

**(1994) 05 DEL CK 0040**

**In the Delhi High Court**

**Case No : Writ Petition No. 871 of 1994**

Shri Hari Exports

APPELLANT

Vs

Director General of Foreign Trade

RESPONDENT

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**Date of Decision :** 27-05-1994

**Acts Referred:**

**Citation :** (1994) 73 ELT 794

**Hon'ble Judges :** K. Shivshankar Bhat, J

**Bench :** Single Bench

**Advocate :** Shri M. Chandrashekharan and Mr. Pradeep Jain, for the Appellant;  
Shri Madan Lokur and Ms. Nandini Ramachandran, for the Respondent

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## **Judgement**

K. Shivashankar Bhat, J.—Petitioner challenges the validity of the two notifications dated 25-1-1994 and 29-1-1994, effect of which is to transform Polypropylene Moulding powder/granules (referred as goods in question) as goods in the sensitive test for the purpose of its importation, though, when the value based license issued to the petitioner, no such restriction was imposed.

2. Petitioner was issued with the Value Based license on 6-7-1993. As per this license, if the petitioner exports the particular goods (Cassettes) he was entitled to import the goods described in the license without any restriction as to their quantity. It is not necessary to refer to other benefits available to this license holder. After the issuance of this license dated 6-7-1993, "goods in question" was added to the "sensitive list", on 14-9-1993. According to the petitioner, this addition did not affect the pre-existing licensees. However, this was altered by the two impugned Notifications dated 25-1-1994 and 29-1-1994. The petitioner relies on the doctrine of promissory estoppel to contend that the license issued to the petitioner was a promise held out to him, permitting the import of goods in question without restriction as to its quantity and that the impugned Notifications are unreasonable restrictions on his fundamental right to carry on with his trade, granted under Article 19(i)(g) of the Constitution of India, further, the petitioner contended that the impugned Notifications were not in the public interest;

instead, they were issued to protect certain "local manufacturers".

3. On 21-2-1994, the Bench issued notice to the respondents for 9-3-1994 to show cause as to why Rule Nisi be not issued. Court directed the respondents to file reply by that date. On 9-3-1994, the Court granted further four weeks "to file counter and directed listing of the case on 2-5-1994 and issued Rule. On 2nd May, 1994 the matter was adjourned; on 16-5-1994, again the case was adjourned to 19-5-1994, on which date Court heard the matter. It is obvious that, since the period of license is about to expire, the Bench directed the listing of the case early.

4. In view of the rival arguments, it is necessary to examine whether the impugned Notifications are invalid or unenforceable against the petitioner. The arguments addressed require a consideration as to whether the Notifications under Challenge are in public interest, or whether they impose an unreasonable restriction on the petitioner's fundamental right to trade and whether, the respondents are estopped from enforcing the Notifications against the petitioner. The term "Public Interest" is not a define mantra purifying every kind of governmental action; repeating the said phrase while exercising the governmental power (be it executive, statutory or sometimes even legislative) by itself would not grant immunity to the action from judicial scrutiny. The said term by itself cannot spread unbreakable fortress against the governmental action. The State, relying on "public interest" shall have to explain as to why the impugned action was necessitated by public interest, unless, under a particular, special set of circumstances, Court can presume it to be warranted to safeguard or ensure public interest. The normal presumption that every State action is in public interest is rebuttable and Therefore when a person comes forward with a specific plea that the impugned action affects his fundamental right or any other right accrued to him and the impugned action is not in public interest, the State shall have to meet the averments made in the pleadings of the petitioner by an appropriate pleading of its, own (Such as a counter affidavit or written statement).

5. As an illustrative case, the decision of the Supreme Court in Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others Vs. Dharmendra Trading Company and Others, may be referred. Entrepreneurs were encouraged to start new industries by the State Government holding out a tax concession scheme to the newly started industries. Subsequently, it was withdrawn. Question was whether, industries started already when the Scheme was in force could be denied the benefit of the tax concession under the provisions of Karnataka Sales Tax Act. The concession scheme was attributed to Section 8A of the said Act and Therefore the source of the power to grant tax concession was found to be statutory. Petitioners relied on the doctrine of promissory estoppel in support of this plea. The State, instead of explaining the reason for withdrawing the scheme, orally submitted that because of large scale misuse of the scheme, the scheme was withdrawn. The Supreme Court rejected this plea, at page 1248

the Court held :-

"The first contention of the learned counsel for the appellants is that the doctrine of Promissory Estoppel was not applicable in the present case because it was found by the Government of Karnataka that the concessions granted under the said order dated 30th June, 1969 were being misused and undue advantage was being taken of the same. It was submitted by him that in view of this, it would not be proper to hold the Government, to the promises or the assurances it had given under the said order dated 30th June, 1969. We are afraid it is not possible to accept this submission. No counter affidavit was filed by the appellant before the trial Court in the writ petition. Beyond the statement of counsel, there is nothing to show that any misuse was made of these concessions or undue advantage taken of the same. It is true that the preamble to the order dated 12th January; 1977 does recite that the concessions given by the earlier order had given room for many types of misuse but such a recital by itself cannot establish that the concessions were, in fact, misused. If that were so, it was the duty of the Government and the concerned authorities to file a counter-affidavit and place the relevant facts establishing the misuse before the Court. This they have totally failed to do. It is well settled that if the Government wants to resile from a promise or an assurance given by it on the ground that undue advantage was being taken or misuse was being made of the concessions granted the court may permit the Government to do so but before allowing the Government to resile from the promise or go back on the assurance the Court would have to be satisfied that allegations by the government, about misuse being made of undue advantage being taken of the concessions given by it were reasonably well established. In the present case, there is nothing on record to show that any such misuse was being made or undue advantage taken of the said concessions by the newly established industries. The Government, had, Therefore, failed to established the requisite ground or the basis of which it might be allowed to go back on its promise. The first submission of the learned counsel for the appellants must, Therefore, fail."

6. Assuming that the impugned Notifications are legislative in character, they are not beyond the pale of judicial examination. Any law, even if enacted directly by the legislature has to stand the test of reasonableness and other tests against violating any of the fundamental rights under part III of the Constitution.

7. In *Indian Express Newspapers (Bombay) Private Ltd. and Others etc. etc. v. Union of India and Others*, , validity of a Notification issued u/s 25 of the Customs Act came up for consideration and the Court had to consider whether it affected the fundamental right under Article 19(i)(a) of the Constitution. At page 541, the Court held :

"We shall assume for purposes of these cases that the power to grant exemption u/s 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government there under amounts to a piece of subordinate legislation. Even then the notification is liable to be questioned on the ground that it is an

unreasonable one."

8. Court, Therefore referred to an earlier decision in *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*, . Court thereafter referred to an earlier decision in *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*, , in support of the proposition. In para 73, the Court proceeded to say :

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifest arbitrary."

At para 27 the Court held :

"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 u/s 25(1) of the Customs Act, 1962 is required to be laid before Parliament u/s 159 thereof does not make any substantial difference as regards the jurisdiction of the court to pronounce on its validity."

9. Therefore, the fact that the source for the exercise of power requires that it has to be exercised in the public interest by itself does not confer any immunity to the said exercise; the power shall have to be exercised in a reasonable way. The reasonableness has to be tested in the light of the Constitutional provisions. Further, reasonableness of any particular action could be gathered only by considering the circumstances under which it is exercised, the evil sought to be eradicated by the action in question or the public purpose sought to be projected by it.

10. Every citizen has a fundamental right to carry on any trade or business under Article 19(1)(g) of the Constitution. However, State may impose reasonable restrictions on the exercise of the said right in the interest of the general public, as per Article 19(6). This restriction also, if circumstances justify, may result in prohibiting the exercise of the right. But the restriction has to be by law and the restriction has to be in public interest; further, it should only be a "reasonable" restriction.

11. The Import & Export (Control) Act has been held as falling within Article

19(6) of the Constitution. But for this enactment, a citizen would be free to engage himself in trading in Import or Export in any commodity. This Act empowers the Government to impose appropriate restrictions in the matter of import or export of any of the goods specified in the order imposing the restriction. Therefore, it is actually the order of the Government made u/s 3 of this Act that results in the restriction on the right of the citizen to trade in the notified goods. The reasonableness of these restrictions, Therefore shall have to be examined not merely by reference to the Import and Export (Control) Act, but also the circumstances under which the power is exercised u/s 3, resulting in the restriction.

12. It has been said that the burden of showing the reasonableness of the restriction under Article 19(6) is on the State, similarly, to justify a restriction under Article 19(6), it will be necessary that the restriction is in the interest of the general public. These two elements of reasonableness and public interest would be based on the particular facts. It follows Therefore, the particular facts leading to the inference that the exercise of the power was reasonable and in the interest of the public, shall have to be proved before the Court by the State.

13. Ld. Counsel Madan Lakur relied on the decision of the Supreme Court in Andhra Industrial Works Vs. Chief Controller of Imports and Others, . A reading of paragraphs 17 and 18 of the report, shows that, on facts, Court found the restrictions reasonable and in the interest of public; and the facts were placed before the Court by the respondents by filing a counter-affidavit (vide para 13).

14. If there is a scope to interpret the order imposing the restriction in a way to reduce the hardship and advance the right to trade, the Court would adopt such a course. In Union of India (UOI) and Others Vs. Suksha International and Nutan Gems and Another, , the Court adopted such a course as otherwise the restriction would be unreasonable. The relevant submission of the petitioners in the said case are found in page 694 at para 8, thus :

"Mr. Salve, submitted that in the very nature of the procedure wand exercises inherent in the effectuation of an imprest-license, as distinguished from Replenishment license, the Export-House has first to import the uncut and unset diamonds and thereafter fulfill its export-obligations of cut and polished diamonds as a necessary antecedent for the effectuation of its entitlement to a revalidation and endorsement for OGL items. The very nature of the time consuming transactions that are required to be gone through preceding the very creation of the right to revalidation and endorsement are inconsistent with the feasibility of compliance with the time schedule in para 185(7). Learned counsel says that the view that should commend itself both on construction and in equity, is that having regard to the innate difference in nature of the obligations and conditions to be fulfilled between the holders of impress-licenses on the one hand and the replenishment-licenses on the other and having regard, further, to the circumstances that export houses, which under impress-licenses, have first to import uncut and unset diamonds and thereafter fulfill their export obligations

before becoming entitled to the import of OGL items, it would be a wholly unreasonable exercise in construction to import the condition in clause (7) into clause (4) and that clause (4) should, Therefore, be treated on its true constructions, as a special provision Constituting an exception to the generality of the provision in clause (7) Otherwise, says counsel, the resulting position would be that the satisfaction of the cumulative conditions in clauses (4) and (7) by an Export-House under an Imprest-license would well might be impossible."

The Court held, thereafter, in para 9 : "We have considered the rival contentions on the point. Para 185(4) was intended to provide certain incentives to the Export Houses which, upon grant of impress-licenses, fulfill their countervailing obligations in the matter of export commitments. The provision is a beneficial one. Clauses (4) and (7), no doubt, on their plain wording present certain constructional difficulties and the view sought to be put across by Shri Subba Rao for the appellants, on the plain language of clause (7), is not without possibilities. However, the basis of a harmonious construction which commended itself to the High Court in other similar cases appears to us to advance and promote the objects of the policy in paragraph 185(4) and is, at all events, not an unreasonable view to take of the matter."

15. There is a presumption that the law is constitutional and is enacted to advance the "public interest". Similar presumption is available to subordinate legislation as also to the exercise of the executive power of the State. However, there is a difference in the weight or the degrees of these presumptions. The presumption attached to a legislative enactment ought to be weightier than the presumption attached to the subordinate legislation or of the exercise of an executive power. Legislative enactment is preceded by debates in the legislature and the representatives of the public have a direct say while enacting a law. That is not the case with a subordinate legislation or an executive order. Even in the case of a Statute to the fact that it was enacted by a competent legislature does not mean that the restrictions imposed by it reasonable and in the interest of public. Constitution has vested the power of determining the reasonableness of a law and its validity, in the Courts. In this context, the observations of the Supreme Court in Mohd. Hanif Quareshi and Others v. State of Bihar and Others, AIR 1985 SC 731 is quite relevant. The Court observed at page 744 (para 21) :

"Clause (6) of Art. 19 protects a law which imposes in the interest of the general public reasonable restrictions on the exercise of the right conferred by sub-cl. (g) of cl. (1) of Art. 19. Quite obviously it is left to the Court, in case of dispute, to determine the reasonableness of the restrictions imposed by the law. In determining that question the Court, we conceive, cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-cl. (g) is expressed in general language and if there had been no qualifying provision like cl. (6), the right so conferred would have been an absolute one. To the person who has this

right any restriction will be irksome and may well be regarded by him as unreasonable. But the question cannot be decided on that basis. What the Court has to do is to consider whether the restrictions imposed are reasonable in the interests of the general public."

16. However, Courts always bear in mind that judicial review is not concerned with matters of economic policy, and that "the problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific." (vide *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, .

17. The petitioner relies on the license granted to him as enabling him to import the goods in question. This Value Based license dated 6-7-1993 is valid for a period of twelve months. By virtue of this license the petitioner was entitled to the following benefit, as stated in para 49 of chapter VII of Export and Import Policy 1992-1997 :

Under a Value Based Advance license, any of the inputs specified in the license may be imported within the total CIF value indicated for those inputs, except inputs specified as sensitive items. The sensitive items may be imported only to the extent of the quantity of value specified in the license.

Under a value based Advance license, both the quantity, and FOB value of the exports to be achieved shall be specified. It shall be obligatory on the part of the license holder to achieve both the quantity and FOB value of the exports specified in the license."

17A. Another benefit is found in para 120 of Hand Book of Procedures :

"The license granted under this scheme shall be subject to Actual User condition till redemption of BG/LUT. The Advance license holder may, however, transfer the duty free imported materials to his supporting manufacturers whose names are entered in the DEEC for the purpose of export production."

18. There is no dispute that the value based license is granted to a prospective exporter for duty free import of the raw-material, components, intermediates, consumables, parts, spares, including mandatory spares, packing material and computer software, subject to fulfillment of a time bound export obligation and the value condition, as per the prescribed to apply for obtaining a value based advance license by specifying the name and description of the items to be imported and exported, the CIF value of imports; the FOB value of exports : and is further required to tender an undertaking of meeting the time bound export obligations as specified in the input/output norms for the item under export. Pursuant to the license, the petitioner took steps to manufacture the cassettes and has invested considerable sums of money. He has already obtained firm orders from abroad; on this basis, he was entitled to import among other goods, polypropylene moulding powder/granules (referred hereinafter as the goods in question). This entitlement to import the goods in question within the overall

value limits is taken away by the impugned action of the respondent by placing the said goods in question in the Sensitive list. The import of goods in the sensitive list is linked to the quantity only. There has been, thus, a drastic change in the right of the petitioner to import the goods in question. The petitioner contends that a promise was held out to him that he may freely import the goods in question provided he exports Audio Cassettes of the prescribed value and that the petitioner has altered his position relying on this promise, by investing large sums to procure the raw materials and taking steps to export the Audio Cassettes, in the hope of importing the goods in question, so that he can sell them in India at competitive rates.

19. The petitioner alleges that the impugned actions are motivated to favor indigenous manufacturers; the relevant averments in the writ petition are :

It is submitted that on the one hand there has been increase of exports by the country, on the other hand, the prices in the indigenous market relating to the goods which have been imported subsequent of fulfilling the export obligation by the parties have also come under control. It is submitted that earlier the indigenous manufacture of the plastic material was ranging from Rs. 40-50 per kg. and after introduction of the Scheme in question, besides increase the exports, the prices of the raw material have also reduced to approx. Rs. 30-35 per kg. It goes without mentioning that the prices as quoted in the local market of the imported goods in question were being sold in the open market after adding the margin of profit of the trader. It is submitted that the price in the international market of the imported material is merely Rs. 15-17 per kg. but the indigenous manufacturers who are having the monopoly of the items in the country, are selling the said material at the price ranging from Rs. 40-45 per Kg. which in turn is inflating the value of all finished goods being manufactured out of the said raw-material. Whereas on the contrary, when competition was faced, the price has substantially reduced down. It is only because of this loss that the Indigenous manufacturers have created a lobby against the genuine exporters who had availed the benefit of this scheme and have attempted to malign the parties which has resulted in huge losses of export proceeds to the Government and also losses to the parties including the petitioner."

Again it is averred :

"It is submitted that the petitioner cannot be bound by the sensitive items which were introduced in a public notice dated 14-9-1993 and cannot be used against the petitioner but in the case of petitioner only sensitive items on the date of issuance of license can be used against the petitioner. It is submitted that at the time when the said notification was issued, the respondent has rightly not made the said sensitive items applicable to the licenses issued prior to 14-9-1993 but what are the circumstances and what is the public interest on the basis of which after a period of about 4 months the said category of sensitive list has been made applicable with retrospective effect is not clear, it is submitted that in case the petitioner would have known that the said items in the sensitive list are also

there when the license was issued to the petitioner, the petitioner would not have opted under the said scheme and would not have taken the steps for fulfilling the export obligation which has resulted in huge losses to the petitioner."

Further down :

"This purported change is also against the policy of the Govt. specially when the context of the ongoing economic reforms. It is a contradiction that Govt. on one hand, despite short term advantages to the indigenous industry/business, the Government is going full steam ahead to globalize the Indian economy, on the other hand Government is succumbing to the pressure of vested interests by withdrawing result oriented schemes like the VALUE BASED ADVANCE license SCHEME. This has caused serious repercussions in the Indian economy and will totally jeopardise the exports which the parties have committed to the Government. Further, in the case of the petitioner, there has also been an intimation from the foreign buyer to supply the goods in terms of the contract within the stipulated time. It is submitted that as the foreign buyer is also aware of the change in the policy, as brought in force w.e.f. 15-1-1994 and modification dated 29-1-1994, Therefore, in view of this changed circumstances it is not at all economically viable for any one to fulfill the export obligation when there is no benefit or incentive after making such exports. The petitioner has acted on the basis of promise made by the Government in the form of grant of license which itself is self-explanatory about the quantity and time and on the basis of which petitioner has already acted now, under these circumstances, the policy cannot be changed to the detriment of the petitioner."

In para 19 of the writ petition, the petitioner asserts :

"That considering the above facts, it is clear that the public notice under challenge are not in public interest but is only to pursue the need and the requirement of only 4 to 5 indigenous big houses so that they can reap exorbitant profits whereas on the contrary the value of similar identical goods in the international market is on a very very lower side and, Therefore, it is clear that the price in the Indian market has been artificially increased."

20. According to the petitioner, this action of the respondents is not in public interest.

21. The assertions of the petitioner are not denied. Therefore, the basic facts alleged in the writ petition has a foundation for the relief sought by the petitioner, could be accepted as correct. The license issued to the petitioner held out a promise that he may import the goods in question without any restriction as to its quantity. This promise was acted upon by the petitioner, because, to avail of this promise, petitioner had to export certain goods; the petitioner had to discharge his obligations and avail the benefit within a period of 12 months. Petitioner took steps to fulfill his obligations and expended large sums of money. In these circumstances, if the petitioner is now asked to change the mode of importation in the sense, his right to import the goods in question is reduced

drastically, it can safely be held that (i) a detriment is caused to the petitioner for acting on the basis of the license. (ii) Petitioner's right to import the goods in question, which is part of his fundamental right to trade under Article 19(i)(g) is affected. Estoppel does not bind the State if the public interest is the cause for the change in its stand. The respondents have not placed any material to show that this equitable doctrine of promissory estoppel must yield in this case in view of other equitable circumstances or public interest, as pointed in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., the requisite facts to infer an equity in favor of the impugned actions are not forthcoming. Unlike in the case before the Full Bench of this Court in Bansal Export (P) Ltd. and another Vs. Union of India and others, , relevant facts pertaining to the public interest at the cause for the impugned actions, also, are not placed before the Court. The respondents have not shown as to how the impugned actions are reasonable restrictions and in the interest of public, so that notwithstanding, the petitioner's right under Article 19(1)(g); impugned actions are justified. 22. In Union of India and Others v. Kanunga Industries; AIR 1990 SC 219 the amendment made to the Import Trade Control Hand Book 1969 was held as ineffective and does not govern the license issued already based on which the licensee had entered into an agreement with the foreign seller to import the goods covered by the amendment, even though by virtue of the amendment the importation was prohibited.

23. Striking down the two notifications dated 25-1-1994 and 29-1-1994 may render them void for all purposes. The two notifications need not be void for all purposes. They are invalid to the extent they operate as an unreasonable restriction on the rights of a citizen under Article 19(i)(g) : As an incident to this right, the petitioner is entitled to invoke the doctrine of promissory estoppel. Petitioner has succeeded to the basis of the particular facts of this case. It is sufficient if a declaration is given that the two impugned notifications do not affect the operation of the petitioner's license No. 2051817 dated 6-7-1993. Petitioner shall not be bound by the two impugned Notifications No. 25(RE)/92-97 dated 29-1-1994 and it is further declared that during the current period of the aforesaid license, the petitioner may import the goods in question as per the said license without reference to the additions made to the Sensitive List.

24. W.P. is allowed accordingly. No costs, Rule made absolute.