
(2013) 10 DEL CK 0266
In the Delhi High Court
Case No : LPA 976-977 of 2006

M/s. Aval Exports and Another	Vs	APPELLANT
Union of India and Others		RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 226, 32
Customs Act, 1962 — Section 25

Citation : (2013) 204 DLT 329 : (2014) 301 ELT 14

Hon'ble Judges : Nuthalapati Venkata Ramana, C.J; Manmohan, J

Bench : Division Bench

Advocate : G.L. Rawal, Mr. Rajesh Rawal and Mr. Jagjit Singh, for the Appellant;
Sachin Datta, CGSC, Ms. Ritika Jhurani and Mr. Dinesh Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present Letters Patent Appeal has been filed challenging the judgment and order dated 13th October, 2004 passed by learned Single Judge whereby appellants' writ petition being Civil Writ Petition No. 300/1997 was dismissed. The facts of the present case are that Appellant no. 1 is an exporter of Mulberry raw silk garments fitted with beads. Between 29th June, 1992 and 12th August, 1993 the appellants exported readymade garments and received foreign exchange remittance totalling to US\$ 15.65 lacs. After receipt of the export proceeds, appellants during the same period, filed twenty six applications for issuance of value based duty free licences in accordance with the Export and Import Policy in vogue on the date of the applications. It is the case of the appellants that by 3rd August, 1993 all discrepancies and queries raised by the respondent were removed and clarified.

2. On 20th August, 1993, the policy underwent a change whereby issue of value based advance licences against silk exports was discontinued and only quantity based licence were to be issued to exporters against their export proceeds.

3. On 20th December, 1993, respondent advised the appellants by a letter to furnish revised applications for quantity based licences. On 1st February, 1994, appellants replied stating that as all the requirements had been satisfied by them long time back, they should be issued only value based licences and not quantity based licences.

4. However, on 25th November, 1994 the respondent issued quantity based licences to the appellants.

5. On 9th December, 1994, appellants by a letter objected to the grant of quantity based licences on the ground that they had applied for value based licences more than two and a half years ago in accordance with the then prevailing policy. By this letter, appellants returned the quantity based licences with a request to respondent to issue value based licences.

6. Thereafter as the respondent did not respond favourably to the representation made by the appellants, they filed the aforesaid writ petition being C.W.P. 300/1997.

7. The appellants' writ petition was dismissed by the learned Single Judge by way of the impugned judgment. The relevant portion of the impugned judgment is reproduced hereinbelow:-

In the light of the aforesaid provisions of the Export and Import Policy 1992-1997 and the judgments of the Supreme Court and of this Court, it is clear that the petitioners had no vested right to have import licences in terms of the policy in force at the date of making the applications. Granting of licences depends upon the policy prevailing on the date of the grant of licence. Therefore, the decision of the respondents to grant quantity based licences in terms of the policy prevailing at the time of grant of licence is upheld.

8. Mr. G.L. Rawal, learned senior counsel for the appellants submitted that learned Single Judge failed to appreciate the scope of para 66 of the Export and Import Policy for the period 1992 to 1997. According to him, the said para entitled the appellants to value based licences inasmuch as it stipulated that licences were to be issued based on norms in force on the date of receipt of the application by the licensing authority.

9. Mr. Rawal further submitted that the learned Single Judge failed to appreciate the distinction between para 48 and para 66 of the Export and Import Policy. According to him, para 48 dealt with the issue of advance licence in anticipation of exports to be made, while para 66 dealt with cases where partial or full exports had already been made. According to him, in cases of advance licence covered under para 48, the licence was to be issued in accordance with the policy in force on the date of issue of the licence, whereas in cases of partial or full exports having already been made, para 66 was to apply and consequently, the licence was to be issued in accordance with the policy in force on the date of receipt of the application by the licensing authority. Paras 48 and 66 of the

Export and Import Policy for the period 1992 to 1997 relied upon by Mr. Rawal are reproduced hereinbelow:-

a) Clause 48

Advance Licence:

An advance Licence is granted for the duty free import of inputs. Such licence shall be issued in accordance with the policy and procedure in force on the date of issue of the licence and shall be subject to the fulfilment on a time-bound export obligation and value addition as may be specified. Advance Licences may be either value based or quantity based.

b) Clause 66

Exports in anticipation of licence:

Exports/supplies made from the date of receipt of an application under this Scheme by the licensing authority may be accepted towards discharge of export obligation. If application is approved, the licence shall be issued based on the input output and value addition norms in force on the date of receipt of application by Licensing authority in proportion to the provisional exports already made till any amendment in the norm is notified. For rest of the exports the Policy/Procedures in force on the date of issue of the licence shall be applicable.

(Emphasis supplied)

10. Mr. Rawal further submitted that because of negligence and omission on the part of the respondents in processing the applications for advance licences, the entitlement of the appellants to receive a value based licence could not be defeated. Mr. Rawal contended that by virtue of paras 109D and 258 of the Handbook of Procedure of the Export and Import Policy during the period 1992 to 1997, respondent was bound to issue licence within five days of the application being filed, subject to the application being correct in all parameters. Paras 109D and 258 are reproduced hereinbelow:-

109D An application for any Duty Free Licence shall be made in the form prescribed in Appendix XVII of the Handbook and all columns thereof shall be duly filled including the quantity of each item to be imported, its broad technical characteristics and its CIF value, based on the prevailing international price. Similarly, each item of export with its broad technical characteristics shall be enumerated and the quantity and FOB value of each item shall also be specified. An application which is not in the prescribed form and which is not complete in all respects shall be rejected. Where the application is complete in all respects, the licensing authorities shall issue the licence along with DEEC Book (Part II) for export duly filled in all respects within five days. DEEC Book (Part I) for import may be issued when the applicant comes for endorsement of LUT.

258. Every endeavour shall be made by the licensing authorities to dispose of the applications for grant of import/export licences etc. expeditiously. However, to

ensure that there is no undue delay, the following time schedule will normally be followed to dispose of the applications provided the application is complete in all respects and accompanied with the prescribed documents;

11. Mr. Rawal pointed out that after 3rd August, 1993 no discrepancy in any of the twenty six applications filed by the appellants had been pointed out. According to him, subsequent issuance of quantity based licence by respondent clearly proved that there was nothing wrong in the applications filed by the appellants and consequently, their entitlement to value based licence could not be denied. Mr. Rawal submitted that the right to obtain value based licence which had accrued in appellants' favour under the earlier policy could not be taken away by a subsequent change of policy on 20th August, 1993. Consequently, according to him, the change in policy with effect from 20th August, 1993 of issuing quantity based licence instead of value based licence could not be given retrospective effect. In support of his submission, Mr. Rawal relied upon the judgment of this Court in G.D. Impex International (India) & Anr. Vs. Union of India & Ors., CWP 567/1994 decided on 12th December, 2002 wherein it has been held as under:-

It is trite law that the Government has right to take a policy decision and it can rescind/alter/modify or reformulate its earlier policy decision. However, any right which has accrued in favour of a party under earlier policy cannot be taken away by change in policy decision which is taken subsequently. In other words, the decision contained in public notice dated 14th September 1993 could not have operated retrospectively so as to take away vested right of the petitioners which had accrued to them on the basis of exports duly made by 21st/23rd July 1993 and for which the petitioners had acquired a right to the grant of value based duty free licence but the licence was in fact been sanctioned and prepared. Merely because the licence was not despatched and thus could not reach the petitioners, would not take away their right to enjoy the fruits of the licence. The matter cannot be left to the whims of the person who had to undertake the despatch of the licence.

12. On the other hand, Mr. Sachin Datta, learned standing counsel for respondent-UOI contended that para 66 referred to and relied upon by learned senior counsel for the appellants was inapplicable to the present case as during the period appellants had applied for licences, the unamended para 66 was in force. Mr. Datta in Court handed over a photocopy of the Export and Import Policy for the period 1992 to 1997 incorporating amendments up to 31st March, 1993. Para 66 in the said Policy reads as under:-

66. Exports/supplies made from the date of receipt of an application under this scheme by the licensing authority may be accepted towards discharge of export obligation. If the application is approved, the licence shall be issued in accordance with the policy and procedures in force on the date of its issue. The conversion of duty free shipping bills to drawback shipping bills may also be permitted by the Customs authorities in case the application is rejected or

modified by the licensing authority.

(Emphasis supplied)

13. Mr. Datta pointed out that para 66 relied upon by learned senior counsel for the appellants had, in fact, been prospectively introduced only on 8th February, 1994.

14. Mr. Datta submitted that there was no distinction leave alone contradiction between paras 48 and 66 of the Export and Import Policy during the period appellants had applied for advance licences. He submitted that both paras 48 and 66 during the relevant period stipulated that licence would be issued by respondent in accordance with the policy in force on the date of issuance of the licence.

15. Mr. Datta emphatically denied that there was any delay in dealing with the appellants applications for grant of licences. He referred to para 13A of the counter-affidavit to contend that the delay in processing the advance licence applications was entirely on account of the appellants inasmuch as they had failed to furnish detail of the quantities of export and import in their applications. Mr. Datta also submitted that paras 109D and 258 of the Handbook of Procedure of Export and Import Policy only mandated the respondent to process the applications for advance licences as expeditiously as possible.

16. Mr. Datta also referred to para 15 of the Export and Import Policy to submit that no person could claim a licence as a matter of right and licensing authority had the power to refuse licence.

17. Mr. Datta also relied upon para 16 of the Export and Import Policy to submit that respondent was well within its right to substitute policy of grant of value based licence with quantity based licence after issuing a public notice.

18. In rejoinder, Mr. Rawal did not dispute that para 66 of the Export and Import Policy referred to by learned counsel for the respondent was in vogue during the period appellants had applied for grant of advance licences. He, however, submitted that the policy of grant of value based licence could not be substituted for grant of quantity based licence by following the method for amendment prescribed in the Handbook of Procedure.

19. Having heard learned counsel for parties, the admitted factual position that emerges is that the appellants applied for advance licences from 29th June, 1992 to 12th August, 1993 and during this period para 66 of the Export and Import Policy stipulated that such licences shall be issued in accordance with the policy and procedure in force on the date of issue of the licences. It is pertinent to mention that on 20th August, 1993 the Export and Import Policy underwent a change whereby only quantity based licence and not value based licence was to be issued to exporters of silk products.

20. We are of the opinion that the argument of learned senior counsel for

appellants though attractive, is without foundation inasmuch as para 66 of the Export and Import Policy relied upon by him was not applicable during the period the appellants had applied for grant of advance licences.

21. In any event, the notification dated 8th February, 1994 did not have retrospective effect. The Supreme Court in *Ms. Darshan Oil Pvt. Ltd. and Another Vs. Union of India and Others*, has held as under:-

6. The submission of Shri Harish Salve, learned counsel for the appellants is that an irrevocable letter of credit having been opened by the appellants in favour of the foreign supplier on 3-10-1983 prior to amendment of the Policy by the public notice dated 11-11-1983, it was not feasible for the appellants to prevent the shipment of the goods thereafter, and, therefore, not extending the benefit of exception to such cases also, confining the exception only to actual shipments made prior to issue of public notice dated 11-11-1983, is unreasonable and violative of Article 14. Learned counsel submits that opening of an irrevocable letter of credit prior to issue of the public notice being lawful, its consequence could not be made unlawful by a subsequent amendment of the Policy. Learned counsel also submitted that amendment of the Import Policy by issue of a public notice can be only prospective, but in this manner it has been made retrospective. Shri Subba Rao, learned counsel for the Central Government submitted that the exception is applicable only to such goods which were already in transit on account of the shipments having been made; and the only consequence of the amendment is an increase in the tax which is not violative of Articles 14 and 19 of the Constitution.

7. We are unable to accept the submissions of the learned counsel for the appellants. These submissions are merely a different facet of the doctrine of promissory estoppel which has been held inapplicable in such a situation. In *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, which related to withdrawal of exemption from payment of duty etc. in exercise of the statutory powers, it was reiterated that the power to exempt includes the power to modify or withdraw that benefit; and the liability to pay duty under the Customs Act, 1962 arises when the taxable event occurs being subject to payment of duty as prevalent on the date of the entry of the goods. It was held that the doctrine of promissory estoppel could not be invoked to question the withdrawal of notification issued u/s 25 of the Customs Act, 1962 when it was done in public interest. Equities have to be balanced and public interest must outweigh individual interest. *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, clearly holds that withdrawal of such a benefit can be made in public interest during the period for which the benefit had earlier been intended. In our opinion, this is sufficient to indicate the fallacy inherent in the submissions made on behalf of the appellant.

8. In *D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others*, it was clearly held that the entitlement to import items which were canalised or not, is governed by the Import Policy prevalent at the time of import. In the

present case, the import of a canalised item being made after amendment of the Policy by the public notice dated 11-11-1983 in a manner not permitted by the amended Policy, the appellants cannot claim to avoid the logical consequences of the import being made contrary to the Import Policy prevailing at the time of import of the goods. Exemption under the amended Policy being limited to shipments already made cannot be termed unreasonable or unduly restrictive. Obviously, the exception was made to cover only those goods of which the shipment had been made and were in transit, excluding all such goods of which no shipment had been made. The classification between goods in transit and those of which the transit had not begun, cannot be called irrational or unreasonable in the context.

(Emphasis supplied)

22. As opposed to para 66 in vogue at the relevant time, appellants had relied upon its amended version-as amended vide notification dated 8th February, 1994. This Court is of the view that the prospective amendment dated 8th February, 1994 would not enure to the benefit of the appellants since the said amendment came into effect when the policy of value based licence had already been discontinued. The amended para 66 vide notification dated 8th February, 1994 would apply only to issue of quantity based licence.

23. There is also no contradiction between paras 48 and 66 of the Export and Import Policy during the period the appellants had applied for grant of advance licences. From a reading of paras 48 and 66 of the Export and Import Policy, as in vogue during the period appellants had applied for advance licences, this Court is of the view that respondent was bound to issue advance licences only in accordance with the policy in force on the date of issuance of licences.

24. In P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, the Supreme Court has held as under:-

4. An applicant has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of the power in which event it is for the applicant to plead and prove to the satisfaction of the court that the refusal was vitiated by the above factors.

5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change

in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest.

(Emphasis supplied)

25. In *S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others*, the Supreme Court has held as under:-

10. We are, therefore, of the opinion that the contention that a vested right accrues to an applicant for issuance of advance licence on the basis of the norm obtaining on the date of application is unacceptable. The scheme and the context militate against the contention. The fact that the policy is statutory in nature (delegated legislation) has no relevance on the question at issue. It would be wrong to equate the filing of an application for advance licence with the filing of a suit where it is held that appeal being a substantive right, the right of appeal inhering in the party on the date of filing of the suit cannot be taken away by a subsequent change in law.

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12. Now, coming to the argument of the authorities taking advantage of their own wrong, viz., delay in issuing the advance licences, it may be noticed that there is no allegation/avermnt in the writ petition that the authorities have deliberately delayed the issuance of the advance licences. We have mentioned hereinbefore that issuance of these licences is not a formality nor a mere ministerial function but that it requires due verification and formation of satisfaction as to compliance with all the relevant provisions. In this case, the applications for advance licences were made on 29-5-1992, 18-6-1992, 24-6-1992 (two applications) and 15-9-1992. The application of 15-9-1992 relates to two contracts of much higher value. The change in policy was on 25-9-1992, i.e., within a few days of the last application. Without a doubt, these applications have to be disposed of within a reasonable time -- indeed with due expedition. But in the absence of any plea in this behalf, it is not possible to hold that there has been any undue delay, procrastination or deliberateness on the part of the authorities in issuing the licences. There is no finding either by the learned Single Judge or the Division Bench to this effect. In such a situation, the mere fact that the appellant is likely to suffer some loss or prejudice -- assuming that the said plea is factually true -- cannot be a ground either for invoking the rule of promissory estoppel or to otherwise bind the Government to apply and adopt the value addition norm in force on the date of application. In this context, the observations of this Court in *M/s. Pankaj Jain Agencies Vs. Union of India and others*,] are apposite. M.N. Venkatachaliah, C.J., speaking for the Court, held: (SCC p. 207, para 22)

The third and the last submission is that the sudden and sharp increase of duty steeply puts up the petitioner's liability from Rs. 1,84,341 to Rs. 6,42,065 on these consignments and constitutes an unreasonable restriction on the petitioner's fundamental rights under Article 19(1)(g) of the Constitution. A tax, in particular, in the nature of duties of customs is not per se violative of Article 19(1)(g). Mere excessiveness of a tax is not, by itself, violative of Article 19(1)(g). This question cannot be divorced from the nature of the right to import. There is no absolute right much less a fundamental right to import. (See *The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, Andhra Industrial Works Vs. Chief Controller of Imports and Others*, 1 SCR 321]; *J. Fernandes and Co. Vs. Deputy Chief Controller of Imports and Exports and Others*,) That apart, no factual foundations are laid to demonstrate how this impost has had the effect of destroying the petitioner's right to carry on a trade or business. This contention also has no merit.

(Emphasis supplied)

26. Further, the judgment of *G.D. Impex International (India) & Anr.* (supra) relied upon by learned senior counsel for the appellants is clearly inapplicable to the present matter as in the said case the respondent had not only processed the application of the petitioners but had even issued licences prior to change in policy of issue of quantity based licence instead of value based licence.

27. This Court is further of the opinion that the only purport of effectuating the amendment in paragraph 66 was to apply the input output and value addition norms in force on the date of receipt of application under the scheme by the Licensing Authority. These norms are relevant both for the purposes of value based advance licences and also quantity based advance licences.

28. In view of the respondent's counter-affidavit that delay in processing advance licence applications was entirely on account of appellants' laxity in furnishing the exact quantity of export and import, this Court is of the opinion that in the present proceedings, no conclusive finding can be reached that the respondent was liable for the delay.

29. In any event, the time period of five days prescribed in paras 109D and 258 of the Handbook of Procedure was only a desirable time frame. It was directory and not mandatory as no consequence on failure to comply with the prescribed requirement had been provided in the Handbook of Procedure itself. The Supreme Court in *Sharif-ud-din Vs. Abdul Gani Lone*, has held as under:-

9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus:

The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

30. Though a feeble attempt was made by appellants' senior counsel in rejoinder to challenge the policy of issuance of quantity based licence instead of value based licence, we are of the opinion that the said plea cannot be entertained in the present case as there is neither any prayer nor any ground either in the writ petition or the present appeal to this effect.

31. Before parting with this case, we would like to emphasise that all parties to a litigation as well as all counsel are under a duty to place on record true, complete and correct facts. If material facts like relevant paras of the export and import policy are suppressed, distorted, withheld or not placed either intentionally or unintentionally, the writ courts would find it difficult to dispense justice expeditiously. In *K.D. Sharma Vs. Steel Authority of India Ltd. and Others*, the Supreme Court has held as under:-

38.As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The petitioner must

disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts.

We are of the view that if correct para 66 of the Export and Import Policy during the period 1992 to 1997 had been brought to the notice of this Court at the earliest, rather than at the stage of final hearing before the Division Bench, the present proceedings would not have lasted for nearly sixteen years. As "judicial capital" in terms of manpower and resources is extremely limited, we hope that parties and counsel in future would be more careful and make earnest efforts to place on record correct notifications and documents. With the aforesaid observations, present letters patent appeal stands dismissed.