

(1990) 04 MAD CK 0037

In the Madras High Court

Case No : Writ Petition No. 75 of 1981 and 12025 of 1983

Rexin Sea (India)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-04-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 8
Central Excises and Salt Act, 1944 — Section 11B
Customs Act, 1962 — Section 25, 27

Citation : (1991) 34 ECC 170 : (1991) ECR 282 : (1991) 53 ELT 218

Hon'ble Judges : S. Ramalingam, J

Bench : Single Bench

Advocate : Shri R. Krishnamurthy, for M/s N.S. Nandakumar and R. Mahesh, for the Appellant; Shri P. Narasimhan, Sr. C.G.S.C., for the Respondent

Judgement

1. The petitioner carries on business of manufacture of P.V.C. coated fabrics. The petitioner, finding that the raw material PVC (Polyvinyl Chloride

Resin) is not available in sufficient quantities in India, wanted to import the same from foreign countries. P.V.C. Resin is classified under Customs

Tariff Act under Item 39.01/06 and the duty is payable 100% ad valorem.

2. However, in exercise of the powers conferred by Section 25 of the Customs Act, the Central Government issued Notification No. 66-Cus., 15-

3-1979, under which they ordered that PVC Resin when imported into India, would be exempt from the whole of the customs duty leviable

thereon. This notification specifically stated that the same shall be in force upto and inclusive of 31st March, 1981. The petitioner states that acting

upon the assurance and promise so held out by the aforesaid Notification dated 15-3-1979, he placed orders with foreign suppliers for import of

certain quantities of PVC Resin. The contract between the petitioner and the

foreign suppliers specifically provided that the consignment is to be delivered before 31-3-1981. The petitioner opened irrevocable letters of credit in favor of the suppliers. One of the consignments so ordered was expected to arrive at the Madras Port on 5th January, 1981. Before the petitioner could clear the consignment by availing the benefit of Notification 66-Cus., dated 15-3-1979; it came to know that by a subsequent notification bearing No. 205-Cus., dated 16-10-1980, the earlier Notification 66-Cus., dated 15-3-1979 was superseded and customs duty at 40% ad valorem was imposed.

3. It is at this stage the present writ petition was filed on 5th January, 1981 praying for a writ of mandamus to direct the respondents to withdraw and cancel the Notification No. 205-Cus., dated 16-10-1980 or in the alternative to forbear the respondents from applying the said notification to the petitioner's case and for a further direction to enable the petitioner to clear the consignment by availing the benefit of Notification 60-Cus., dated 15-3-1979. This writ petition was admitted and by an interim order, the petitioner was enabled to clear the consignment on paying 50% of the disputed duty and furnishing a bank guarantee for the balance. According to the petitioner, because of financial constraints, it was not able to pay 50% of the disputed duty. In such circumstances, it prayed the 2nd respondent to warehouse the imported consignment which arrived from time to time much before 31-3-1981. Thereafter, it paid the full duty as per the Notification No. 205-Cus., dated 16-10-1980 and subsequent Notifications and cleared the consignments for use in its factory. After having so paid the amount and cleared the consignment, the petitioner has filed a subsequent writ petition bearing No. 12025 of 1983 praying for a mandamus directing the 2nd respondent to refund the customs duty collected from the petitioner in respect of PVC Resin imported by it prior to 31-3-1981 under different bills of lading.

4. Mr. R. Krishnamoorthy, learned senior counsel appearing for the petitioner in both the writ petitions submit that the respondents are bound by the principle of promissory estoppel and they are bound to give the benefit of Notification 66 dated 15-3-1979 to the PVC Resins imported by the petitioner before 31-3-1981 and the respondents should be restrained from invoking to their aid Notification No. 205 dated 16-10-1980. The

case of the petitioner is that the trade was given a promise that the Notification No. 66-Cus., dated 15-3-1979 would be in force upto and

inclusive of 31st March, 1981. It is under the Notification, the Central Government in public interest exempted polyvinyl chloride Resin when

imported into India from the whole of duty of customs leviable thereon. Based on this representation contained in the Notification dated 15-3-

1979, the petitioner had placed orders with foreign suppliers for import of PVC Resins. It is not in dispute that such firm orders were made much

before 31-3-1981. It is also not in dispute that the letters of credit were opened before 31-3-1981. The consignment in question had also arrived

at the Madras Port much before 31st March, 1981. Therefore, if Notification No. 66-Cus., dated 15-3-1979 had been applied to the imports

made by the petitioner and covered by those writ petitions, then the petitioner would not have had to pay any customs duty. The petitioner's case

is that it was given a representation by the Central Government that if it would import polyvinyl chloride Resin on or before 31st March, 1981, then

it would not have had to pay duty of customs leviable thereon. It states that but for such representation, it would not have ventured into this task of

importing PVC Resins from foreign countries. It is also its case that if customs duty at 40% etc., is levied and collected from it, then it would not be

in a position to stand the competition in the trade as its cost of production would increase enormously. Being lulled into such a belief that it would

be entitled to clear the consignment if imported before 31st March, 1981 without payment of customs duty, it was shocked and surprised when the

respondents invoked the aid of Customs Notification 205, dated 16-10-1980 and refused to allow clearance without payment of customs duty.

The petitioner thus invokes the well known doctrine of promissory estoppel.

5. Mr. P. Narasimhan, Senior Central Government Standing Counsel would oppose these contentions.

He would submit that there cannot be an estoppel against the statute. It is his case that a Notification issued by exercise of powers u/s 25 of the

Customs Act is neither an administrative action, nor the making of subordinate legislation, but it will amount to legislation itself, because any

Notification made u/s 25 has to be tabled before the House of the Parliament and comes into force only on approval. Secondly, he would submit

that in any event, when the Government of India had taken a policy decision that effective from 16-1-1980, the import of PVC Resins would

attract customs duty at 40% ad valorem, etc., the petitioner cannot question the policy of the government.

6. How far the principle of promissory estoppel can be invoked by an importer or by a manufacturer had come up for consideration in more than

one decisions of the Supreme Court. In Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., a case arising under the Central Excises

and Salt Act, in dealing with the doctrine of promissory estoppel, the Supreme Court held that the earlier decision reported in Jit Ram Shiv Kumar

and Others Vs. State of Haryana and Others, was not good law and held as follow :-

The doctrine of promissory estoppel is well established in the administrative law of India. It represents a principle evolved by equity to avoid

injustice and though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this

doctrine is the interposition of equity which has always, true to form, stepped in to mitigate the rigour of strict law. This doctrine, though of ancient

vintage, was rescued from obscurity by the decision of Mr. Justice Denning in his celebrated Judgment in Central London Property Trust v. High

Trees House Ltd. The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and

unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or

intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other

party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be in

equitable to allow him to do so, having regard to the dealings which have taken place between the parties. It has often been said in England that the

doctrine of promissory estoppel cannot itself be the basis of an action; it can only be a shield and not a sword; but the law in India has gone far

ahead of the narrow position adopted in England and as a result of the decision of Supreme Court in Motilal Sugar Mills v. State of Uttar Pradesh,

it is now well settled that the doctrine of promissory estoppel is not limited in its application only to defence but it can also found a cause of action.

The decision of this court in Motilal Sugar Mills case supra (contains an exhaustive discussion of the doctrine of promissory estoppel and we find ourselves wholly in agreement with the various parameters of this doctrine outlined in that decision. The doctrine of promissory estoppel is also applicable against the Government and it cannot be defeated by invoking the defence of the executive necessity because if party who has, acting in reliance on a promise or representation made by the Government, altered his position, is entitled to enforce the promise or the representation against the Government, even though the promise or representation is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government. The doctrine of promissory estoppel is also applicable against public authorities because there is no distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned. The Supreme Court Judgment in Jeet Ram's case where it was held 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, is not a correct law to the extent. However, there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. The doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the court would not raise an equity in favor of the person to whom the promise or representation is made; [(1979)2 SCR 64] approved; Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., All England Law Report relied upon. Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, disagreed]"".

Very recently, a Division Bench of this court in their judgment reported in Union of India Vs. Chakra Tyres Limited, after following the decision of

the Supreme Court in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., and also the decision of the Bombay High Court in Tapti

Oil Industries v. State of Maharashtra 1984 (2) ECC 307 held that on the principle of promissory estoppel, the writ petitioner would be entitled to

relief. In that case, by a Notification No. 268/82-Central Excise, dated 13-11-1982 made in exercise of powers under Rule 8 of the Central

Excise Rules, the Central Government exempted from so much of the duty of excise leviable on the manufacture of tyres and tubes for automobiles

as is in excess of the amount calculated at the rate of 75% of the rate of duty leviable on such tyres. This Notification specifically stated that the

exemption contained in the Notification shall not apply to clearance of tyres effected after the expiry of a period of 7 years from the date of first

clearance of tyres from any factory. This notification was understood as promising a concession for a definite period of 7 years from the date of

first clearance of tyres from the factory. The petitioner in that case claimed that he acted on the basis of that representation and was manufacturing

tyres and tubes for automobiles. However, by a subsequent Notification No. 159/85 dated 15-7-1985, the benefit conferred by Notification No.

268/82 dated 13-11-1982 was rescinded. The Division Bench noticed that the later notification was issued will within the period of 7 years

assured under the earlier Notification. It was in such circumstances, when relief by way of writ petition from invoking Notification 159/85 dated

15-7-1985 by the Department against the petitioner therein was sought, it was contended by the Revenue that a Notification issued under Rule 8 is

legislative in character and the doctrine of estoppel is not available against legislative enactment (no estoppel against law). The Division Bench

relying on the decision reported in Kerala State Electricity Board v. Indian Aluminium Co. AIR 1976 SC. 1081 where it was held as follows :-

Even so, we do not think that where an executive authority is given power to frame subordinate legislation within stated limits, rules made by such

authority if outside the scope of the rule making power should be deemed to be valid merely because such rules have been placed before the

legislature and are subject to such modification, amendment or annulment, as the case may be, as the legislature may think fit. The process of such

annulment, modification or annulment is not the same as the process of legislation and in particular it lacks the assent either of the President or the

Governor of the state, as the case may be. We are, therefore, of opinion that the correct view is that notwithstanding the subordinate legislation

being laid on the table of the Houses, of Parliament or the State Legislature and being subject to such modification, annulment or amendment as

they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the rule making power provided in the statute"".

repelled the defence of the Revenue. It would therefore be seen that though a Notification issued under the relevant provisions of an enactment -

be it Rule 8 of the Central Excises and Salt Act or Section 25 of the Customs Act, it would still remain a subordinate legislation, even though it may

have to be laid on the table of the Houses of the Parliament and is subject to modification, annulment or amendment as the Parliament may desire.

Therefore the first of the contentions of the learned counsel for the respondents that the notification being a legislative measure, there cannot be an

application of the principle of promissory estoppel against such legislative measures, has to be rejected in the light of the Division Bench decision

which followed the decision of the Supreme Court in holding that such Notifications are not legislative enactments made by parliament or the

Legislature as the case may be, but are only subordinate legislations. In such a case, the doctrine of promissory estoppel will apply.

7. If that be the position, the next question is whether there was any representation by the respondents and whether the petitioner had acted on

those representations, which would enable the petitioner to plead that the respondents should be prohibited from going back on their

representation. The facts have already been stated which would show that by the Notification 66 dated 15-3-1979, the respondents held out a

promise. It is also not in dispute that acting on that representation, the petitioner imported the consignment of P.V.C. Resin well before 31-3-1981.

Now if the new Notification No. 205-Cus., dated 16-10-1980 is applied, the petitioner would be put to detriment. Hence, the ingredients for the

application of the doctrine of promissory estoppel are available on the facts of this case. The conclusion is that the respondents cannot apply

Customs Notification 205 dated 16-10-1980 for the consignments imported by the petitioner which arrived at the Madras Port on or before 31-

3-1981.

8. The contention of the respondents" counsel that the policy of the Government cannot be questioned though sounds attractive, cannot be upheld

because the doctrine of promissory estoppel has become a well recognised and accepted law. Further, under the guise of a policy decision, rights

which came to be vested in citizens on the strength of a valid Notification, cannot be arbitrarily and unreasonably interfered with. Reliance in this

regard may be made on the decision of the Supreme Court reported in I. E. Newspapers (Bombay) P. Ltd. v. Union of India where in paragraphs

69, 70, 71 and 77, the Supreme Court dealt with the theory of unreasonableness of subordinate legislation and executive orders. Mr. P.

Narasimhan, learned Senior Central Govt. Standing Counsel would rely on the decision of a Full Bench of the Delhi High Court reported in

Bombay Conductors & Electricals v. Chandramouli (Delhi) 1984 E.C.C. 1 to contend that the doctrine of promissory estoppel is not available in

respect of exemption Notifications. But in the light of the decision of the Division Bench of this court reported in Union of India Vs. Chakra Tyres

Limited, which is binding on me and since the Full Bench decision of the Delhi High Court in Bombay Conductors & Electricals v. Chandramouli

1984 E.C.C. 1 may have only a persuasive value, the contention of the respondents is repelled.

8A. Therefore, W.P.No. 75 of 1981 will stand allowed to the extent that the respondents would be restrained by a writ of mandamus from

applying Notification No. 205 dated 16-10-1980 to the imports made by the petitioner, which arrived at the Madras Port on or before 31-3-

1981 of PVC Resins covered by Notification No. 66-Cus., dated 15-3-1979.

9. As stated earlier, though an interim order was granted by this court permitting the petitioner to clear the consignment on payment of 50% of duty

and furnishing bank guarantee for the balance of the disputed amount, the petitioner was not in a position to clear the consignment because of its

financial constraints. The consignment had to be warehoused and thereafter, the petitioner had cleared portions of the consignment by paying the

duty in force at the time of clearance. It is the case of the petitioner, that but for the illegal demand to pay customs, dated 16-10-1980, it would not

have had the misfortune of having the consignment warehoused and clear the

same thereafter. The petitioner would submit that by the wrongful act of the respondents in not allowing the petitioner to clear the consignment by availing the benefit of Notification No. 66-Cus, dated 15-3-1979, the petitioner had been compelled to pay the demanded duty at the time of clearance of the consignment from the warehouse which duty had not been paid by it voluntarily. Even on 5th January, 1981, it had filed W.P. No. 75 of 1981 questioning duty as per Notification 205-Cus., dated 16-10-1980. The petitioner therefore prays in W.P. No. 12025 of 1983 that the duty which it had been so compelled to pay, should be refunded to it, because such payment not being supported by law, is an illegal extraction, which the respondents have no legal right to retain with them. The petitioner would submit that a tax or duty collected without authority of law should be ordered to be refunded.

10. In answer to the above submissions, Mr. P. Narasimhan would submit that under the provisions of the Customs Act, the petitioner should have filed an application for refund within stipulated period and not having filed such an application, it is not open to the petitioner to ask for refund by filing a writ petition. He would further submit that even assuming that the demand and collection of duty in the instant case were not authorised by law, a writ would not lie, but the remedy should be way of a suit.

11. It is a well recognised position in law that if a tax is collected without authority of law, the Revenue has no jurisdiction to retain the same, because the Constitution itself states, no taxation without authority of law. It would not be fair to drive the petitioner to file a suit when facts are not in dispute. Hence, for the foregoing reasons, W.P. No. 12025 of 1983 is allowed. While giving the benefit of customs Notification 66 dated 15-3-1979 to the consignments in question, any duty in excess of what is warranted by the said Notification collected from the petitioner would be refunded to it. Time for refund 31st July, 1990. However, there will be no order as to costs.