor can the Court compel the legislature to withdraw legislation. But the Court can, in certain circumstances, relieve a party against the applicability of certain laws to it notwithstanding the validity and existence of such laws.

19. It is vital to appreciate this difference. If a law is made or a law is withdrawn it affects each and every citizen. That is the competence and the province of the law making authority. The Court shall neither legislate nor interfere with legislation which affects each and every one. However, the Court shall step in and relieve against the applicability of general laws in particular instances in case an appropriate situation exists for grant of such relief. Accordingly, the cases relied on by Mr. Bhattacharjee in the case of *Feno Plast Pvt. Ltd. and Another Vs. Union of India and Another*, and *Netai Mohan Saha Vs. Collector of C. Ex. and Customs*, are not authorities which go against relief being granted to the writ petitioners in this case. In those two cases, it has been held, as I respectfully read the said cases, that legislative power can neither be got rid of nor can the legislative authority be prevented from exercising its legislative power by a Court of Law. There is no dispute with proposition. But these cases do not say that the law of promissory estoppel shall not be applicable even in any situation where there has been an exercise of subordinate legislative power. If the same were said, that would not be good law in view of the later pronouncements of the Supreme Court.

20. Mr. Chakraborty also relied on the three cases namely Rajesh Plastic Industries Vs. Union of India (UOI), , Union of India v. J.K. Industries Ltd. reported in 1990 (49) ELT 511 and Bharat Commerce and Industries Ltd. and another Vs. Union of India and others, respectively where the Court has applied the principles of promissory estoppel to the sphere of subordinate legislation like in Customs and Excise cases.

21. Mr. Bhattacharjee relied on the case of Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, and placed paragraph 62 thereof for the proposition that even if a tax imposes financial hardship, the same cannot be got rid of by reason of the financial hardship alone and has to be borne as the same is an exercise of permitted legislative function of the State.

22. There is no dispute with this proposition. If the financial hardship arises because of the tax and is equally applicable to all then the same has to be borne. But if the financial hardship arises not merely because of the tax or the change in duty or tax but because also of actions undertaken by an individual on the basis of duty situations previously prevailing, then and in that event, the circumstances might call for relief, as has been held to be so in the several cases referred to above.

23. In view of the foregoing authorities and in view of the fact that in this case the import was clearly arranged to be made in a situation where the incidence of tax was less by Rs. 12 lakhs in a total import cost of Rs. 28 lakhs, to my mind it cannot but be said that the writ petitioner altered its position and took steps on a basis which cannot be changed so drastically as to affect him in a manner which is unjust and which would cause undue prejudice to him.

24. The writ petition accordingly succeeds; in case the goods were still uncollected there would have to be orders for delivery thereof without payment of any additional duty caused by reason of the withdrawal of the exemptions as stated above; but since the goods have already been delivered, it is declared that such delivery to the writ petitioners shall be permanent and good, but that the cash security of Rs. 7 lakhs furnished to the second (2nd) respondent should be returned to the writ petitioners within a fortnight of the service of a copy of this dictated order upon the said respondent. Within that time and upon such service upon the respondents and any other concerned authorities, if necessary, the Bank Guarantee for Rs. 4,39,800/- shall also be returned as discharged. The Bank authorities shall also act accordingly in the above regard upon service of a copy of the dictated order upon them.

There will be no order as to costs.

Xerox copy of this dictated order on the usual undertaking.