

(1993) 03 MAD CK 0031
In the Madras High Court
Case No : Writ Appeal No. 127 of 1993

The Union of India and others		APPELLANT
	Vs	
Rizwan International		RESPONDENT

Date of Decision : 04-03-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 31(2)
Customs Act, 1962 — Section 11, 159, 25, 35(1)
Evidence Act, 1872 — Section 115
Imports and Exports (Control) Act, 1947 — Section 3

Citation : AIR 1993 Mad 336 : (1993) 42 ECC 183 : (1993) 1 MLJ 569

Hon'ble Judges : V. Ratam, Acting C.J.;Somasundara, J

Bench : Division Bench

Advocate : Mr. M. Kalyanasundaram, A.C.G.S.C, for the Appellant; Mr. R. Krishnamurthy, for the Respondent

Judgement

Somasundaram, J.—This Writ Appeal has been filed against the order in W.P. 10444 of 1992, issuing a ""Writ of Mandamus directing the

appellants herein to issue a licence for the export of the goods to the value of U.S. Dollars 75,000/- against the letter of credit No. 41-2432445-

031.

2. The respondent, a partnership firm, is recognised exporter. The main products of export is musical instruments parts made out of red sanders

wood. The respondent has installed the necessary infrastructures for carrying on its export business by setting up a production facility at No. 1,

Riswan Madhavaram. Red Sanders wood is widely used by Japaness for making the musical instrument known as ""Shamisen"". Export of Red

sanders musical instruments and chips, powder and koto-parts had been taking place in the past several years from Tamil Nadu as per the exports

and imports policy prevailing up to 31-3-1992, The export of the said products was on the basis of the licence issued by the Chief Controller of

Imports and Exports, New Delhi. As a matter of fact, the export and import policy was announced for the period from April 1990 to March 1993.

But, however, in March 1992, the export import policy was suddenly changed and a new policy was framed for 5 years commencing from 1-4-

1992 and ending with 31-3-1997, Under the export import policy for the period from 1-4-1992 to 31-3-1997, (hereinafter referred to as new

policy) a prohibition is introduced against export of red sanders in any form. The respondent made a representation to the authorities and wanted

to know from them as to whether musical instruments and other chips made out of red sanders wood, which was being exported by the

respondent, could be exported, even after the coming into force of the new policy. The second appellant sent a reply dated 14-5-1992 Stating that

the export of red sanders wood in any form is prohibited under the new policy and that the respondent will not be entitled to continue export.

Aggrieved by the reply dated 14-5-1992 sent by the second appellant, the respondent filed W.P. 10444 of 1992 for quashing the said

communication dated 14-5-1992 and for the issue of Writ of Mandamus directing the appellants herein to grant a licence for the value of U.S.

Dollars 75,000/-against the letter of credit No. 41-2432445-031. According to the respondent, on the basis of the earlier export and import

policy, the respondent had been entering into contract with various buyers for sale of musical instruments parts. Under one such contract, latter of

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

credit and the amount mentioned is U.S. Dollars 1,00,000/-. The date of expiry for negotiation was mentioned as 31-7-1992. The period was

subsequently extended up to the end of December, 1992. The said letter of credit covers the musical instrument parts made of red sanders as

approved by the buyer.

3. The genuineness of the letter of credit of the correctness of the claim made by the respondents that it had entered into contract with a foreign

buyer prior to the introduction of the new policy is not in dispute. Section 3(1) of the Imports and Exports (Control) Act, 1947 (hereinafter

referred to as 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 the import, export carriage costwise or shipment as ships stores of goods of any

specified description. Subsection (2) of Section 3 of the Act refers to Section 11 of the Customs Act and declares that all goods to which any

order under subsection (1) applies shall be deemed to be goods of which the import or export has been prohibited u/s 11 of the Customs Act and

all the provisions of that Act shall have effect accordingly. Sub-section (3) of Section 3 reads thus;

Notwithstanding anything contained in the aforesaid Act, the Central Government, may, by order published in the Official Gazette, prohibit,

restrict or impose condition on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into

India".

The export and import policy is made in exercise of the power u/s 3 of the Act. Under the earlier export and import policy for the years 1990 to

1993, export of red sanders wood, was not prohibited. It is only Clause 7 of Part I of the Negative List of the new policy which prohibits export

of wood and wood products in the form of logs, timber, stumps, roots, barks, chips, powder, flakes, dust, pulp and charcoal. Therefore, under the

new policy, even chips, powder of red sanders are prohibited. Serial Number 44 of Part V of the Negative List of the new policy allows export of

processed timber alone of all species, excluding sandalwood and red sanders wood.

4. Before the learned single Judge, who heard the writ petition, it was contended on behalf of the respondent herein, that the principle of

promissory estoppel would apply to the case of the respondent and. the respondent having acted upon the representations made by the appellants

in the earlier export and import 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 appellants to change the export and

import policy all of a sudden and prevent the respondent from fulfilling its contractual obligation. It was further contended before the learned single

Judge, that the new policy is unreasonable and arbitrary in so far as it relates to red sanders wood already cut and converted into parts of musical instruments. The learned single Judge, on a consideration of the entire facts and circumstances of the case, found that the respondent has acted in pursuance of the representations contained in the earlier policy, which was announced for the period from 1-4-1990 to 31-3-1993 and suffered detriment by borrowing loans from financial institutions. The learned Judge also found that on the basis of the earlier policy the respondent has already prepared musical instruments parts by applying the necessary manufacturing process and made them ready for export and at that stage, the export import policy of the Government is changed and apply therefore, the principle of promissory estoppel would, against the enforcement of the new policy. The learned Judge further found that the new policy is arbitrary and unreasonable insofar as the goods which are ready for export in the converted form are concerned. Consequently, the learned single Judge held that the respondent is entitled to get the relief prayed for in the writ petition and issued a Writ of Mandamus directing the appellants herein to issue a licence for the export of the goods to the value of U.S. Dollars 75,000/- against the letter of credit No. 41-2432445-031. This Writ Appeal is directed against the order of the learned single Judge.

5. Before us, Mr. M. Kalyanasundaram, learned Additional Central Government Standing Counsel, appearing for the appellants, contended that the principle of promissory estoppel will apply to a legislative action. According to the learned counsel for the appellants, the export and import policy is made in exercise of a legislative function u/s 3 of the Act and, therefore, the doctrine of promissory estoppel cannot be invoked against such legislative action and the appellants cannot be prevented from enforcing the new policy during the period for which the new policy is enacted. In support of this contention, the learned counsel relied on the decision of the Delhi High Court in *Bansal Export (P) Ltd. and another Vs. Union of India and others*, . In that decision, it was held that the doctrine of promissory estoppel can be invoked only against executive actions of the Government, but not against legislature. In that decision the Full Bench of the Delhi High Court, further held that the export control orders issued u/s 3 of the Act are examples of delegated legislation and they can be amended from time to time and they being legislative in nature, the doctrine

of promissory estoppel of cannot be invoked against the provision fo such orders.

6. Per contra, Mr. R. Krishnamurty, learned Senior Counsel appearing for the respondent, reiterated the contentions urged on behalf of the

respondent before the learned single Judge and submitted that the principle of promissory estoppel will apply to the case of the respondent,

because on the representations made by the appellants in the earlier policy which was to be in force up to 31-3-1993, the respondent suffered

detriment by purchasing red sanders wood after taking loans from financial institutions and by manufacturing parts of musical instruments and,

therefore, it is not open to the appellants to change the policy even before 31-3-1993 and prevent the respondent from fulfilling its pre-ban

contractual obligations. The learned Counsel for the respondent also contended that 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.

7. Let us first examine the position of law on the question whether the doctrine of promissory estoppel can be invoked against the Governmental

action taken in exercise of statutory power and similarly against sub-ordinate legislations and delegated legislations, before examining the question

whether the respondent can invoke the principle of promissory estoppel against the action of the appellants in the present case.

8. In Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., , in the year 1962 the Central Government promulgated the Export

Promotion Scheme providing incentives to exporters of woollen textiles and goods. It provided for the grant to an exporter, certificates to import

raw materials of a total amount equal to 100% of the F.O.B. value of this export. Clause 10 of the Scheme provided that the Textile Commissioner

could grant an import certificate for a lesser amount if he is satisfied, after holding an inquiry, that the declared value of the goods exported is higher

than the real value of the goods. The Scheme was extended to exports of woollen textiles and goods to Afghanistan. The respondents exported

woollen goods to Afghanistan and were issued an Import Entitlement Certificate by the Textile Commissioner not for the full F.O.B. value of the

goods exported, but for a reduced amount. The respondents made representations to the Central Government but the Government confirmed the

orders of the Textile Commissioner. The respondents then filed writ petitions in the High Court. The High Court set aside the orders of the Textile

Commissioner and Government, and held that the respondents were entitled under the Scheme to obtain import licences for an amount equal to

100% of the F.O.B. value of their exports, unless it was found on enquiry duly made under Clause 10 of the Scheme that the respondents had by

"over-invoicing" the goods disentitled themselves to the import licences of the full value; and that the Textile Commissioner without making any

such enquiry, proceeded upon his "subjective satisfaction" that the respondents had "over" invoiced" the goods exported; and the Government

also acted in a similar manner in dealing with the representation of the respondents. In the appeal before the Supreme Court, it was contended inter

alia, on behalf of the Union of India that the Export Promotion Scheme was administrative in character, that it contained mere executive instructions

issued by the Central Government to the Textile Commissioner, and created no enforceable rights in the exporters, who exported their goods in

pursuance of the Scheme and that it imposed no obligations upon the Government to issue import certificates. The Supreme Court while repelling

the above contention of the appellant, held as follows at page 727 :

This case is, in our judgment a clear authority that even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still

open to a party who has 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 is not recorded in this form of a formal contract as required by the Constitution." In the above decision, the

Supreme Court while holding, that the Government is not exempt from liability to carry out the representations made by it as to its future conduct

and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, observes

thus at page 723;

It cannot be assumed merely because the Import Trade Policy is general in terms and deals with the grant of licences for import of goods and

related matters, 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, carriage etc. of

the goods and by the Imports (Control) Order, 1955, dated December 7, 1955, and by the provisions which were sought to be repealed restrictions were 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 u/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.

9. In *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, the Supreme Court considered the validity of a notification issued u/s 25 of the Customs Act. The Apex Court, while holding that the notification issued u/s 25 of the Customs Act is a piece of subordinate legislation held as follows at Page 542 :

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 manifestly arbitrary. In England, the Judges would say ""Parliament never intended authority to make such rules. They are unreasonable and ultra vires"".

In paragraphs 76 and 77 of the above judgment, the Supreme Court further observes thus:

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 Article 14 or Article 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 relevant circumstances which the Court considers relevant,

77. 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 35(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.

10. In *Pournami Oil Mills and Others Vs. State of Kerala and Another*, ; the Government by an order deemed to have been made u/s 10 of the

Kerala General Sales Tax Act, granted package of concessions to new Small Scale Industries in order to boost industrialisation in the State of

Kerala. On the basis of the said Government Order, several small scale units were set up. Subsequent to the setting up of the small scale units, the

Government issued another order withdrawing the concessions granted under the earlier order. The Supreme Court while accepting the case of the

small scale units, based on the doctrine of promissory estoppel held as follows at page 593 :

It is not disputed that the first Order namely, the one dated 11-4-1979 gave more of tax exemption than the second one. The second notification

withdrew the exemption relating to purchase tax and confined the exemption from Sales Tax to the limit specified in the proviso of the Notification.

All parties before us who in response to the Order of April 11, 1979 set up their

industries prior to 21-10-1980 within the State of Kerala would

thus be entitled to the exemption extended and/or promised under that Order. Such exemption would continue for the full period of five years from

the date they started production"".

11. In *Vij Resins Pvt. Ltd. and Others Vs. State of Jammu and Kashmir*, , the Apex Court, while dealing with the question whether it is possible to

invoke the principle of promissory estoppel against legislature, observed thus:

25. Petitioners 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 crore 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 representation made by the State and when the factories were

ready and they were in a position to utilise the raw material, 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 and 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"".

12. In *Union of India Vs. Chakra Tyres Limited*, , a Division Bench of this Court has taken the view that the theory of promissory estoppel is not

applicable only when the power is exercised under plenary power of the Legislature and not when the power is exercised under a delegated

legislation.

13. The learned single Judge, following the ratio of the decision of the Apex Court and that of the Division Bench Court in *Union of India Vs.*

Chakra Tyres Limited, referred to above and after referring to the principles laid down by the Bombay High Court in *Tapti Oil Industries and*

Another etc. Vs. State of Maharashtra and Others, and in Union of India Vs. Hindustan Platinum Private Limited, ; the Rajasthan High Court in

Union of India (UOI) Vs. J.K. Industries Ltd., ; the Orissa Cement Ltd. Vs. Superintendent, Customs and C. Ex., and the Karnataka High Court

in Vikrant Tyres Ltd. Vs. Union of India, , correctly summarised the position of law on the question of promissory estoppel in paragraph 18 of his

order in the following terms:

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"".

14. We fully endorse the above conclusion arrived at by the learned single Judge.

15. In view of the above settled position of law, we are unable to accept the contention of the learned counsel for the appellants that the doctrine

of promissory estoppel cannot be invoked against the action of the appellants in the present case, because the export and import policy issued

under S. 3 of the Act has to be taken as a legislative action. The new policy issued in exercise of the power under S. 3 of the Act, whether such

policy is considered as a governmental action taken in exercise of the statutory power, or as subordinate or the delegated legislation, the doctrine

of promissory estoppel can be applied against the enforcement of the new policy on the facts and circumstances of a given case.

16. Coming to the facts of the present case, the materials on record go to show that the respondent had acted in pursuance of the representations

contained in the earlier export and import policy, which was announced for the period from 1-4-1990 to 31-3-1993 to the effect, that the export

of red sanders in any form was permitted and entered into contract with foreign buyers for the export of musical instruments parts made out of red

sanders wood and under one such a contract entered into by the respondent with a foreign purchaser, products worth US Dollars 1,00,000/-were

agreed to be exported and for which purpose an open and irrevocable letter of credit No. 41-2432445-031 dated 21-2-1992 was opened, the

beneficiary being the respondent herein. The materials on record further disclose that pursuant to the said contract, as part fulfilment of the same,

US Dollars 25,000/- worth of products which were prepared and kept ready for export against the letter of credit referred to above, were already

exported to Japan in March 1992 after obtaining the necessary export licence. It is also seen from the records that the respondent has suffered

detriment by borrowing loans from financial institutions for manufacturing musical instrument parts and for keeping them ready for export and at

that stage the export and import policy though was considered to be in force till 31-3-1993, was suddenly changed by framing the new policy for a

period of 5 years from 1-4-1992 to 31-3-1997. Under the new policy, the export of red sanders wood in any form is prohibited with effect from

1-4-1992. In the above circumstances, as rightly pointed out by the learned single Judge, it has to be held that the principle of promissory estoppel

would apply against the enforcement of the new policy and, therefore, it is not open to the appellants to change the policy even before 31-3-1993

and prevent the respondent from fulfilling its pre-ban contractual obligations.

17. Now, let us consider the other contention of the learned counsel for the respondent that the new policy is unreasonable and arbitrary in so far

as it relates to red sanders wood already cut and converted into parts of musical instruments and which are kept ready for export. It is seen from

the counter-affidavit filed on behalf of the appellants herein in the writ petition that, issue of licence for export of musical instruments parts and

koto-parts made out of red sanders wood is not possible as the present policy bans export of any product made out of red sanders wood as an

ecological conservation measure. It is further stated in the counter-affidavit that in order to make the conservation measure totally effective, the

Government has banned the export of chips and powder of red sanders wood also. It must be pointed out that there is nothing on record to show

that cutting of red sanders wood has been banned by the Government or any authority at any time. Therefore, as rightly pointed out by the learned

single Judge, if the cutting of the red sanders tree is not banned, and the citizens are permitted to manufacture musical instruments parts, out of the

cut trees, there is no substance in the contention that export of musical instruments parts or the export of red sanders wood in any form has been

banned, after the trees are cut and converted into parts of musical instruments, as an ecological conservation measure. In view of the specific case of the respondent that the necessary manufacturing processes have been completed and that the musical instruments parts made out of the red sanders wood are kept ready for export, it is not known how the refusal to issue licence for the export of the finished goods will help in maintaining or conserving the ecological balance in the area. In the above circumstances, we have no hesitation in accepting the contention of the learned counsel for the respondent that the new policy in so far as it prohibits export of finished goods which are ready for export is Unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy. Therefore, the learned Judge is quite right in issuing a writ of mandamus directing the appellants to issue a licence for the export of the goods to the value of US Dollars 75,000/- against the Letter of Credit No. 41-2432445-031.

18. For all the reasons stated above, we cannot take exception to the view taken by the learned single Judge and we see no infirmity in the order of the learned single Judge warranting interference at our hands in this writ appeal. There is no merit in the writ appeal and it is liable to be dismissed. Accordingly, the writ appeal is dismissed. No costs.

19. Appeal dismissed.