

(1992) 11 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No. 10444 of 1992

Rizwan International

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 13-11-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Constitution of India, 1950 — Article 14, 19(1), 226, 31(2)
Customs Act, 1962 — Section 11, 159, 25
Evidence Act, 1872 — Section 115
Imports and Exports (Control) Act, 1947 — Section 3

Citation : AIR 1994 Mad 112 : (1994) 73 ELT 804

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : R. Krishnamurthy and M/s. V. Soundarajan and T.S. Thiagarajan, for the Appellant; M. Kalyanasundaram, Additional Central Govt. Standing Counsel, for the Respondent

Judgement

1. Petitioner is a recognised exporter. The main product of export is musical instruments part made out of red-sanders wood. The petitioner is a

partnership firm and it has installed the necessary infrastructures for carrying on its export business by setting up a production facility at No. 1

Rizwan Road, Madhavasram. Red Sanders Wood is widely used by Japanese for making the musical instrument known as ""Shamisen"". It is used

for accompaniment of two types of vocal music. Export of red-sanders musical instruments and chips and powder and koto parts had been taking

place for the past several years from Tamil Nadu and in the import-export policy prevailing up to 31-3-1992. The export of the said product was

on the basis of the licence issued by the Chief Controller of Imports and Exports, New Delhi. In fact the policy was for the period from April 1990

to March 1993. But in March 1992 the policy was suddenly changed and a new policy was framed for five years commencing from 1-4-1992

ending with 31-3-1997. Under the new policy, a prohibition is introduced against export of red-sanders in any form. The petitioner made a

representation to the authorities submitting that there is a confusion in understanding the new policy and the matter should be clarified as to whether

musical instruments and other chips etc. which were being exported by the petitioner could be exported even after the coming into force of the new

policy. Second respondent sent a reply on 14-5-1992 under reference No. 57/1/92/E.II/230. The reply is to the effect that the export of red-

sanders in any form is prohibited under the new policy and the petitioner will not be entitled to continue the export. A reference is made in the letter

to Serial Number 7 of Part I, Serial No. 44 of Part V of Negative List of Exports in the Export and Import Policy, 1992-97. Aggrieved thereby,

the petitioner has filed this writ petition for quashing the said communication dated 14-5-1992 and for the issue of a mandamus directing the

respondents to grant a licence for the value of U.S-\$ 75,000/- against the letter of credit No. 41-2432445-031. The petitioner on the basis of the

earlier policy had been entering into contracts with foreign buyers for sale of musical instruments parts. Under one such contract, a letter of credit

was opened on 21-2-1992 by Sanwa Bank, Osaka, in favour of Indian Overseas Bank, Madras. It is an open irrevocable letter of credit and the

amount mentioned is U.S. \$ 1,00,000/- The date of expiry for negotiations was mentioned as July 31, 1992. But, it was subsequently extended up

to the end of December 1992. As per the said letter of credit, it covers musical instruments parts made of red-sanders as approved by buyer.

2. There is no dispute before me as to the genuineness of the letter of credit on the correctness of the claim made by the petitioner that it had

entered into contracts with foreign buyers prior to the introduction of the new policy, 1992-97.

3. Item No. 7 of Part I of Negative List of Exports reads thus:

Wood and Wood products in the form of logs, timber, stumps, roots, barks, chips, powder, flakes, dust, pulp and char coal".

Item No. 44 of Part V is in the following words:

Processed timber of all species excluding sandalwood and redsanders wood".

Though the petitioner attempted to make a distinction between wood"" and ""timber"" and contend before the authorities that there was a distinction between ""Wood"" and ""timber"" and that the position was not clear with regard to export of parts of musical instruments made of red-sanders, such a contention is not urged before me and I do not think it necessary to go into the same. In so far as this case is concerned, it is contended by the petitioner that the principle of promissory estoppel would apply and the petitioner having acted upon the representations made by the respondents in the earlier policy which was to be in force till 31-3-1993 and suffered detriment by availing loans from financial institutions for the purpose of purchasing red-sanders and manufacturing parts of musical instruments, it is not open to the respondents to change the policy all on a sudden and prevent the petitioner from fulfilling its contractual obligations. It is also contended that the new policy is unreasonable and arbitrary in so far as it relates to red-sanders already out and converted into parts of musical instruments. For contra, the contention of learned Central Government Standing Counsel is that the principle of promissory estoppel will not apply to a legislative action of the respondents. According to him, the import and export policy is a result of a legislative function exercised by the Government under S. 3 of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as "the Act"). Learned counsel contends that inasmuch as the policy is legislative in character, the Court is not entitled to apply the doctrine of promissory estoppel or any kind of estoppel and prevent the respondents from enforcing the said policy during the period for which the policy is enacted.

4. Section 3(1) of the Act empowers the Central Government to make provisions by publishing an order in the official gazette prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order.

(a) the import, export carriage costwise or shipment as ships stores of goods of any specified description,

It is not necessary to refer to the remaining parts of sub-sec. (1) of S. 3 of the Act, sub-sec. (2) of S. 3 refers to S. 11 of the Customs Act and declares that all goods to which any order under sub-sec. (1) applies shall be

deemed to be goods of which the import or export has been prohibited under S. 11 of the Customs Act and all the provisions of that Act shall have effect accordingly. Sub-section (3) of S. 3 contains a non obstante clause and it reads.

Notwithstanding anything contained in the aforesaid Act, the Central Government, may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into India.

5. Learned Central Government Standing Counsel contends that when the Central Government exercises its power under S. 3 of the Act, it is

legislate in character and the import and export policy will be outside the doctrine of promissory estoppel. He placed reliance on the judgment of

Full Bench of Delhi High Court in Bansal Export (P) Ltd. and another Vs. Union of India and others, . It was held that the doctrine of promissory

estoppel can be invoked only against executive actions of the Government, but not against legislature. It was also held that the Export Control

Orders issued under S. 3 of the Act are examples of delegated legislations and they can be amended from time to time and they being legislative in

nature, promissory estoppel cannot be pleaded against the provisions of such orders. The Full Bench has referred to the earlier rulings of the

Supreme Court and proceeded on the footing that the Supreme Court had held categorically in Union of India v. Anglo Afghan Agencies, AIR

1968 SC 718 that the Export Control Orders were Legislative in character.

6. In Anglo Afghan Agencies case AIR 1968 SC 718 (supra) the Court was concerned with a scheme published by the Textile Commissioner.

The scheme was called the Export Promotion Scheme and it provided incentives to exporters of woollen goods. By the Scheme as extended to

exports to Afghanistan, the exporters were invited to get themselves registered with the Textile Commissioner for exporting woollen goods and it

was represented that the exporters will be entitled to import raw materials of the total amount equal to 100 per cent of the f.o.b. value of the

exports. Under Clause 10 of the Scheme, the Textile Commissioner had authority, if it was found that a fraudulent attempt was made to secure an

import certificate in excess of the true value of the goods exported to reduce the

import certificate. The Court held that it could not be assumed merely because the Import Trade Policy was general in terms and dealt with the grant of licences for import of goods and related matters that it was statutory in character. It was held further that even though the case did not fall within the terms of S. 115 of the Indian Evidence Act, it was still open to a party who had acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise was not recorded in the form of a formal contract as required by Art. 299 of the Constitution. The following passage in the judgment is relevant (at p. 723 of AIR) :

The defence of executive necessity was not relied upon in the present case in the affidavit filed on behalf of the Union of India. It was also not pleaded that the representation to the Scheme was subject to implied term that the Union of India will not be bound to grant the import certificate for the full value of the goods exported if they deem it inexpedient to grant the certificate. 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 powers derived from the law -- common or statute -- the Courts will be competent to, and indeed would be bound to protect the rights of the aggrieved citizen".

The orders which the Central Government may issue in exercise of the power conferred by S. 3 of the Imports and Exports Control Act may be -

- executive or legislative..... It cannot be assume merely because the Imports Trade Police is general in terms and deals with the grant of licences

for import of goods and related matter, it is statutory in character. The Imports and Exports (Control) Act, 1947, authorises the Central

Government to make provisions prohibiting, restricting or otherwise controlling import, export, carriages etc. of the goods and by the Imports

(Control) Order, 1965, dated December 7, 1955 and by the provisions which were sought to be repealed restrictions already imposed. The order

was clearly legislative in character. The import Trade Policy was evolved to

facilitate the mechanism of the Act and the orders issued thereunder.

Even granting that the Import Trade Policy notifications were issued in exercise of the power under S. 3 of the Imports and Exports (Control) Act,

1947, the order as already observed authorised the making of executive or administrative instructions as well as legislative directions. It is not the

form of the order, the method of its publication or the source of its authority, but its substance, which determines its true character.

7. In *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, the Apex Court dealt with in detail the doctrine of promissory

estoppel and its applicability as against the executive actions of the State. The Court observed (at p. 647 of AIR).

It may also be noted that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by

law. There can also be no promissory estoppel against the exercise of legislative power. The legislature can never be precluded from exercising its

legislative function by resort to the doctrine of promissory estoppel. (Vide *State of Kerala and Another Vs. The Gwalior Rayon Silk Manufacturing*

(Wvg.) Co. Ltd. etc.,)".

8. A discordant note was struck by a Bench of two Judges of the Supreme Court in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and*

Others, . After referring to certain earlier decisions, it was observed that the principle of estoppel was not available against the Government in

exercise of legislative, sovereign or executive power. Referring to an earlier judgment in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar*

Pradesh and Others, , the Bench expressed its disagreement with the principles laid down in that case.

9. The position was clarified by a Bench of three Judges in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.,* . The Bench overrules

the earlier judgment of two Judges in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, holding that it was not right on the part of

the Bench of two Judges to express their dissent with the Judgment in the earlier case and they should have referred the matter to a larger Bench, if

they wanted to differ. Reiterating the proposition laid down in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, the

Court observed as follows *Union of India (UOI) and Others Vs. Godfrey Philips*

India Ltd., :

Of Course we must make it clear, and that is also laid down in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*,

(supra), that 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. We may also point out that the doctrine of promissory estoppel being

an equitable doctrine, it must yield when the equity so requires, if 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 as equity in favour of the person to whom the promise or representation is made and enforce the promise or representation

against the Government or Public Authority, The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity

would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been

dealt with fully in *Motilal Sugar Mills case* (supra) and we find ourselves wholly in agreement with what has been said in that decision in this point.

10. In *Indian Express Newspapers (Bombay) P. Ltd. v. Union of India*, a Bench of three Judges considered the validity of a notification under S.

25 of the Customs Act, Observing that it is a piece of subordinate legislation, the Court held that such subordinate legislation does not carry the

same degree of immunity which is enjoyed by a statute passed by a competent legislature. It was observed that a subordinate legislation may be

questioned on any of the grounds on which plenary legislation is questioned and in addition, it may further be questioned on the ground that it was

contrary to the provisions of the statute under which it was made and that it was contrary to some other statute and it was unreasonable not in the

sense of not being reasonable but in the sense that it is manifestly arbitrary. The following passage in the judgment is relevant for the purpose of this

case.

A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired

into and the investment by statute to exercise particular discretionary powers. In the latter case, the question may be considered on all grounds on

which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take

relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or

contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be ""taken into

consideration by the statute, or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or

constitutional requirements or that it offends Art. 14 or Art. 19(1)(a) of the Constitution. It cannot, no doubt be done merely on the ground that it is

not reasonable or that it has not taken into account the relevant circumstances which the Court considers relevant.

We do not, therefore, find much substance in the contention that the Courts cannot at all exercise judicial control over the impugned notifications.

In cases where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the

Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a

notification issued under S. 25(1) of the Customs Act, 1962 is required to be laid before Parliament under S. 159 thereof does not make any

substantial difference as regards the jurisdiction of the Court to pronounce on its validity.

11. In *Pournami Oil Mills and Others Vs. State of Kerala and Another*, Government Order granting package of concessions to new Small Scale

Industries in order to boost industrialisation, was issued under the Kerala General Sales Tax Act and the Court held that the Small Scale Units set

up in response to the said Order and before the passing of a subsequent order withdrawing the concessions, were entitled to raise the plea of

estoppel against the Government. In *Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI)*, it was held that for the applicability of the

doctrine of estoppel, it was not necessary for the promises to incur damage, prejudice or detriment and prove the same, but it was enough if he had altered his position on the basis of the representation made earlier. In that case, an assurance was given by the railways as regards the charges for carriage of Naptha. When such an assurance was later changed by a subsequent notification, the Court held that the principle of estoppel would apply.

12. In a recent case considered by the Apex Court, namely *Vij Resins Pvt. Ltd. and Others Vs. State of Jammu and Kashmir*, the Court has made an observation to the effect that even in cases of legislations, it would be possible to invoke the principle of estoppel. No doubt the observation was obiter in the particular case, because findings on facts were favourable to the premises. The following passage is significant (at p. 1637 of AIR):

Petitioner in writ petition No. 794/86 had claimed that pursuant to the arrangement entered into between them and the State following the invitation by the State they had invested Rs. 1.68 Crores in shape of plant and machinery and 63 lacs of rupees by way of land and buildings. The petitioner in the other two cases stated that investments had been made by them as well. The petitioners were invited to set up industries by assuring them supply of the raw material. They changed their position on the basis of representations made by the State and when the factories were ready and they were in a position to utilise the raw materials, the impugned Act came into force to obliterate their rights and enabled the State to get out of the commitments. We are inclined to agree with the submissions made on behalf of the petitioners that the circumstances gave rise to a fact situation of estoppel. It is true that there is no estoppel against the legislature and the vires of the Act cannot be tested by invoking the plea but so far as the State Government is concerned the rule of estoppel does apply to the precedents of this Court are clear. It is unnecessary to go into that aspect of the matter as in our considered opinion the impugned Act suffers from the vice of taking away rights to property without providing for compensation at all and is hit by Art. 31(2) of the Constitution.

13. In so far as High Courts are concerned, it has been consistently held by several Courts that the principle of estoppel would apply to statutory

notifications issued by the Government in exercise of powers conferred by statute. A Full Bench of Bombay High Court has in *Tapti Oil Industries and Another etc. Vs. State of Maharashtra and Others*, held that the scheme announced by the Government to give incentives for establishing industrial units in backward areas, would give rise to principle of estoppel, if the person concerned had taken all steps for obtaining the eligibility certificates and before he could get the same, the Government changes its policy. The Full Bench also adverted to Art. 14 of the Constitution of India and observed that the said Article confers a right of equality and violation of the same could always be challenged under Art. 226 of the Constitution.

14. In *Union of India Vs. Hindustan Platinum Private Limited*, a Division Bench of Bombay High Court applied the principle of estoppel as against the enforcement of a public notice issued by the Central Government, pursuant to the import and export policy framed under the provisions of the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order 1955.

15. A Division Bench of this Court has in *Union of India Vs. Chakra Tyres Limited*, made a distinction between an enactment passed by the Legislature in exercise of its plenary powers on one hand and a piece of delegated legislation brought into existence by the Government in exercise of the power conferred by a statute on the other and held that a delegated legislation cannot get any immunity from the applicability of the doctrine of promissory estoppel.

16. The Rajasthan High Court has considered the matter in detail in *Union of India (UOI) Vs. J.K. Industries Ltd.*, and held that the notification issued by the Central Government in exercise of the powers conferred on it by R. 8(1) of the Central Excise Rules, 1944 is not a legislative act and the Government is bound by the promissory estoppel in respect thereof, where the party has altered its position on the basis of the said notification.

The relevant authorities on the subject have been discussed and the principle has been culled out therefrom by the Bench.

17. In *Orissa Cement Ltd. Vs. Superintendent, Customs and C. Ex.*, a Division Bench of Orissa High Court has applied the principle of promissory estoppel as against a notification issued under the Customs Act. In *Vikrant Tyres Ltd. Vs. Union of India*, the Karnataka High Court

upheld the plea of promissory estoppel as against the notification issued under the provisions of the Central Excise Rules.

18. Thus, it is clear that the uniform view taken by all the High Courts and the Supreme Court is that the doctrine of promissory estoppel will be

available as against the Governmental action, though the said action has been taken in exercise of statutory power. There is also no doubt that the

principle of estoppel is available against subordinate legislations and delegated legislations which cannot be placed on the same pedestal as an

enactment passed by the Legislature in exercise of the plenary powers. In the present case, the petitioner has produced the relevant records to

show that it has acted in pursuance of the representations contained in the policy which was announced for the period from 1st April, 1990 to 31st

March, 1993, and incurred detriment by borrowing loans from financial institutions. Apart from that, the petitioner has already prepared musical

instruments, parts by applying the necessary manufacturing process and made them ready for export. At that stage, the policy of the Government is

changed and undoubtedly the principle of promissory estoppel would apply against the enforcement of new policy.

19. There is also no doubt in this case that the policy is arbitrary and unreasonable in so far as the goods which are ready for export in the

converted form, are concerned. In the counter-affidavit filed by the respondents it is stated as follows:

The issue of licence for export of musical instrument, parts and koto parts made out of red-sanders wood is not possible as the present policy

bans the export of any product made out of red-sanders wood as a ecological conservation measure." (Underlining mine)

In the counter it is stated in the same paragraph, namely paragraph 4, that in order to make the conservation measure totally effective, the

Government has banned chips and powder of red-sanders wood also. There is nothing on record before me to show that cutting of red-sanders

wood has been banned by the Government or any authority at any time. If that has not been done, the imposition of new policy would be like

cutting the trunk of a tree while sitting on the branch of the tree. If the cutting of the trees is not banned and the citizens are allowed to manufacture

musical instrument parts out of cut trees, there is no substance in the contention that the export of instrument parts or the export of wood in any

form has been banned after the trees are cut and converted into parts of musical instruments. In that case, there is no question of maintaining ecological balance or conserving ecological surroundings in the particular area. In the present case, the petitioner has categorically stated in the affidavit that necessary process has already been undergone and the goods are ready for export. The petitioner has also prayed for the issue of a licence on that footing and at this stage, if the export is stopped, it will not help in any way the respondents in maintaining or conserving ecological balance in the area.

20. Learned Standing Counsel for the Central Government refers to the provisions of S. 11 of the Customs Act and places reliance on clauses 2(k)(m) and (v) thereof. In the said clause, the purposes for which the Central Government is entitled to issue notifications prohibiting import or export of goods are (1) the protection of human, animal or plant life or health; (2) the conservation of exhaustible natural resources, and (3) any other purpose conducive to the interests of the general public. The respondents cannot bring the ban on export of manufactured goods under any of the aforesaid clauses. In the course of arguments, learned Central Government Standing Counsel contended that it is open to the petitioner to sell the goods inside the country and they need not be exported to a foreign country. The said argument only cuts the nose of the respondents themselves. If the export of goods is banned for the purpose of conserving ecological measure, there is no substance in contending that the goods could be sold inside the country. The purpose for which the policy is alleged to have been brought into force will not be served in any manner by the sale of goods inside the country, if the trees are cut and converted into such goods. Thus, the new policy in so far as it prohibits export of goods which are ready for export is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy.

21. In the result, the petitioner is entitled to get the relief prayed for in the writ petition namely a direction to the respondents to grant a licence for the value of U. S. \$ 75,000/- as against the letter of credit No. 41-2432445--031. There will be a mandamus directing the respondents to issue a licence for the export of the goods to the value of U. S. \$ 75,000/-against the aforesaid letter of credit No. 41-2432445--031. The writ petition is

allowed to the extent indicated above. There will be no order as to costs.

22. Order accordingly.