

(1975) 10 MAD CK 0006
In the Madras High Court
Case No : Writ Petition No. 993 of 1975

Madras Steelware Industry, Madras

APPELLANT

Vs

The Joint Chief Controller of Imports and Exports, Madras
and others

RESPONDENT

Date of Decision : 10-10-1975

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 22, 359(1)

Citation : (1975) 10 MAD CK 0006

Hon'ble Judges : Balasubramaniam, J

Bench : Single Bench

Advocate : R. Krishnamurthi, for the Appellant; S.M. Ali Mohammad, for the Respondent

Final Decision : Dismissed

Judgement

Balasubramaniam, J.—This writ petition relates to a question concerning the allotment to the petitioner of a certain quantity of imported

stainless steel sheets for the year 1971-72 by the Joint Chief Controller of Imports and Exports, Madras.

2. The laws governing our country's imports and exports have grown, over the years, into a vast, complex, and highly esoteric lore. There are

different laws for different imports, different laws for different exports, different laws for different years, different procedures for different purposes

and different authorities with different powers. This bewildering variety of laws and regulations is brought together under departmental publication -

one compilation relating to policy and another relating to procedure. They are popularly known as the "Red book" and the "hand book"

respectively. Each year has its own operative red books. Each year has its own

separate hand book. I have leafed through a few of these annuals.

I dare say that the people in the Government to whom it is given to enunciate the Policy and draw up the procedure, year in year out - are doing

their darnedest to make their meaning clear in their compositions. But my own efforts at understanding their writings have left me with the

impression that to all but the most highly gifted analyst of forensic prose these ponderous volumes must for ever remain dense and impenetrable.

One must have a mind like a card index or, better still, a data-processing machine, for finding his way through the labyrinth of classifications and

cross-references, headings and subheadings, footnotes and marginal notes, Arabic numerals and Roman numerals and a host of other drafting

devices employed in these year books. I confess that, un-minded by learned counsel on either side, I could hardly have been able to get at the

pattern of the relevant provisions, much less their rationale. Even with their assistance, I cannot say I have had a comprehension of the full measure

of the red book or the hand book, from cover to cover. But I have endeavored to understand such part of the literature as relates to stainless steel

sheets which forms the subject-matter of this writ petition.

3. The import of stainless steel sheets has, for some years past, been subject to stringent regulations. The basic policy behind the restrictions

remained more or less unchanged for a long time. There was, however, a shift in the year 1971-72 not so much in the policy of control but as

respects points of procedure. Before 1970-71, the import of this commodity was permitted, in a limited way and for specified uses, on application

by actual users for the grant of direct import licences in their own individual names. In 1971-72, with the policy of restriction remaining the same,

there was an alteration of the procedure which the actual users of stainless steel sheets had to follow for obtaining their quota of imported goods.

4. On the basic question of import entitlement, the red book for 1971-72 declared what had been a long standing feature of import policy, namely,

that the import of stainless steel in any form was banned for industries engaged in the manufacture of domestic ware, utensils etc. Import was

however allowed for a few well defined objects. One of them was to provide the raw material for the manufacture of hospital equipments, such as,

operation tables, surgical instruments etc. Even to those selected industries,

allotment of imported goods would be made only on application to the concerned licensing authority, namely, the Joint Chief Controller of Imports and Exports. The application had to be accompanied by a certificate from the concerned sponsoring authority, that is, the Director of Industries of the State, to the effect that the applicant had the requisite items of machinery in which to utilise the imported raw material. To quote the hand-book for 1971-72, the Director of Industries will have to certify "that the Unit has at least the following items of machinery in possession and installed:

- (i) Heavy duty double action power press 100 tones capacity;
- (ii) Ply Wheel hand press No. 6
- (iii) Beach drilling machine 1/8 dia capacity;
- (iv) Bending brake;
- (v) Guillotine shear;
- (vi) Arson Arc Welding set;
- (vii) Grinding/buffing machine
- (viii) Flexible shaft grinders 1 No. and spray painting equipment.

Under this scheme for import of stainless steel sheets, as laid down in the red book for 1971-72, actual users of the product did not have to take out a direct licence for import on their own individual account. Nor did they need to have to apply for release of the requisite foreign exchange for any such imports. Their requirements, on the contrary, were to be met by a system of distribution of the imported commodity procured in bulk by the Minerals and Metal Trading Corporation of India, which falls within the description of a "canalising agency." Under this system of import distribution, it was for the M. M. T. C. to apply for the requisite allocation of foreign exchange to pay for the necessary imports for all the actual users of the raw material. Apart from stainless steel sheets, there were other classes of goods whose imports were regulated and canalised by the system of distribution through public sector canalising agencies. The red book for 1971-72 accordingly provided for different methods of allotment for different classes of canalised imports. So far as stainless steel sheets were concerned, the allocation of imports to actual users was to be by allotment, made by the M. M. T. C. But effective control over distribution and allotment by the M. M. T. C. continued to vest with the licensing

authority, namely, the Joint Chief Controller of Imports and Exports, by the expedient of release orders. To elaborate, actual users had to apply to

the Joint Chief Controller for release orders, and it was only after obtaining these release orders that they could approach the canalising agency for

allotment and delivery of the imported goods, in accordance with the release orders.

5. The Hand book of Rules and Procedure for the year 1971 detailed more or less a uniform procedure for the allotment of canalised imports of

every kind by public sector agencies. The procedure accordingly applied to the canalised imports of stainless steel sheets as well. Paragraph 97 (3)

(d) of the Hand book provided that application was to be made by the actual user unit direct to the licensing authority, concerned. The licensing

authority would then consider the application on merits, in terms of the import policy in force. If the authority was satisfied that the application was

in order, it would proceed to grant the release order in favour of the applicant. A copy of the release order would also be addressed to the

canalising agency concerned. The release order would be in the proforma exhibited in Appendix 34 of the hand book.

6. The writ petitioner is running what is styled as a small scale Industrial unit from 1962 onwards. The Unit is engaged in the manufacture of

hospital and surgical instruments from imported stainless steel sheets. Till 1970-71, the petitioner had been obtaining his requirements of imported

raw materials by direct import licences from the Joint Chief Controller of Imports and Exports, Madras. When, in 1971-72, the scheme of

stainless steel imports was modified enabling actual users to apply for allotment of imported stainless steel sheets through the M. M. T. C., the

petitioner applied for allotment of a certain quantity of these sheets to the Joint Chief Controller. The petitioner also registered its allotment with the

M. M. T. C. The petitioner's application before the Joint Chief Controller was filed on 27-3-1972. On 30-3-1974, the Joint Chief Controller

issued a release order, more or less in terms of the pro forma set out in Appendix 34 in the hand book of procedure for 1971.

7. The release order contained many provisions, set out in numbered paragraphs, described as columns. Column 7 contained a declaration to the

effect that the release order was being issued to the petitioner subject to the condition that a valid "SSI" (that is, Small Scale Industries)

Registration certificate was produced to the Joint Chief Controller, and the particular endorsement in column 7 got cancelled. Column 7 further

declared that the M. M. T. C. would not deliver the raw material to the petitioner until the endorsement in column 7 was duly cancelled by the Joint

Chief Controller over his own seal and signature. There was yet another condition under the release order, and that was set out in column 9. This

column stipulated that the valid IVC (income tax Verification certificate) number should be produced by the petitioner before the Joint Chief

Controller as another pre-condition for obtaining the release order.

8. It appears that even as early as 27-3-1972, when applying for allotment of stainless steel sheets for 1971-72 the petitioner had filed before the

Joint Chief Controller copies of the Small Scale Industry certificate and the income tax verification certificate, for purposes of reference. Even so,

when the release order dated 30-3-1974, in terms, asked for these certificates, the petitioner once again obtained copies thereof and forwarded

them to the Joint Chief Controller along with the release order, with a request that the latter may cancel columns 7 and 9 and re-issue the release

order in final form so that the petitioner might present the same to the M. M. T. C. for actual delivery of the allotted quantity of imported material.

9. The petitioner made the above request to the Joint Chief Controller on 24-1-1975. He wrote a reminder on 19-2-1975. There was, however,

no reply. The release order was not re-issued to the petitioner, but was continued to be retained in the office of the Joint Chief Controller. In point

of fact it still remains with the Joint Chief Controller.

10. The petitioner alleges in his affidavit that he was anxious to get his allotment of imported stainless steel sheets from the M. M. T. C. and utilise

them in proper time in the manufacture of hospital equipment. But this aim, according to the petitioner, was thwarted by the Joint Chief Controller's

refusal or neglect to re-issue the release order. Hence the present writ petition for the issue of a Writ of Mandamus directing the Joint Chief

Controller to return to the petitioner the release order dated 30-8-1974, after duly canceling columns 7 and 9 therein.

11. It was pointed out in the writ petition, inter alia, that while the Joint Chief Controller had withheld the release order, as aforesaid, for 1971-72,

he had issued release orders for the two succeeding years 1972-73 and 1973-74.

It was further pointed out that the release orders issued for 1972-73 and 1973-74 did not contain any conditions such as those that were found mentioned in columns 7 and 9 of the release order for 1971-72.

12. The petitioner's affidavit in support of the writ petition is not clear as to why the Joint Chief Controller should have withheld the release order for 1971-72. According to the petitioner, there could possibly be no reason for this attitude of the authorities considering that the petitioner, for his part, had complied with all the conditions provided for under the red book and hand book for 1971-72, for the allotment of imported stainless steel sheets.

13. In answer to the rule nisi issued in the case, a counter affidavit sworn to by the Deputy Chief Controller of Imports and Exports, Madras, has been filed on behalf of the respondents. This counter affidavit stated that the reason for withholding the release order was the subsequent discovery by the authorities that the petitioner was not entitled to any release order for 1971-72. According to the counter affidavit, the release order was issued on 30-3-1974, in the first instance, without ascertaining whether the petitioner had complied with all the conditions prescribed in the red book. In particular, it was claimed that the petitioner had not installed in his production unit any of the 8 items of machinery, which under the terms of the policy laid down in the red book for 1971-72, the petitioner had to set up within that licensing period. It was stated in the counter affidavit that the petitioner's own sponsoring authority, namely, the Director of Industries, Madras had reported that the petitioner had acquired the requisite items of machinery only subsequent to 1971-72, that is, in August 1973. It was accordingly submitted that the release order dated 30-3-1974, granted by the Joint Chief Controller in the first instance, had been made without proper verification. It was also mentioned, by way of information, that appropriate proceedings were even now being taken by the Joint Chief Controller to cancel the petitioner's release order dated 30-3-1974.

14. The petitioner filed a reply affidavit, wherein he contended, inter alia, that the licensing authority had no power to cancel the release order dated 30-3-1974. According to the petitioner, the Joint Chief Controller must be

taken to have satisfied himself about the propriety of issuing the release order when he did so on 30-3-1974. In any case, the Joint Chief Controller having issued the release order was thereafter estopped from going back on it. The petitioner further contended that in the case of certain other stainless steel manufacturing units, similarly placed like the petitioner, the Joint Chief Controller of Imports and Exports had finally issued the relevant release orders after due cancellation of columns 7 and 9, although the said units did not possess all the requisite items of machinery in their respective units during the relevant licensing period. According to the petitioner, this act of the Joint Chief Controller in singling out the petitioner for differential treatment amounted to a hostile discrimination which was inconsistent with Article 14 of the Constitution and hence void.

15. To the petitioner's reply affidavit, as aforesaid, the respondent filed a rejoinder, with the leave of Court. This rejoinder mainly related to the question whether the Joint Chief Controller had practiced discrimination as between the petitioner and other units similarly placed. While admitting that in the one or two cases cited by the petitioner the Joint Chief Controller had finally issued the release orders, it was however explained that there was no favoritism involved in such grants, considering that the issue of the said release orders was in virtue of certain interim orders passed by the Andhra Pradesh High Court in writ petitions filed by the Units in question.

16. The last point regarding discriminatory treatment may be disposed of even without going into its merits. This can be done, for the nonce, by reference to the proclamation of emergency declared by the President of India on 25-6-1975, followed by a further declaration dated 27-6-1975 made by the President under Article 359 (1) of the Constitution. The avowed constitutional effect of these declarations is that "the right of any person to move any Court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution and all proceedings pending in any Court for the enforcement of such rights shall remain suspended for the period during which the proclamation of the emergency dated 25-6-1975 as well as the earlier proclamation dated 3-12-1971, were both in force. The Presidential Declaration quoted above effectively debars the petitioner from raising any contention based on Article 14 of the Constitution even as respects executive discrimination against him. Till so long as

the emergency lasts, therefore, the petitioner will not be heard in any Court of law, to say, even if it were a fact, that he has been unjustly

discriminated against by the Joint Chief Controller of Imports and Exports in the matter of release orders.

17. Mr. B. Krishnamurthi, learned counsel for the petitioner, sought to make a point of the fact that the Joint Chief Controller had thought fit to

grant release orders to the petitioner for the immediately following periods. 1972-73 and 1973-74, and argued that the decision could not be

different for 1971-72. It seems to me however, that for purposes of import policy each year forms a separate unit by itself of licensing procedure.

It would not, therefore, do to rely on the action of the licensing authority for one year as a binding precedent for any other year, even as respects

the same importer. There is also a practical aspect to be noticed. Licensing is not always a grim and unrelenting jurisdiction. I believe a Joint Chief

Controller may permit himself an occasional smile. And it might well be that he had smiled on the petitioner in 1972-73 and 1973-74. But this does

not mean that he should do so again for 1971-72. Under the Red Book, he can only smile from year to year.

18. Mr. Krishnamurthi next urged that the Joint Chief Controller having issued the release order on 30-3-1974, in the first instance, cannot be

heard to say just at present that what he did earlier was quite invalid. According to learned counsel, the Joint Chief Controller cannot withhold the

final issue of the release order and retain the document in his hands, by taking advantage of the fact that the petitioner had filed the papers in his

office for the purpose of canceling columns 7 and 9 in the release order. According to Mr. Krishnamurthi, in the events that happened, the Joint

Chief Controller was estopped in law from questioning the validity of the release order which he had himself earlier issued. Learned counsel relied,

for this position, on the ruling given by the Supreme Court in Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., . The following

observations of Shah J. in that judgment were quoted-

We are unable to accede to the contention that the doctrine of executive necessity releases the Government from honoring its solemn promises

relying on which citizens have acted to their detriment.

The judgment in the above case drew heavily from the views expressed by

Denning, J., as he then was, in *Robertson v. Minister of Pensions*, (1949) 1 KB 227. The later trend of authority on the subject would, however, seem to have taken a different course not only in this country, but even in England. The more acceptable view, at the present moment, would seem to be that the doctrine of promissory, or equitable estoppel does not apply to representations and assurances by the Government or by officers acting on its behalf. In *Asst. Custodian of Evacuee Property v. Agarwala*, (1975) 1 SCC 21 = (AIR 1974 SC 2325), for instance, our Supreme Court has recently expressed the view that the doctrine adumbrated by Denning J. in *Robertson v. Minister of Pensions*, (1949) 1 KB 227 is not good in law in view of the later decision of the House of Lords in *Howell v. Falmouth Boat Construction*, 1951 AC 837.

19. Even otherwise, it is not clear as to how the doctrine of promissory estoppel would apply to the present case. It seems extremely doubtful to regard the making of a release order as a promise, properly so called, or as an act founded on a promise. Having regard to the nature of the policy propounded in the red book and the administrative procedure codified in the hand book, there seems to me to be no scope at all for any one to imply a "promise" of any sort on the part of the Joint Chief Controller of Imports and Exports to issue a release order. In any case, the petitioner has not claimed, much less established, that on the basis of the release order initially issued to him on 30-3-1974, he had reordered his own affairs to his detriment. Unless the element of detriment is proved, the person aggrieved cannot rely on the plea of promissory estoppel. See the passage in *Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.*, already quoted. The facts in this case do not show that the petitioner had suffered any detriment at all relying on the issue of the release order dated 20-2-1974. The petitioner has not even pleaded that in between his application dated 27-3-1972 and the release order dated 30-3-1974 he had scheduled his time table of production in his factory in the hope and expectation that he would obtain a release order for 1971-72. The position, on the contrary, is that no man is entitled, as of right, to a release order. The petitioner must have known it only too well, considering that his Unit could not boast of the installation of the prescribed items of machinery in 1971-72, for the release order to be granted. It may be that at the

time when the Joint Chief Controller issued the release order, in the first instance, on 30-3-1974, he should have correctly verified whether the petitioner had satisfied all the conditions therefore, including the one relating to the installation of machinery. The fact that for some reason, or for no reason, the Joint Chief Controller had not done so cannot, in my opinion, estop him from verifying or re verifying at the time of the re-issue of the said release order whether any of the conditions had been satisfied in the case.

20. Mr. Krishnamurthi pointed out that even at the time the Joint Chief Controller issued his release order on 30-3-1974, he must have had the report of the sponsoring authority, before him. The record shows that the Director of Industries, Madras, as the sponsoring authority, had addressed the Joint Chief Controller on the subject of installation of machinery in the petitioner's unit in two letters dated 15-10-1973 and 30-1-1974.

21. The first letter informed that the petitioner's unit "are in possession of all the machineries contained in Item II (iii) of the Schedule C of

Appendix 41 of I. T. C. Policy Book." Apparently, the Director of Industries felt that this certificate was quite appropriate for the licensing period

1973-74, for in the same letter it was clearly stated that "the machines have been acquired in August 1973 only. In the next letter dated 30-1-

1974, the Director of Industries reported that although the petitioner's industrial unit was claimed to be in existence since 1962, it had "ordered for

all the 8 items of machineries only during August 1973, and acquired them and installed thereafter." The letter ended with the suggestion that "the

firm's application for the period April-March 1971-72 and 1972-73 may be decided by you as per the policy."

22. Mr. S.M. Ali Mohammad, learned Junior Central Government Standing Counsel, appearing for the Joint Chief Controller, argued that the

above correspondence from the Director of Industries does not help the petitioner at all. On the contrary, they supported the Joint Chief

Controller's stand that, in the events that happened, the petitioner was not entitled to any release order for 1971-72. Learned counsel pointed out

the important requirement in the red book for 1971-72 which stipulated that the application by the actual user to the Joint Chief Controller for

allotment of imported stainless steel sheets must be "accompanied by a certificate from the sponsoring authority to the effect that the Unit in question was installed and is in possession at least of the 8 items of machinery enumerated in the schedule". According to Mr. Ali Mohamed, this important requirement has not been fulfilled by the petitioner in 1971-72. The report of the Director of Industries clearly stated that the petitioner had acquired the machinery only in August 1973. In these events, no release order ought to have been properly issued at all for 1971-72. The release order dated 30-3-1974 was issued under a mistake, apparently without regard to the report of the Director of Industries.

23. Mr. Krishnamurthi, however, argued that even on the footing that the release order dated 30-3-1974, had been issued by the Joint Chief

Controller under a mistaken assumption that the petitioner had installed the items of machinery even during the licensing period 1971-72, yet, such

a mistake cannot be pleaded by the Joint Chief Controller for withholding the release order from being finally issued to the petitioner. Mr.

Krishnamurthi further contended that the Joint Chief Controller had no power under the law to cancel a release order once issued. According to

Mr. Krishnamurthi, the power of rectifying a mistake must be specifically conferred by the law on the authority concerned.

24. I do not think I can subscribe to this view, on principle. There is a sense in which the power to rectify mistakes in release orders can be traced

to reside within the four corners of the very power to draw up those release orders. A mistake or error is, by definition, something which has no

business to persist, for, on all accounts, it ought never to have been committed in the first place. If, for instance, some one were to say that two

plus two makes five, he does not thereby commit himself irretrievably to any position based on that wrong addition; it is open to him to correct

himself, presently. After all, mistakes are meant to be rectified when discovered. If to err is human, it is not less human to correct it. The processes

available for carrying out the correction may be many and various. One may do so by the simple expedient of using an eraser; or by scoring out the

error and inserting the correction, or by affixing a correction slip; or by drawing up a table of errata, or corrigenda; or by composing a formal

rectification order. The process adopted in any given case may be simple and even primitive; it may be elaborate and procedurally sophisticated.

But the basic urge in all is the same. Rectification or correction is what mistakes fairly cry aloud for, every time. In this view, there is no juridical

compulsion that for every error committed by an authority there should be some specific conferment by the legislature of a relative power of

rectification.

25. Mr. Ali Mohamed pointed out that the dispatch of the release order to the petitioner on 30-3-1974, was palpably against the import policy in

so far as it had been granted when the petitioner had not installed the required machinery in his factory in the licensing periods This means that not

only was the release order a mistake, it was also invalid. This plea, in my view, precisely fits in with the concept of nullity, familiar to lawyers. The

argument is, that the licensing authority had no jurisdiction to issue a release order to a unit which had not installed the prescribed items of

machinery for production, and if nevertheless, a release order had been given in their absence, that order must certainly be a nullity. An order

passed in such circumstances must be regarded in the eye of the law, as nonexistent. It would seem that no overt effort is even needed to set it

aside. To avoid an order which is ab initio void, the law does not require the institution of any distinctive proceeding for the special purpose of

annulling it. Annul liability, it would seem, may be pleaded at any place, at any time, in any proceeding, whether direct or collateral, and the Court

can accept that plea and mould the relief in any form. See the discussion in Amnion Rubenstein's Jurisdiction and Illegality", (1965) pages 4 to 7.

26. Mr. Ali Mohamed also invited my attention to paragraph 292 of the Import Trade Control Hand Book for 1973-74 and identical provisions in

the hand books for 1974-75 and 1975-76. I quote below the relevant paragraph from the latest hand book, for 1975-76:

(292) Cancellation of Release Order:

(1) The licensing authority may Cancel a release order issued for allotment of imported goods through a public sector agency, or otherwise render

it ineffective:

(a) If the release order has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation;

(b) if the release order has been granted contrary to the rules or the import policy in force;

(c) if the holder of the release order has committed a breach of any condition of the release order;

(d) if the licensing authority is satisfied that the release order will not serve the purpose for which it has been granted; and

(e) if the release order holder has committed a breach of any law or rules and regulations relating to the import or export of goods.

(2) The licensing authority may also suspend the operation of a release order pending investigation into one or more of the allegations mentioned in

sub-para. (1)

(3) Before taking any action under sub-paras. (1) and (2) above, the release order holder will be given a reasonable opportunity of being heard in

the matter.

27. Mr. Ali Mohamed relied on clauses (a) and (b) above quoted, and urged that they confer ample power on the Joint Chief Controller to cancel

a release order once granted, either on the ground that it was vitiated by an error or on the ground that it had been issued without proper regard to

the relevant policy or rules.

28. Mr. Krishnamurthi argued that paragraph 292 of the hand book cannot be relied upon to support the impugned action of the Joint Chief

Controller in the present case. Mr. Krishnamurthi explained that paragraph 292 was introduced in the Hand Book in 1973-74 there being no such

provision in the Hand Book for 1971-72. Learned counsel urged that the power to cancel a release order is a substantive power and not a matter

of procedure, merely, and paragraph 292 conferring such power for the first time in 1973 could not be invoked retrospectively with reference to a

release order relevant for 1971-72.

Mr. Ali Mohamed, on the other hand, contended that although the release order appertained to 1971-72, it was governed by the procedure which

was actually in force on the date on which the said order happened to have been issued. In this view according to Mr. Ali Mohamed the petitioner

could not escape from the provisions of paragraph 292, which, admittedly, was in force at the time when the release order dated 30-3-1974 was

issued. According to Mr. Ali Mohamed, the power to cancel a release order on the ground of a mistake or for any other reason was available

under the law with reference to all release orders passed subsequent to the

conferment of the relative power.

29. I am inclined to agree with the position urged by Mr. Ali Mohamed but on different reasoning. Paragraph 292 of the Hand book bears

analysis. The power conferred by that paragraph on the licensing authority is avowedly meant for cancellation of release orders made by him

earlier. If the orders disclose any errors of the kind mentioned in that paragraph, the power exists, here and now, to cancel such orders. The

power, in its nature, is exercisable in praesenti. It is clear that it is meant to be exercised with reference to past acts, which had culminated in orders

already passed. The power of cancellation, in this sense, is essentially a backward-looking power. There cannot, by definition, be any cancellation

of a future order. There cannot be a cancellation of an order which has not already been made. This being the nature of the power, it cannot be

regarded as having retrospective effect merely because, for the exercise of that power, something that had already taken place, must, per force, fall

within its term of reference. When the power of rectification, in this sense, is presently exercised, it may have consequences relating to the past

actions but those are results which are necessarily within the contemplation of the law as a concomitant of the exercise of the power.

30. This idea of backward looking, forward acting power has been well brought out in an English case, the Queen v. St. Mary Whitchappel,

(1848) 12 QB 120 = 116 ER 811. The question in that case arose as to the applicability of a statute authorising the removal of destitute widows

from a parish. The argument was that the Act applied only to those women who had become widows subsequent to the passing of the statute. This

contention however, was repelled.

31. The observations of Lord Denman, C.J. in that case deserves to be noticed-

It was said that the operation of the statute is confined to persons who have become widows after the Act was passed and that the presumption

against a retrospective statute being intended supported this construction. But we have before shown that the statute is in its direct operation.

Prospective as it relates to future removals only and that it is not properly called a retrospective statute because a part of the requisite for its action

is drawn from a time antecedent to its passing.

There is thus a fine, but well-merited, distinction between a statute which has to

draw on the past, and a statute which actually affects the past. It is only the latter kind which is properly designated as retrospective. In *The Union of India Vs. Madan Gopal Kabra*, our Supreme Court would seem to have recognised this distinction as valid in the interpretation of laws in our country. The passage from the judgment of Denman, C.J., extracted above, is quoted by the Supreme Court, apparently, with approval.

32. In view of the considerations aforesaid, it looks to me to be quite a wrong approach to paragraph 292 of the Hand book, to register the complaint; acting under that provision, the licensing authority, is here and now proceeding to cancel a release order issued prior to 1973. In my opinion, the Joint Chief Controller would have the jurisdiction to cancel a release order even though it might have been issued prior to 1-4-1973.

33. Mr. Krishnamurthi referred me to an unreported judgment of Alagiriswami, J. as he then was in W.P. Nos. 344 and 435 of 1969 (Mad), (*Subramanian v. Union of India*). This case raised the point whether for a contravention, in the year 1963 by an importer of the regulations in force in 1963, the licensing authority could apply the penal provisions which were later introduced in the Imports Control Order, by way of amendment in 1965 and in 1968. The learned Judge took the view that the amendments made by the rule making authority in 1965 and 1968 in the Imports Control Order, 1955, have no retrospective operation. The learned Judge also seems to have put his decision on a somewhat broader principle, to the effect that no retrospective effect could be given to a mere subordinate legislation. The relevant passage from the judgment reads as under—
The power conferred on the Controller either by the 1964 amendment or by the 1968 amendment cannot be exercised in respect of what happened in 1963. Such a power is only prospective and cannot be used retrospectively in respect of past breach. It may also be noticed that the Import Control Order is made in exercise of the power under the Imports and Exports Control Act, 1947 and being a subordinate legislation, no retrospective effect can be given to it.

The last proposition in the above passage is, in my view, rather widely stated. I do not accept the implication that retrospective law making, parse is beyond the competence of subordinate rule-making bodies. It is true, there is some distinction between elected legislatures, on the one hand, and

subordinate rule-making bodies on the other, as respects retrospective law-making. In the case of the former, it is an axiom of constitutional law that a Sovereign legislature's power to make laws includes the power to make laws retrospectively. No such constitutional principle is known to exist as respects rule making authorities. On this account, however, it cannot be said, without any qualification, that subordinate legislation can never possess the requisite authority to promulgate rules with retrospective force. To accept this view would, in my submission, be destructive of a fundamental principle of subordinate legislation, to the effect that the ambit of the rule-making authority's power to make rules is to be spelled from the concerned provision made by the legislature in the enabling Act. There is no law or constitutional principle, that I know of, which prevents a supreme legislative body from conferring on the rule making authority the power to pass rules with retrospective effect. If the power is there, and can be found to exist in the enabling statute, the rule making authority, as the dome of that power, has the requisite statutory warrant to pass retrospective rules.

34. Instances are not lacking in modern legislation in which elected legislatures, in the plenitude of their wisdom, have chosen to arm and equip subordinate rule making bodies with the power to make retrospective rules and regulations. There have been recent cases too in the books wherein Courts have upheld not only the competence of the legislature to confer such authority on the rule making bodies, but also the validity of the relevant subordinate legislation. See for instance, the decision of the Supreme Court in *The State of Madhya Pradesh and Others Vs. Tikamdas*,

35. It cannot, therefore, be right to argue that subordinate legislation, as a class, should never be given retrospective effect. The correct position would seem to be that while elected legislatures have inherent power to make retrospective Acts, a rule-making authority can do so only if the scope of its rule-making power includes the making of retrospective rules. This is not to say however, that the power to make retrospective rules must always be found conferred in express terms. Retrospective rule-making is only one aspect of the rule-making power, and hence its existence or nonexistence must be a matter to be decided essentially upon a construction

of the relevant provision in the parent statute. It follows, then, that a retrospective rule can be examined as to its validity not necessarily by looking for express words in the enabling section; for such a power can be construed to exist by necessary intendment. It is all a question as to what the Legislature, as the donor of the rule-making power, intended to convey, and this intention can be gathered from the enactment either through express words or by necessary intendment. There is, however, one recognisable limit to the lengths to which a rule-making authority can stretch its retrospective rules. That limit is inherent in every piece of subordinate legislation. It is this: the rules cannot be more retrospective than the parent Act itself. It seems to me that this is the only limit that can be laid down as a matter of principle. For the rest, one has only to look to the enabling statute to see whether the power of retrospective rule-making exists and, if so, to what extent.

36. Mr. Krishnamurthi then cited a judgment of Ismail, J. in *M/s. Mithuna Industries v. Dy. Chief Controller*, 1974-2 Mad LJ 53, in which the learned Judge had taken the view that the procedure for a direct import licence, on the one hand, and the procedure for allotment of imported goods from a canalising agency on the other, are entirely different. The learned Judge held that the provisions relating to the cancellation of an import licence cannot be applied *mutatis mutandis* to cancellation of allotment on the basis of a release order issued by the licensing authority. The learned Judge's attention, however, does not seem to have been drawn to the existence of paragraph 292 of the *Import Trade Control Handbook*. It further seems that the ruling given by the learned Judge was on the basis of a concession on the part of the counsel appearing for the Joint Chief Controller of Imports and Exports in that case. Quite apart from these considerations. I do not think that the judgment of Ismail, J. can be relied upon by the petitioner as throwing any light on the issues arising for consideration in the present case, which, as I shall presently show, have to do not with the cancellation of a release order, but with there-verification of a tentative release order before it is issued in its final form.

37. It is undeniable in the present case that no release order has been finally issued to the petitioner. Indeed, the writ petition itself is for the very purpose of directing a Mandamus to issue to the Joint Chief Controller to issue

the release order. It is also common ground that at the time when, on 30-3-1974, the Joint Chief Controller issued the release order, it was not complete in every respect.

Admittedly, columns 7 and 9 in that release order had not been cancelled and, until they were cancelled, the release order could not effectively operate. Indeed, the prayer in the writ petition is not merely for a mandamus to return to the petitioner the release order dated 30-3-1974, but to direct the Joint Chief Controller to cancel columns 7 and 9 therein before returning the release order to the petitioner. The position, as on date, therefore, is that the release order in its present form is inchoate and tentative. Something yet remains to be done in and upon that release order, and it remains for the Joint Chief Controller to do those things. Since the release order dated 30-3-1974, is not, in this sense, a full-fledged release order, it is, in contemplation of law, no release order at all.

38. There are two legal consequences that flow from this situation. One is that paragraph 292 of the Hand book does not apply to this situation.

The rule provides, in terms, for a cancellation or release orders. The idea of "cancellation" involves the pre existence of a release order complete in all respects. In my view, there is no such order for the Joint Chief Controller to contemplate, let alone cancel. The release order dated 30-3-1974, is so called only out of courtesy; it is still "in the making". It has not matured into a final release order which alone would need the corrective process of paragraph 292.

39. The other consequence of the incomplete release order is that the licensing authority does not need to be armed with a power of cancellation, such as is found in paragraph 292 of the Hand book of Rules and Procedures, in order to be able to decide whether or not to issue a full-fledged, and completely effective, release order. Avenues of investigation and of correction, as well as opportunities for retention or rejection of what is really a tentative release order are not closed till, the moment the licensing authority actually decides to issue the release order in its final form. Till that point is reached, the licensing authority does not need to have any specially conferred power in order to enable it to withhold the release order.

It is within the power of the licensing authority to stop a release order or to withhold from issuing it, so long as it has not been issued in its final form

that is to say after cancellation of columns 7 and 9.

40. It may be that in this case, the cancellation of columns 7 and 9 in the tentative release order of 30-3-1974 is merely a formality and, in the normal course, must follow as day follows night. Open so, it is the fulfillment of this requirement, however formal it may be, that would render the release order a complete document. In the circumstances of this case, the issue of the order on 30-3-1974, cannot, by any means, be regarded as putting an end to the jurisdiction of the Joint Chief Controller of Imports and Exports. If the true view is that the release order dated 30-3-1974 is still an incomplete document and is properly on file, lodged with the Joint Chief Controller of Imports and Exports then by the same token that authority is not functus officio with reference to that document. In this view, there is no need at all to refer to a provision such as paragraph 292 of the Hand book introduced in 1973 in order to sustain the action of the Chief Controller in withholding the release order.

41. The petitioner has asked for the issue of a writ of Mandamus directing the Joint Chief Controller of Imports and Exports to give back to him the release order dated 30-3-1974, after due cancellation of columns 7 and 9 therein. For the reasons I have set out in the foregoing paragraphs, I cannot compel the Joint Chief Controller of Imports and Exports, Madras, by a Mandamus in the manner prayed for by the petitioner.

42. I, accordingly, dismiss the writ petition with costs. Counsel's fee Rs. 250.