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**(2002) 09 CAL CK 0050**  
**In the Calcutta High Court**  
**Case No : Writ Petition No. 2386 of 2001**

Ruia Cotex Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

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**Date of Decision :** 13-09-2002

**Acts Referred:**

Evidence Act, 1872 — Section 115

**Citation :** (2003) 151 ELT 40

**Hon'ble Judges :** Amitava Lala, J

**Bench :** Single Bench

**Advocate :** B. Sen, N. Patharia and N. Sengupta, for the Appellant; P.K. Ghosh and M.K. Lodh, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

Amitava Lala, J.—This writ petition is made on behalf of the petitioner No. 1 company by the pen of petitioner No. 1, one Shri Krishna Kumar Chamaria claims to be the Secretary of the Company. He filed his affidavit of competency which is kept with the record,

2. There is a scheme in connection with export and import known as Export Promotion Capital Goods (EPCG) scheme whereunder ad valorem customs duty @ 10% has been provided. On and from 1st April, 1999 to 31st March, 2000 the Government of India introduced 0% duty by amending the previous 10% ad valorem duty under the scheme.

3. The petitioner imported three machines and applied to the authority concerned for granting licence to import capital goods on 14th January, 1999 under the 10% duty scheme. The same was approved by a communication of the authorities dated 18th February, 1999.

4. According to the writ petitioners, the goods were released on 31st August, 1999 when 0% duty scheme became effective. According to them, out of three machines one had come before for which the 10% duty had been paid. But

remaining two machines have come after the introduction of the new scheme. However when all the machines were treated to be released by the authority such date will be the cut of date for the purpose of availability of the scheme. At the material point of time 0% duty scheme was prevailing. Therefore, the petitioners are not only entitled to get a declaration from the court that they are not supposed to pay any duty but whatever they have paid, will be refunded.

5. Further, according to the petitioners, by a letter dated 29th June, 1999 the authority informed that the case of the petitioners had been considered and approved by EPCG committee at the meeting held on 14th June, 1999. Necessary instruction in this regard will have to be issued to the Joint DGFT, Calcutta. But, surprisingly, duty of 10% ad valorem introduced on 5th August, 1999. Subsequently, an explanation was given by the authority on 8th September, 1999 saying that in a meeting of the EPCG committee on 23rd August, 1999 it has been decided that the request of the petitioners cannot be entertained because the policy is prospective and cannot be made retrospective. The letter dated 29th June, 1999 is a promise made by the authorities to grant licence to the petitioners. Going against the promise is not permitted under principle of promissory estoppel. They have relied upon judgments reported in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another, and 2001 (2) SCC 41 (Tata Iron & Steel Co. Ltd. v. Union of India and Ors.) on the ground of promissory estoppel.

6. The basic parameter of consideration in coming to a conclusion in respect of promissory estoppel is whether anybody is victim of withdrawal of promise by the State machinery or not. It is not a direct contractual obligation as normally available under a written agreement but indirect obligation. The authority is estopped from withdrawing such promise. Therefore, there is a necessity of threadbare scrutiny. This doctrine is evolved to avoid injustice. Two things are required for the purpose of due consideration, one is the doctrine of fairness and another is element of Section 115 of the Evidence Act if the Court is satisfied with these two tests there should not be any escape of the promisor.

7. The petitioners have cited another judgment reported in S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others, wherefrom I find that promissory estoppel cannot be declared as pure question of law. Various ingredients have to be established to get a relief. Otherwise the plea of promissory estoppel held to be misconceived. They have further cited The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, at Page 948 in its paragraph 7 to establish that application for a licence must be considered in the light of the policy relevant and prevailing during the period.

8. Ultimately, it has been prayed that the petitioners are entitled to issuance of licence as per "0" percent duty scheme with a refund of a sum of Rs. 1,24,45,091.80 along with interest at the rate of twenty-four per cent (@ 24%)

per annum or at the rate charged by the nationalised bank.

9. The respondents have taken the plea that the subject-matter in issue is hit by principles of *fait accompli*. The learned Counsel appearing on behalf of the respondent has brought to notice of the Court to the relevant parts of the petition which are as follows :

"3. Your petitioners, for the afore-mentioned project, imported three machines from Thies GmbH & Co., Lindauer Doriner GmbH & Calator Ruckh AB. Your petitioners by virtue of the said import became entitled to avail of the Export Promotion Capital Goods (EPCG) Scheme which provided for a duty of customs at the rate of 10% *ad valorem*. Accordingly your petitioners applied to authorities concerned for grant of licence to import capital goods on 14th January, 1999 under the 10% duty, Scheme. Your petitioners crave leave to refer to the said application dated 14th January, 1999 along with its enclosures at the hearing, if necessary.

4. The said application of your petitioners was approved by EPCG committee and communication in this respect was made to your petitioners by letter dated 18-2-1999. Your petitioners crave leave to refer to a copy of the said letter dated 18-2-99 at the hearing, if necessary."

According to me, paragraph 5 is also relevant for the purpose, which is also as follows:

"5. Before the petitioners could avail of the benefit of 10% duty scheme in April, 1999 the Government introduced the Zero duty scheme with effect from 1st April, 1999. The said scheme was an amendment to the 10% duty scheme existing till 31st March, 1999. The validity of the zero duty scheme was for the period 1-4-1999 to 31-3-2000".

10. The respondent has taken the plea that the communication dated 24th June, 1999 is in respect of issuance of import licence but not in connection with the sanction of "0" per cent duty available for import. The letter dated 5th July, 1999 also speaks about fresh application. The letter of 6th August, 1999 is also for fresh application and applicability of "0" per cent duty on such applications with a clarification in respect entitlement of refund of 10% of duty that has already been paid. Under the communication dated 8th September, 1999 it has been clarified that the policy is prospective and cannot be made retrospective. Thus, it cannot be said to be the period for which the duty has already been received. Ultimately, I find by a communication dated 20th November, 2000 it was clarified that conversion of the EPCG Licence No. 02500213, dated 10th August, 1999 from 10% duty EPCG scheme to "0"% duty scheme has been examined in the office. It has been informed that though the application was filed under the "0"% duty scheme, since the petitioners had insisted vide letter dated 4th August, 1999 that the licence should be issued for immediate clearance of capital goods, necessary instruction had to be given by this office to the office of the DGFT to issue licence under 10% duty scheme, as the corresponding customs notification

extending the "0" duty benefit to the textile sector was not then issued. The corresponding customs Notification No. 122, dated 4th November, 1999 was only issued on that date. Since the customs, notification is prospective the subject EPCG licence issued on 10th March, 1999 cannot be converted into "0" duty licence as the "0" duty cannot be made applicable with retrospective effect.

11. According to me the stand of the authorities are vasilating. Firstly there was stand of consideration. Secondly there was a stand of giving hope. Thirdly there was a stand of giving prospective or retrospective effect. Fourthly there was a stand of applicability or non-applicability of the notification to the textile sector. Lastly verbal stand that as because EPCG committee approved the application of the petitioners and communicated by 18th February, 1999, the case of the petitioners become fait accompli. Therefore what is the standpoint of the authorities? Will it be unreasonable to believe that the act of the authorities is neither bona fide nor outcome of fair deal? It is to be remembered in a fiscal dispute one element of wrong can create huge amount of loss or gain. According to me prospectivity or retrospectivity of the applicability of the fiscal statute on account of imposition of duty on valid importation is based on declaration of the importer by way of submitting bill of entry. Such question arose before this court in another application being W.P. 2573 of 2001 (Anvil Investment Pvt. Ltd. and Anr. v. Union of India and Ors.) when this court observed this aspect of the matter in an unreported Judgment dated 24th May, 2002. The relevant part of such judgment is as follows :

"Learned Counsel appearing on behalf of the Union of India contended that the Bill of Entry is the appropriate date of legal importation of the goods. A process of law due to unauthorized importation cannot be couched as a valid importation. He has drawn my attention to Section 46 of the Act, which speaks, about the goods on importation. From there I find that the importer of any goods other than goods intended for transfer or transfer shipment shall make entry thereof by presenting to the appropriate officer on Bill of Entry for home consumption or warehousing in prescribed form. Such part of the Section is applicable with proviso whereunder it is stated if he is unable to furnish full particulars of the goods required under sub-section, the proper officer may pending the production of such information, permit him previous to entry, examine the goods in the presence of officer of the Customs or deposit the goods in the public warehouse. Bill of Entry shall include all the goods mentioned in the Bill of Lading and receipts given by the carrier to the consignee. A Bill of Entry may be presented at the time after deliver of the import manifest and import repayment as the case may be. However, a right of disposition is there in the section under certain contingencies. Sub-section (5) of such Section is important in this respect wherefrom it appears if the proper officer is satisfied that the interests of Revenue are not prejudicially affected and that there was no fraudulent intention he may permit substitution of a Bill of Entry for home consumption for a Bill of Entry of warehousing or vice versa. u/s 2(23) of the Act says that "import", with its grammatical variations and cognate expressions, means bringing into India

from the place outside India. Section 111 gives a power to the customs authority to confiscate improperly imported goods.

According to me, importation in general and importation for specific satisfaction of the law are not same or similar. The arrival and entry are distinct or different. A principle applicable for arrival grammatically can be construed as importation but may not connect the legal requirements. One is the importation for verification which is by nomenclature "import" but, in effect, "arrival" of the goods in the country. Such position is a transitional position. Whether goods will be allowed to enter upon or not is a matter of consideration which is far from the levy any duty whatsoever on such importation. Therefore, such transitional period cannot be construed as valid period of legal importation on the bill of entry so that the goods can be released for home consumption on bonds. Goods arrived in the country cannot be necessarily mean that such arrival is made as per the bill of entry. Bill of entry is the declaration of the importer about lawful entry of the goods. On the basis of such declaration duty can be imposed. Imposition of duty cannot be compared with confiscation of goods or illegal or irregular entry which may not be declared as valid entry in future".

12. That apart non-applicability of the 0% duty benefit to the textile sector as per the explanation of the respondents appears to be wrong appreciation of facts. Therefore it is far to say that any question of prospective application arose therein. It appears to me that as per General Exemption No. 76J under the Notification No. 28/97-Cus., dated 1st April, 1997 amended up to 11th May, 1999 speaks that whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 and from so much of the additional duty leviable thereon u/s 3 of the Act, as in the excess of the amount calculated @ 10% of the value of the goods. But textile garments including until were even exempted from whole of the additional duty. If this is the policy then the machineries being alleged capital goods for such textile sector cannot be said to be untouched. In fact it is not so. The exemption scheme has two parts. The first part is covered up to notification dated 11th May, 1999 and the second part is falling under notification dated 1st March, 2000 which includes notification dated 4th November, 1999. The spinning, weaving, processing, knitting and worsted machineries are falling under first part of the exemption. Since no notification dated 4th November, 1999 has been produced before this Court the above inference can be drawn by way of necessary implication. That apart any clarification notification relates back to original one about its effectivity. As because one sector is included by way of clarification objectivity of the same in respect of such type of industry available in the main body of the exemption cannot be ignored. It appears more relaxation is given to such industry.

13. Therefore in total, this application cannot throw it out without giving direction to the authorities for due consideration.

14. Hence, this writ petition is disposed of with a direction upon the appropriate respondent authority to give fullest opportunity of hearing and pass a reasoned

order in this respect as to why exemption cannot be given and/or, if any deposit is made wrongly will not be refunded in the light of the judgment and order passed herein within a period of one month from the date of the communication of the order. For the purpose of effective adjudication copy of the writ petition with annexures and copy of the affidavits along with annexures, if any, will be treated as part and parcel of the proceeding. If the petitioners become dissatisfied with the reasoning, they will be at liberty to proceed before the appellate authority or CEGAT by way of appeal or revision in whose jurisdiction it lies. They will also be at liberty to proceed for review of the same. On the other hand, if during the course of hearing the authority concerned found that the grievance of the petitioners is genuine, such authority will be entitled to grant relief irrespective of passing any reasoned order as directed above which will have superseding effect upon earlier orders of rejection. No order is passed as to costs.

15. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

16. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the Court in respect as above.