

(1995) 08 MAD CK 0063

In the Madras High Court

Case No : Writ Petition No's. 7907 and 7908/84

Rex Trading Company

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-08-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 19
Customs Act, 1962 — Section 124

Citation : (1996) 56 ECC 74 : (1996) 86 ELT 189

Hon'ble Judges : S.M. Ali Mohammed, J

Bench : Single Bench

Advocate : Shri Habibullah Basha for E.S. Govindan, for the Appellant; Shri V.T. Gopalan for A. Ramakrishna Reddy, ACGSC, for the Respondent

Judgement

1. These Writ Petitions coming on for hearing on Tuesday the 4th, Wednesday the 5th, Friday the 7th, Monday the 10th, Tuesday the 11th, Wednesday the 12th, Thursday the 20th, Friday the 21st and Monday the 24th days of July 1995, and on this day respective affidavits filed in support thereof the order of the High Court, dated 6-8-1984 and made herein and the Counter affidavits filed herein and the records relating to the Order in (i) Show Cause Notice to S8/185/84-SIB/SIB-70/84, dated 20-7-1984 on the file of the 3rd Respondent, and (ii) Public Notice No. 44-ITC (PN)/83, dated 17-10-1983 on the file of the Ist Respondent respectively and comprised in the return of the Respondents in both the petitions to the Writ made by the High Court, and upon hearing the arguments of Mr. Habibullah Basha, Senior Counsel for Mr. E. S. Govindan, Advocates for the Petitioner in both the petitions and of Mr. V. T. Gopalan, Senior Counsel for Mr. A. Ramakrishna Reddy, Additional Central Government Standing Counsel on behalf of the Respondents in both the Petitions, the Court made the following order :-

W.P. No. 7907 of 1984 :

In W.P. No. 7907 of 1984, the prayer of the Petitioner is to issue a Writ of Certiorarified Mandamus, calling for the records before the third respondent

ending with the Show Cause Notice No. S8/185/84-SIB/SIB-70/84 dated 20-7-1984 issued by the Fourth respondent, quashing the same and direct the third respondent not to proceed with the adjudication.

W.P. No. 7908 of 1984 :

In W.P. No. 7908 of 1984, the prayer of the petitioner is to issue a Writ of Certiorarified Mandamus, calling for the records before the first respondent ending with the Public Notice No. 44-ITC (PN)/83 dated 17-10-1983 quashing Para 3 of the Public Notice in so far as it compels the shipment within 90 days from the date of Public Notice and direct the respondent not to give effect to Para 3 of the Public Notice.

The Petitioner herein is a registered Partnership firm carrying on business of exports and imports under the name and style of "The Rex Trading Company". The Partner of the firm, in the affidavit filed in support of the Writ Petitions, has stated that during the relevant time, Appendix 10 of Import and Export Policy, 1983-84 lays down the categories of Importers and the Items which will be allowed under Open General Licence and till 17-10-1983 Isoborneol was allowed to be imported under Open General Licence. It is further stated that the first respondent, in exercise of the powers conferred by Section 3 of the Imports and Exports (Control) Act, 1947 issued a notification on 15-4-1983 giving general permission to import certain items under Open General Licence. Clause (22) of the said Notification says the items covered under Part III of the Schedule to the licence, can be imported under Open General Licence by Actual Users (Industrial) and others, for stock and sale.

2. Clause (26) reads as follows :

"... Such goods are shipped on Through consignment to India on or before 31st March, 1984 or, in the case of Actual User (Industrial), on or before 30th June, 1984, against firm orders for which irrevocable letters of credit are opened and established on or before 29-2-1984, without any grace period what-so-ever..."

3. As per Clause (22), items covered under Part III of the Schedule to the licence can be imported under Open General Licence by Actual Users (Industrial) and others for stock and sale. The Petitioner opened an irrevocable Letter of Credit through the State Bank of India, favouring M/s. Sanlui Limited, Hong Kong for U.S. Dollars 50,000/- on 6th July 1983 for the import of Isoboneol Powder. On 5-8-1983, the letter of Credit was enhanced by another 50,000 U.S. Dollars. The Letter of Credit was valid for shipment upto 31-3-1984 and negotiable upto 30-4-1984.

4. While so, the first respondent issued a Public Notice No. 44-ITC (PN)/83-New Delhi, dated 17th October, 1983, by which in Appendix 3, List of Limited Permissible Items, Entry No. 61, the description has been amended as under :

"Borneol/Isoborneol and its esters including bornyl acetate, but excluding Isobornyl acetate."

With the result, the chemical Isoborneol was ordered to be removed from the list of limited permissible items under Open General Licence, which requires a specific licence, under the Import and Export Control Order, under the concerned Authority, Clause 3 of the said Public Notice, mentioned above, reads as follows :

"...REP Licences/Additional licences held by Export Houses and Trading Houses shall cease to be valid for import of Acetic acid, Ethyl Acetate, Isoborneol, threading taps 1.6 mm to below 3.0 mm dia and lead alloys, referred to at S. Nos. (1), (2), (3), (5) and (19) in para 2 above except to the extent permissible under the relevant provisions of Import and Export Policy 1983-84 as per the amended policy of these items. This restriction will not apply to imports covered by irrevocable letters of credit opened and established before the date of this Public Notice as per the Policy in force, against which shipment of goods is made within a period of 90 days from the date of this Public Notice. This facility of import against irrevocable letters of credit already opened will also be available to eligible importers for import of Isoborneol and threading taps 1.6 mm to below 3.0 mm dia under Open General Licence as in force before the date of this Public Notice..."

As soon as the Petitioner came to know about the Public Notice, it informed its bankers to amend the Letter of Credit so that the date of shipment would be changed to 10-1-1984 and the date of negotiation to 9-2-1984. However, the beneficiaries of the Letter of Credit did not agree to this change and Hong Kong-Shanghai Banking Corporation also rejected the amendments. The Bankers informed the Petitioners accordingly. On 24-10-1983, the petitioner wrote a letter directly to the beneficiaries M/s. Sanlui Ltd. Asking them to complete the shipment before 10-1-1984 or to cancel the said order. The beneficiaries replied to the Petitioner stating their inability to ship the material before 20th March, 1984. They have also stated that it was not possible to cancel the order as they had entered into a firm commitment with their Chinese Suppliers, and for the above reasons, they were not in a position to comply with the shipment within 90 days from the date of the Public Notice, mentioned above. Ultimately, the Petitioner wrote to the suppliers to cancel the order. The efforts of the Petitioner were of no avail resulting the petitioner to pay for the goods and to suffer heavy loss. It is further stated that the goods arrived at Madras Port and the Petitioner's clearing Agents filed three Bills of Entry Viz. Nos. Line Nos. 111, 112 and 113 Rotation No. 446 of 1984, dated 13-6-1984 respectively, for the clearance of 12.5 M.T. of Isoborneol powder. Under each of the Bills of entry, value of each consignment covered by each of the Bills of entry was Rs. 2,30,860. Based upon the aforesaid Public Notice, the Customs department issued a show cause notice bearing No. S8/185/84-SIB/SIB/70-84 in which it has been stated that the shipment of the goods had not taken place within 90 days from the date of Public Notice, (that) though the goods were shipped on 25-3-1984, the goods were transhipped at Hong Kong and sent on board the ship ex. M.V. POSTJONA and that therefore, the imports do not appear to be in order. The Petitioner replied to the show cause notice, on 24-7-1984, pointing out that

the goods covered by the Bills of Entry were imported by sea, that the shipments are governed by Para 203 of the Hand Book, that the date of the Bills of (Lading) is the relevant date that there is no direct shipment from China to Madras and that the goods have to come to Hong Kong and only then, they have to be transhipped. It is further stated in the affidavit, that the Letter of Credit had provided for the shipment at Hong Kong. It is submitted by the Petitioner that the Public Notice is void, that it has no effect, that the third respondent, viz. the Collector of Customs, Madras-1 has no jurisdiction to issue the show cause notice and that therefore, it is violative of Art. 14 and 19(1)(g) of the Constitution of India. Aggrieved by the impugned show cause notice, the Petitioner has approached this Court praying for the issue of a writ of certiorarified mandamus, calling for the records before the third respondent in Show Cause Notice No. S8/185/84-SIB/SIB-70/84 dated 20-7-1984 issued by the fourth respondent, to quash the same and to direct the third respondent not to proceed with the adjudication.

5. A counter-affidavit has been filed on behalf of the respondents stating that the impugned notice is valid and is in accordance with law. Extracting Paragraph 255(1) of the Import and Export Policy for 1983-84, it is stated in the counter-affidavit that Para 255(1) of the Import and Export Policy for 1983-84 does not refer to the items which were earlier listed under Open General Licence, but whose import Policy was changed in 1983-84 Policy period and that it protects the firms who have opened Letters of Credit before 1-4-1983. It is stated in the Counter-affidavit that the Customs Department issued show cause notice to the Petitioner, for the reason that though the goods were shipped on 25-3-1984, the goods were transhipped at Hong Kong and sent on Board the ship Ex. M.V. POSTJONA. It is pointed out that as per the Handbook of Import and Export procedure 1983-84, the consignments had to be through consignment and since the transshipment had taken place, it is not through consignment. It is further stated in the counter-affidavit, that u/s 3 of the Exports and Imports Act, 1947 as amended, the Central Government has powers for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exceptions Imports into India, that the Import Export Policy for each year is announced for each financial year by means of Public Notices in the Gazette of India Extraordinary, that it has been clearly laid down in Paragraph 6 of the Handbook of Import Export Procedure 1983-84, which was published under the Ministry of Commerce Public Notice No. 11-ITC(PN)/83, dated 15-4-1983, that changes/amendment in the Import and Export policy that becomes necessary from time to time, are separately notified by means of public notices, that the provisions of the above Policy book are subject to such amendments/changes as and when notified, that Isoborneol was shifted from O.G.L. to the List of limited permissible items vide public notice No. 44 ITC(PN)/83, dated 17-10-1983 and as such, the said Public Notice No. 44 is within the provisions of the Import and Export Control Act, 1947 and Import Control Order, 1955. It is further stated in the counter-affidavit, that in order to ensure that those parties who have opened

and established irrevocable letters of credit before the date of issue of the said Public notices, a provision was made to allow import of Isoborneol against such letters of credit, provided shipment of goods is made within a period of 90 days from the date of the said public notice, that the said period of shipment of 90 days is considered sufficient to effect shipments against an irrevocable letter of credit and that this would clearly establish that this public notice had no retrospective effect. The plea raised by the petitioner on the question of estoppel is stoutly opposed in the counter-affidavit, stating that the alleged assurance of the Government in view of the opening of the Letters of Credit is not taken away and that it only adds that the shipment should be done within 90 days from the date of Public Notice.

6. Mr. Habibullah Basha, the learned Senior Counsel contended that (1) the Public notice cannot amend the statutory provision issued u/s 3 of Imports and Exports (Control) Act, 1947, (2) that Public notices or Rule will have no retrospective effect, and (3) that the respondents are bound by the doctrine of promissory estoppel as given in the Import and Export policy for the year 1983-84, followed by a notification issued u/s 3 of the Imports and Exports Control Act, with regard to Isoborneol.

7. On the other hand, Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel appearing on behalf of the respondents, submitted that the Public notice, dated 17-10-1983 is valid and in accordance with law. The learned Senior standing Council, further submitted that the Public notice dated 17-10-1983 should not be read as a change in policy, but as a change in the statutory provisions prohibiting Isoborneol.

8. In support of the contention, viz., that the public notice cannot amend the statutory provisions issued u/s 3 of the Import and Export Act, Mr. Habibullah Basha, the learned Senior counsel cited the following rulings of the Supreme Court and rulings of other High Courts.

(i) Union of India v. M/s. Anglo Afghan Agencies (AIR 1968 SC 718 at 723), wherein the Supreme Court has observed thus :

"... The orders which the Central Government may issue in exercise of the power conferred by Section 3 of the imports and Exports Control Act may be executive or legislative.

There is no pattern of order or logical sequence in the policy statement, it is a jumble of executive instructions and matters which impose several restrictions upon the rights of citizens. Some of the provisions which impose restrictions upon citizens in the exercise of their right to carry on trade without statutory limits may be open to serious objections, but we do not find it necessary to embark upon an enquiry whether the provision which authorises the issue of import entitlement certificate for the full f.o.b. value of the goods exported in legislative in character, this Court has held that the Courts have the power in appropriate cases to compel performance of the obligations imposed by the

Schemes upon the departmental authorities..."

(ii) Joint Chief Controller of Imports and Exports, Madras Vs. Aminchand Mutha Etc., , it is observed thus :

"...Now there is no doubt that it is open to the Central Government u/s 3 to prohibit the import of any article, but that can only be done by an order published in the Official gazette by the Central Government, u/s 3. The High Court has found that no such order, u/s 3 of the Act has been published. Nor has any such order by the Central Government been brought to our notice. All that has been said is that in the declaration of policy as to import, the word, "nil" appears against fountain pens. That necessarily does not amount to prohibition of import of fountain pens unless there is an order of the Central Government to that effect published in the official gazette."

(iii) In Kaptan's Enterprises and Another Vs. Union of India, it has been observed thus :

"... the second question that arises is regarding the effect of the public notice dated 11-11-1983. On behalf of the petitioners, two points are made. One, relying on the decision of the Supreme Court in East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, and of this court in Bansal Export Private Limited v. Union of India AIR 1983 Del 4450 is that the public notice of 11-11-1983 being only an administrative circular or instruction has no statutory force (vide paragraphs 31 to 33 of the above Supreme Court Judgment) and cannot override or obliterate to the right of import available to traders under OGL 1/83....

We are of the opinion that the petitioner's right to import the goods in question under OGL did not cease on 11-11-1983. If, as we have held, the original import policy announced for 1983-84 coupled with OGL 1/83 entitled the petitioner to import "Stearin Fatty Acid" under OGL and again, as we assume, if the petitioner firm had placed firm contracts with the third respondent for the import of these goods on 7-10-1983 itself that right of import is no doubt liable to statutory changes but cannot be taken away to the petitioner's detriment except by another statutory instrument. In this case, that has not been done, for on 11-11-1983 only a public notice has been issued. We do not see how a public notice such as one issued on 11-11-1983 which has no statutory force by itself and which is inconsistent with OGL 1/83 which has been issued u/s 3 of the Act can be given effect to.

iv. Jain Shudh Vanaspathi Limited v. Collector of Customs, a learned single of Calcutta observed thus :-

"...The learned Advocate for the respondents submitted that on account of the Public Notice dated 5th June, 1981 the item in question stands deleted from the list of OGL items, and immediately on issuance of public notice, it become canalised item. I have given my anxious consideration on the submissions of the

learned counsel of the parties and I find that there is no force in the contention of the learned counsel for the petitioner, and I accordingly hold that the public Notice dated 5th June, 1981 being administrative in character, cannot affect the OGL order, and as such no item was placed under OGL because of the issuance of OGL order No. 1 of 1981 can be deleted therefore, I hold that the item in question continued to be under OGL and finds its place at Serial No. 1 of Appendix 10, during the entire policy period of AM-81-82. I further hold that the Public Notice dated 5th June 1981 cannot effect or take away the right of the petitioner which have accrued to it on account of the contract having been entered into by the petitioner with the foreign seller...."

9. With regard to the second contention that the Public Notice or Rule will no retrospective effect, the learned Senior counsel cited the following rulings.

In The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others, it is observed thus :-

"Dr. Seiyed Muthammad, learned counsel for the department did not support the impugned demand on the basis of the retrospective effect purported to have been given to the explanation referred to earlier by the notification dated February, 16, 1963 (Exn P. 12) for obvious reasons. The rule making authority had not been vested with the power under the Central Excises and Salt Act to make rules with retrospective effect. Therefore, the retrospective effect purported to be given under Exn. P. 12 was beyond the powers of the rule making authority."

In Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another, it is observed thus :-

"(A) Imports and Exports (Control) Act (1947), Section 3 Iron and Steel controller's Public Notice No. 1/1-3/62, dated 6-12-1962 is not retrospective. Hence condition that sheets imported must be of "Prime Quality" cannot apply to sheets imported under licences issued before 6-12-1962".

In Union of India and others Vs. Kanunga Industries, it has been observed thus :-

"Thus it would be clear that it is by the correction that the strips were brought within the prohibited items. There is no dispute that in the meanwhile the respondent had already contracted with the foreign parties for the import of the strips and, therefore, the goods were authorised on the date they were contracted for....

We have pointed out that in 1967 the relevant entry was "stainless steel of any specifications" whereas in 1968 it was "stainless steel sheets/plates/strips/circles of any specifications. The erratum only brought the situation to the 1968 position. It is also for this reason that we cannot accept the contention that the erratum only made clear or explicit what was implicit in the entry earlier. This is apart from the settled legal position that taxation statutes have to be construed strictly, and the benefit of doubt, if any has to be given to the assessee.

10. With regard to other contention that the respondents were bound by the doctrine of promissory estoppel, the learned senior counsel cited the following rulings :

In *Union of India v. Anglo Afghan Agencies* AIR 1968 SC 718 it has been observed thus :-

"... We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set up, no person may be deprived of his right or liberty except in due course of and by authority of law if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law - common or statute - the courts will be competent to, and indeed would be bound to, project the rights of the aggrieved citizen..."

In *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, it has been observed thus :-

"... There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or execution functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. We must concede that the subsequent decision of this court in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, takes a slightly different view and holds that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State and the State cannot be prevented from exercising its functions under the law. This decision also expresses its disagreement with the observations made in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, that the doctrine of promissory estoppel cannot be defeated by invoking the defence of executive necessity, suggesting by Necessary implication that the doctrine of executive necessity is available to the Government to escape its obligation under the doctrine of promissory estoppel. We find it difficult to understand (how) a Bench of two Judges in *Jeet Ram's* case could possibly overturn or disagree with what was said by another Bench of two judges in *Motilal Sugar Mills Case*. If the Bench of two Judges in *Jeet Ram's* case found themselves unable to agree with law laid down in *Motilal Sugar Mills Case*, they could have referred *Jeet Ram's* case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a Co-ordinate Bench of the same Court in *Motilal Sugar Mills*.

We have carefully considered both the decisions in *Motilal Sugar Mills* case and *Jeet Ram's* case and we are clearly of the view that what has been laid down in *Motilal Sugar Mills* case represents the correct law in regard to the doctrine of promissory Estoppel and we express our disagreement with the observations in *Jeet Ram's* case to the extent that they conflict with the statement of the law in

Motilal Sugar Mills case and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case.

Mr. V. T. Gopalan, the learned Senior Central Government Standing Counsel in support of his contentions, cited the Judgment of the Supreme Court in *Ms. Darshan Oil Pvt. Ltd. and Another Vs. Union of India and Others*, wherein the Supreme Court has observed, with regard to the facts and circumstances of the case, that "Import and Export policy" for the period 1-4-1983 to 31-3-1984 was declared by Central Government by Order u/s 3 of Import Export Control Act, 1974, giving general permission for import into India of raw materials, components and consumables by actual users (industrial) subject to certain conditions..."

Mr. V. T. Gopalan, learned Senior Central Government standing Counsel emphasised that the Supreme Court itself has proceeded that the Import and Export policy was declared by the Central Government exercising its powers u/s 3 of Import and Export Control Act, 1947 and therefore, it has statutory force. He further referred to the following Rulings. -

In *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, it has been observed thus :

"... Learned counsel for the respondent asserts that the said public notice is an order made in exercise of the power conferred on the Central Government under S. 3(1) of the Act. On the other hand, learned counsel for the appellants contends that public notices are not such orders but only information given to the public for their guidance..."

In *Joint Chief Controller of Imports and Exports, Madras Vs. Aminchand Mutha Etc.*, it is observed thus :

".... These are the statutory provisions under the Act and the Rules for granting licences. In order however, to guide the licensing authorities in the matter of granting import licences, the Central Government issued certain administrative instructions to be followed by the licensing authorities. These instructions provided for grant of import licences to three kinds of persons. - (i) established importers, (ii) actual users, and (iii) newcomers; (see the Red Book of Rules and Procedure for Import Trade Control for the period January - June 1957)..

It will be seen that these administrative instructions do not create any right as such in favour of persons with whom they deal. They are for guidance of the authorities in the matter of granting quotas for the purpose of the order.

He also cited the rulings of the Supreme Court reported in *Liberty Oil Mills and Others Vs. Union of India (UOI) and Others*, in support of the above contention. He further referred to Serial No. 61, in Appendix 3, Import and Export policy for the year 1983-84 which reads as follows :-

"... 61. Borneol and its esters including bornyl acetate."

He contended that Isoborneol is a derivative of the chemicals described therein and in the public notice it was removed from the OGL list to the prohibited item.

11. With regard to the contention namely, the Public Notice dated 17-10-1983 has to be read as one issued u/s 3 of the Import and Export Control Act and not as a change in policy, but as a change in the statutory order, the learned senior central Government standing counsel cited the ruling of the Supreme Court in Joint Chief Controller of Imports and Exports, Madras Vs. Aminchand Mutha Etc., wherein it is observed thus :

"Now there is no doubt that it is open to the Central Government, u/s 3 to prohibit the import of any article but that can only be done by an order published in the official gazette by the Central Government u/s 3. The High Court has found that no such order under S. 3 of the Act has been published. Nor has any such order by the Central Government been brought to our notice. All that has been said is that in the declaration of policy as to import, the word, "nil" appears against fountain pens. That necessarily does not amount to prohibition of import of fountain pens unless there is an order of the Central Government to that effect published in the official gazette. We therefore, agree with the High Court that unless such an order is produced it would be open to the licensing authority to issue a licence for the period of January - June 1957 even after October 1, 1957..."

In Union of India v. Anglo Afghan Agencies (AIR 1968 SC 718) it is observed thus :

"... The orders which the Central Government may issue in exercise of the power conferred by Section 3 of the Imports and Exports Control Act may be executive or legislative. In exercise of that power, the order was issued on December 7, 1955, that was clearly legislative in character..."

Being general provisions restricting the rights of citizens to carry on business in certain commodities the schemes were it was said, legislative in character and the obligations imposed or the sanctions prescribed thereby must on that account be deemed to be enforceable by command of the court..."

With regard to second contention that public notice or rule will have no retrospective effect, Mr. V. T. Gopalan submitted that upon the facts and circumstances of the case, public notice is not retrospective as a provision was made in the public notice to allow import of Isoborneol against the letter of credit provided shipment of goods were made within a period of 90 days from the date of the said public notice.

12. With regard to the third contention Mr. V. T. Gopalan submitted that the doctrine of promissory estoppel will not apply to the facts and circumstances of the case and in this connection, the learned senior counsel referred to paragraph-3 of the public notice, No. 44-ITC (PN)/83 dated 17-10-1983 which reads as follows :-

"Rep Licences/Additional licences held by Export Houses and Trading Houses shall cease to be valid for import of Acetic Acid, Ethyl Acetate, Isoborneol, threading taps 1.6 mm to below 3.0 mm dia and lead alloys, referred to at S. Nos. (1), (2), (3), (5) and 19 in para 2 above except to the extent permissible under the relevant provisions of Import and Export Policy 1983-84 as per the amended policy of those items. This restriction will not apply to imports covered by irrevocable letters of credit opened and established before the date of this Public Notice as per the policy in force, against which shipment of goods is made within a period of 90 days from the date of this public notice. This facility of import against irrevocable letters of credit already opened will also be available to eligible importers for import of Isoborneol and threading taps 1.6 mm to below 3.0 mm dia under Open General Licence as in force before the date of this Public Notice."

He further submitted that the Central Government has given adequate time, namely, 90 days from the date of Public Notice for those who have opened the Letter of Credit before the Public Notice was enforced and therefore, it was the duty of the petitioner to have made arrangements for the shipment of the goods within 90 days from the date of the issue of the Public Notice, and that the petitioner having failed to utilise the said 90 days, is not entitled to invoke the doctrine of promissory estoppel, on the facts and circumstances of the case.

13. I have carefully considered the respective contentions made by the learned senior counsel on behalf of the petitioner and the respondents. The Import and Export Control Act, 1947 was originally enacted as a temporary measure to prohibit or control imports and exports as a war time measure. In *Baul and Another Vs. State of U.P.*, the Supreme Court has summarised the genesis of the Import and Export (Control) Act, 1947 and it reads thus :

"The Imports and Exports (Control) Act 18 of 1947 was enacted on March 24, 1947 with the object of enabling the Central Government to continue to exercise the power to prohibit, restrict or otherwise control imports and exports which had till then been controlled by orders issued in exercise of the powers conferred by R. 84 of the Defence of India Rules, 1939 as extended by the Emergency Provisions (Continuance) Ordinance 20 of 1946.

14. Mr. Habibullah Basha, the learned senior counsel for the petitioner emphasised from the above rulings of the Supreme Court and other Courts and pointed out that there is a marked difference between the exercise of executive power and the issue of public notices and an order made in exercise of power u/s 3 of the Imports and Exports Control Act, 1947 which is legislative in nature.

15. Mr. V. T. Gopalan, the learned Senior Central Government Standing Counsel emphasized that both the policy of Import and Export issued by the Central Government in the relevant material period as well as the statutory orders u/s 3 of the Import and Export Control Act, 1947 are one and the same and have statutory force. In particular, Mr. V. T. Gopalan, the learned Senior Central

Government Standing Counsel emphasized upon the latest ruling of the Supreme Court in *Ms. Darshan Oil Pvt. Ltd. and Another Vs. Union of India and Others*, wherein the Supreme Court observed that, "... the Import and Export Policy relating to the material period of that case declared by the Central Government was issued by an order in exercise of the power conferred u/s 3 of the Import and Export Control Act and therefore, Mr. V. T. Gopalan submitted that the Public Notice in question was issued, in exercise of the power vested u/s 3 of the Import and Export Control Act and it has statutory force. On the other hand, Mr. Habibullah Basha, the learned Senior Counsel emphasized that when there is a conflict between executive public notice announcing a change in the policy and the statutory order passed by the Central Government, in exercise of power u/s 3 of the Import and Export Act, 1947, the statutory order issued under 3 or the Act alone will prevail.

16. The crux of the matter with regard to the first submission of the learned Senior counsel for the petitioner and the respondents is that when there is a conflict between an executive public notice changing the policy of Import and Export and a statutory order issued by Central Government, in exercise of the power u/s 3 of the Act, which is to prevail ?

17. In a decision of the Supreme Court in *Baul and Another Vs. State of U.P.*, , the Supreme Court has emphatically pointed out thus :

"The order which Central Government may issue in exercise of the power conferred by Section 3 of the Import and Export Control Act, 1947 may be executive or legislative."

It is clear from the above ruling of the Supreme Court that the power conferred u/s 3 of the Import and Export Control Act, 1947 may be executive or legislative depending upon whether executive public notice is issued or orders u/s 3 of the Act are made which orders are legislative exercise of power. Upon the facts and circumstances of the case, the public notice dated 17-10-1983 issued is in exercise of executive power. This aspect of the matter has been made clear in *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, , by the Supreme Court which reads as follows :

"We shall now proceed to consider the merits. Sub-section (2) of S. 3 of the Act clearly lays down that all goods, to which an order under sub-section (1) thereof applies, shall be deemed to be goods of which the export or import has been prohibited or restricted u/s 19 of the Sea Customs Act. Therefore, S. 167 (8) of the Sea Customs Act can be attracted only if there was a contravention of the order issued Section 3 of the Act."

Learned counsel for the respondent asserts that the said public notice is an order made in exercise of the power conferred on the Central Government, u/s 3(1) of the Act. On the other hand, learned counsel for the petitioner contends that public notices are not such orders but only information given to the public for their guidance.

The Central Government itself makes a clear distinction in the form adopted in issuing the notice. Secondly, while the notifications issued under S. 3 of the Act are described as orders, the notices are described as "public notice"; while the notifications, under S. 3 of the Act regulate the rights of parties, the public notices give information to the public regarding the principles governing the issue of Import licences for specified periods. It is also clear that the orders issued under S. 3 of the Act, having statutory force, have to be repealed, if the new order in any manner modifies or supersedes the provisions of an earlier order; public notices are issued periodically without repealing or modifying the earlier notices or notifications.

.... To put it differently, orders made under S. 3 of the Act have statutory force, whereas public notices are policy statements administratively made by the Government for public information.

It follows from the above that the infringement of a condition in the licence not to sell the goods imported to third parties is not an infringement of the Order, and, therefore, the said infringement does not attract S. 167(8) of the Sea Customs Act."

The learned Standing Counsel for the Central Government was not in a position to produce any order passed u/s 3(3) of the Act, whereby it has amended the Schedule to the OGL Order. On the other hand, the learned Senior Counsel for the petitioner produced OGL No. 1/83 which is an order passed by the Central Government in Exercise of the power conferred u/s 3(3) of the Import and Export Control Act, 1947 and therefore, it is an exercise of the subordinate legislative power of the Central Government with regard to the items given in OGL, mentioned above. No doubt the policy can be amended and the public notice has to be read as the exercise of executive power amending the Public Policy. However, the same was not followed by the issue of an order u/s 3 of the Act to amend OGL No. 1/83.

18. It is the submission of Mr. Habibullah Basha, that this is an order passed in exercise of subordinate legislative power, namely in exercise of Section 3 of the Imports and Exports (Control) Act, 1947 and therefore, it has a statutory force. The said order in item No. 22 states that items covered under Part III of the schedule to the 1 licence can be imported under Open General Licence by Actual Users (Industrial) and others, for stock and sale. Clause 26 of the Schedule says that such goods are shipped on through consignment to India on or before 31st March 1984 or, in the case of Actual User (Industrial), on or before 30th June, 1984 against firm orders for which irrevocable letters of credit are opened and established on or before 29-2-1984. In the schedule of the said order, Part III refers to the items allowed for import by Actual Users, and others for stock and sale. Item 16 states that all other items permitted under Open General Licence in terms of the import policy in force, other than those covered by part I & II. Clause 26 of the said order says that the goods are shipped on through consignment to India on or before 31st March, 1984 or, in the case of Actual User

(Industrial) on or before 30th June, 1984 against firm orders for which irrevocable letters of credit are opened and established on or before 29-2-1984 without any grace period whatsoever. The petitioner comes under the category of users for sale. Persons who import under Open General Licence for stock and sale and in pursuance of this Open General Licence Order No. 1 of 1983, the petitioner opened a firm letter of credit on 6-7-1983 and also entered into a firm contract with the foreign supplier on 24-10-1983. Therefore, he has complied with the terms and conditions of the Open General Licence Order No. 1 of 1983 relating to item imported by the petitioner. While so, by public notice No. 44-ITC (PN)/83-New Delhi, the first respondent has prohibited the import of Isoborneol by removing it from the Open General Licence category to banned item and added Item 61 of Appendix 3 whereby the imports were restricted to 90 days not only the prohibition of Isoborneol but for the earlier commitments made by the irrevocable letter of credit.

19. In answer to the said contention, Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel, who appeared on behalf of the respondents submitted that as the public notice dated 17-10-1983 is in exercise of the power conferred u/s 3 of the Imports and Exports (Control) Act, 1947, it has the same consequence, namely, it will amend the provisions contained in the order passed with regard to Open General Licence No. 1 of 1983.

20. In this connection, Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel referred to the ruling of the Supreme Court in *Ms. Darshan Oil Pvt. Ltd. and Another Vs. Union of India and Others*, wherein the Supreme Court has observed that the "Import and Export Policy for the period from 1-4-1983 to 31-3-1984 was declared by Central Government by order u/s 3 of Import and Export (Control) Act, 1947" and contended that the Public Notice dated 17-10-1983 has equal force as the order made u/s 3 of Import and Export (Control) Act, 1947. I am unable to accept the said contention of Mr. V. T. Gopalan. There is no controversy that in the instant case, the Open General Licence order No. 1 of 1983 as well as the Public Notice, dated 17-10-1983 has been issued by the Central Government in exercise of the power conferred u/s 3 of the Imports and Exports (Control) Act, 1947. Further, the point for consideration is what is the nature of the power that has been exercised by the Central Government. It is clear from the wording of the Open General Licence Order No. 1 of 1983 that the said order has been passed in exercise of the power conferred u/s 3 of the Imports and Exports (Control) Act, 1947. Therefore it is clear that it is in exercise of the Subordinate Legislative power that the Open General Licence Order No. 1 of 1983 was passed by the Central Government. On the other hand, the Public Notice, dated 17-10-1983 no doubt made u/s 3 of the Act is in exercise of the executive power of the Central Government.

21. The cardinal point for consideration in this case is that when there is a conflict between an order passed by the Central Government in exercise of subordinate legislative power, u/s 3(3) of the Import and Export (Control) Act,

1947, in the instant case, viz., OGL Order No. 1/83, dated 15-4-1983, and an executive order passed by the Central Government, u/s 3 of the Import and Export (Control) Act, 1947, in the instant case, viz., Public Notice No. 44/I.T.C./ (PN)/83, dated 17-10-1983 which of the two has to prevail ? As observed by the Supreme Court, in East India Commercial Company's Case, reported in AIR 1962 - S.C. - 1993.

"The Central Government itself makes a clear distinction in the form adopted in issuing the notice. Secondly, while the notifications issued u/s 3 of the Act are described as orders, the notices are described as "public notices"; while the notifications, under S. 3 of the Act regulate the rights of parties, the public notices give information to the public regarding the principles governing the issue of import licences for specified periods. It is also clear that the orders issued under S. 3 of the Act, having statutory force, have to be repealed, if the new order in any manner modifies or supersedes the provisions of an earlier order; public notices are issued periodically without repealing or modifying the earlier notices or notifications.

To put in differently, orders made under, S. 3 of the Act have statutory force, whereas public notices are policy statements administratively made by the Government for public information.

It follows from the above that the infringement of a condition in the licence not to sell the goods imported to third parties is not an infringement of the order, and, therefore, the said infringement does not attract S. 167(8) of the Sea Customs Act.

A Division Bench of the Delhi High Court in the case of Kaptan's Enterprises and Another Vs. Union of India, has observed as follows :-

"The second question that arises is regarding the effect of the public notice dated 11-11-1983. On behalf of the petitioners, two points are made. One, relying on the decision of the Supreme Court in East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, and of this court in Bansal Export (P) Ltd. and another Vs. Union of India and others, is that the public notice of 11-11-1983 being only an administrative circular or instruction has no statutory force (vide paragraphs 31 to 33 of the above Supreme Court Judgment) and cannot override or obliterate the right of import available to traders under OGL. 1/1983. The second is that, even if it has the same effect as a law or statutory notification it will be applicable only in respect of imports made into India after 11-11-1983 otherwise that in pursuance of a firm commitment or contract entered into by the importer before that date. It is urged that the announcement of the import policy coupled with OGL No. 1/1983 in respect of the financial year 1983-84 amounts to a promise or representation to the public in general that imports will be permitted subject only to the terms, restrictions and conditions thus announced; and, though these terms, restrictions and conditions could be changed by the Government, that could be done only with retrospective effect

and without affecting any previously acquired right. It cannot deprive an importer of the valuable right of importing certain goods under OGL that was available to him till then and in exercise of which he has, before the date of the change of police entered into contracts or other commitments which he can avoid only at great peril, risk or loss. In other words the petitioners seek to invoke the doctrine of promissory estoppel enunciated by the Supreme Court in the Indo Afghan case AIR 1968 SC 718 and elaborated in the Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, . Our attention is also invited to the recent decision of a Full Bench of this Court in Bansal Export (P) Ltd. and another Vs. Union of India and others, explaining the scope of the application of this doctrine in matters of import-export policy and law."

In the instant case, no doubt the order of Open General Licence No. 1 of 1983 as well as the Public Notice, dated 17-10-1983 is issued in exercise of the power conferred u/s 3 of the Imports and Exports (Control) Act, 1947 but it varies in the nature of the power exercised. In the case of the order of Open General Licence No. 1 of 1983, it is the exercise of the Subordinate legislative power u/s 3; whereas in the case of public notice, it is in the exercise of the executive power. Following the observations of the Supreme Court in The Union of India and Others v. Anglo Afghan Agencies etc., and the East India Commercial Company's Cases referred to above and also the ruling of Delhi High Court in Kaptan's Enterprises and Another Vs. Union of India, and the Calcutta High Court in (Jain) Jain Shudh Vanaspati Ltd. Vs. Collector of Customs, , it is clear that the amendment to the policy has not the same force to amend the subordinate Legislation made u/s 3 of the Imports and Exports (Control) Act, 1947 in the form of Open General Licence No. 1 of 1983. The net effect will be that no amendment has been carried out to the open General Licence No. 1 of 1983. Further, there is conflict between the order of Open General Licence No. 1 of 1983 and the Public Notice, dated 17-10-1983. I am of the considered view that when there is a conflict between the exercise of the subordinate legislative power exercised u/s 3 of the Imports and Exports (Control) Act, 1947 and the executive Power, the order in exercise of the Subordinate Legislative power will prevail. Further, the Public Notice, dated 17-10-1983 has no legal effect of amending the O.G.L. Order No. 1/83.

22. With regard to the second contention of Mr. Habibullah Basha the learned Senior Counsel for the petitioner, it is submitted that in any event, the Public Notice will have no retrospective effect. In this connection, the learned senior counsel for the petitioner, Mr. Habibullah Basha cited the following rulings of the Supreme Court in the case of the The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others, and in Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another, and in Union of India and others Vs. Kanunga Industries, . It is clear from the above rulings that notifications will have only prospective operation unless the enactment provides for a retrospective operation. In view of the above, there is force in the contention of the learned senior counsel for the

petitioner that the Public Notice will have only prospective effect and not retrospective effect.

23. The third submission of Mr. Habibullah Basha, the learned senior counsel for the petitioner is that in any event the public notice is hit by the doctrine of promissory estoppel. In support of the said contention, the learned senior counsel for the petitioner cited the ruling of the Supreme Court in *Anglo Afghan Agencies*" case as referred to above and submits that in pursuance of the Open General Licence No. 1 of 1983, the petitioner acted upon and carried out certain acts detrimental to himself, namely by entering into a firm contract with the foreign supplier for the supply of Isoborneol and also by opening an irrevocable letter of credit. He further referred to the correspondence between the foreign supplier and the petitioner subsequent to the issue of public notice and pointed out that the petitioner tried his best to persuade the foreign supplier to send the shipment within 90 days as per the amended public notice but the foreign supplier refused to comply with his request and insisted upon the earlier commitment. As the petitioner has already opened an irrevocable letter of credit, he has no other option but to allow the foreign supplier to encash the letter of credit. Therefore, it was submitted that the petitioner has complied with all the terms of Open General Licence No. 1 of 1983 and it is not open to the respondents to unilaterally issue a public notice which adversely affects the interest of the petitioner and therefore, the public notice is (hit) by the doctrine of promissory estoppel. In answer to this Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel appearing for the respondents referred to the counter-affidavit filed by the respondents wherein in para 6, it is stated as follows :

"The plea of estoppel raised in the grounds are not tenable. The alleged assurance of the Government in view of the opening of the letters of credit is not taken and it only adds that the shipment should be done within 90 days from the date of public notice."

24. I have carefully considered the contentions of the learned Senior counsel for the petitioner and respondents with regard to the third contention and I am of the view that upon the facts and circumstances of the case, the doctrine of promissory estoppel will apply. It is well settled by the above rulings of the Supreme Court that the doctrine of promissory estoppel is applicable against the Government in exercise of its Governmental or public or executive functions and executive action cannot be invoked to defeat the applicability of doctrine of promissory estoppel. I am, therefore, of the considered view that upon the facts and circumstances of the case, the doctrine of promissory estoppel will apply, as the petitioner in pursuance of Open General Licence Order No. 1 of 1983 has carried out certain acts detrimental to himself by entering into contract with the foreign supplier to supply Isoborneol and by opening an irrevocable letter of credit and other incidental and connected acts. It was further pointed out by the learned senior counsel for the petitioner that by virtue of an earlier order passed

by this court in W.M.P. Nos. 12555 and 12556 of 1984, the petitioner was allowed to clear the goods on payment of the customs duty, and the petitioner has paid the customs duty and cleared the goods. The only point that is open to the respondents is with regard to the levy of penalty u/s 124 of the Customs Act. In the instant case, the import has been in accordance with O.G.L. Order No. 1/83 and as the Public Notice dated 17-10-1983 has no legal effect of amending the O.G.L. Order No. 1/83, the import of Isoborneol is in accordance with law and levy of penalty does not arise upon the facts and circumstances of the case.

25. For the reasons stated above, I am of the view that the impugned notice is without jurisdiction as the petitioner has imported Isoborneol strictly in accordance with the Open General Licence Order No. 1 of 1983, dated 15-4-1983. In view of the above the writ petitions are allowed. There shall be no order as to costs.