
(2011) 07 DEL CK 0399
In the Delhi High Court
Case No : L.P.A. No. 884 of 2010

Union of India (UOI) and Another

APPELLANT

Vs

Himsheel International

RESPONDENT

Date of Decision : 25-07-2011

Acts Referred:

Customs Act, 1962 — Section 25
General Clauses Act, 1897 — Section 25

Citation : (2011) 187 ECR 144

Hon'ble Judges : Dipak Misra, C.J.; Sanjiv Khanna, J

Bench : Division Bench

Advocate : B. Niren, CGSC, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Whether Reporters of local papers may be allowed to see the judgment? 2. To be referred to the Reporter or not ? Yes. 3. Whether the judgment should be reported in the Digest ? Yes. SANJIV KHANNA, J.: Union of India and Director General of Foreign Trade have filed the present intra court appeal assailing the decision dated 21st May, 2010, allowing the writ petition filed by Himsheel International, the Respondent herein.

2. The Respondent is engaged in exports and on 19th March, 1998, had received a confirmation order for supply of 10,000 jackets to a company in USA. On 31st March, 1998, the foreign party issued an irrevocable letter of credit issued by a commercial bank in USA, in favour of the Respondent. By 21 shipping bills, 10,000 jackets were exported by the Respondent to the said foreign party between the period 26th March, 1998 to 5th June, 1998 as per the details given below:

S.No. S. Bill No. and Date order S/Bill FOB Value as Customs House

1. 007932/26.3.98 Rs. 502000 IGI Airport New Delhi.

2. 009692/15.4.98 Rs. 501585.00 -do-
3. 009693/15.4.98 Rs. 501585.00 -do-
4. 009696/15.4.98 Rs. 501585.00 -do-
5. 009694/15.4.98 Rs. 501585.00 -do-
6. 009691/15.4.98 Rs. 501585.00 -do-
7. 009695/15.4.98 Rs. 501585.00 -do-
8. 011058/28.4.98 Rs. 499578.66 -do-
9. 011059/28.4.98 Rs. 499578.66 -do-
10. 001060/24.4.98 Rs. 485534.28 -do-
11. 012218/12.5.98 Rs. 499346.10 -do-
12. 012217/12.5.98 Rs. 498337.32 -do-
13. 012453/14.5.98 Rs. 499346.10 -do-
14. 012734/17.5.98 Rs. 499346.10 -do-
15. 012985/20.5.98 Rs. 499346.10 -do-
16. 013189/22.5.98 Rs. 499346.10 -do-
17. 013487/26.5.98 Rs. 499346.10 -do-
18. 013683/28.5.98 Rs. 499346.10 -do-
19. 014091/2.6.98 Rs. 499346.10 -do-
20. 014505/5.6.98 Rs. 302634.00 -do-
21. 014504/5.6.98 Rs.2,54,924.01 -do-

3. There is no dispute and the factum that the Respondent received payment in terms of the export order and the irrevocable letter of credit.

4. The Appellant has introduced Duty Entitlement Passbook Scheme/Benefit (DEPB, for short). As per the said scheme, the exporter is eligible to claim credit of a specified percentage of FOB value of the exports made in freely convertible currency. The credit is available against such export products and at such rates as may be specified by the Appellant No. 2 in the public notices. The DEPB copy or scripts can be utilised for payment of customs duty at the time of clearance of goods, except capital goods or the goods mentioned in the negative list. DEPB scripts can be also sold by the exporters in the market and utilised by the third party purchaser for payment of custom duty. Referring to the objective and purpose behind the scheme, the Supreme Court in *Liberty India Vs. Commissioner of Income Tax*, has observed:

35. DEPB is an incentive. It is given under the Duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object behind DEPB is to neutralise the incidence of customs duty payment on the import content of export product. This neutralisation is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw materials, components, etc. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per the basic customs duty and special additional duty payable on such deemed imports.

5. Upto 15th April, 1998, the DEPB credit rate on Gents Jacket was 23% of the FOB value of goods as per Sl. No. 17 for Textile Groups in the Exim Policy, 1997-2002. However, with effect from 15th April, 1998, the DEPB credit rate was modified and revised as follows:

Product Group: Textiles S. No. 17 Gents Jackets with or without lining.

(a) Knitted 16% with a value cap of Rs. 200/-.

(b) Woven 20%

6. By a circular dated 28th July, 1998, a "clarification" was issued and it was stated as under:

It is clarified that the value cap on various types of garments are applicable both for woven as well as knitted garments.

7. As per the aforesaid clarification, the cap value of Rs. 200/- was applicable to woven jackets as well. The term "cap value" in DEPB implies the maximum FOB value of exports per piece. In other words the cap value of Rs. 200/- per piece on DEPB entitlement means that the exporter will get DEPB upto Rs. 40/- per piece.

8. The Respondent moved an application for credit of DEPB for the shipments made including the aforesaid shipments. The Respondent was given credit for the export/shipment on 26th March, 1998 at Sl. No. 1 as per the rate prevailing before 15th April, 1998 i.e. 23% of the FOB value on each exported jacket. However, for the balance exports from Sl. No. 2 to 21 made after 15th April, 1998, the Respondent was given credit @ Rs. 40 per jacket by applying the revised DEPB rate read with the circular dated 28th July, 1998. FOB value per jacket was Rs. 1,000/- and thus the Respondent was denied substantial benefit of DEPB credit by restricting FOB credit to Rs. 200/- per jacket. In other words for shipments at Sl. No 2 to 21, the Respondent was given DEPB credit of Rs 40/- per jacket.

9. The Respondent made representations pleading promissory estoppel and the factum that the Respondent had entered into a contract and even receipt of the

irrevocable letter of credit prior to 15th April, 1998 is established. It was highlighted that the new rate of DEPB with the cap value would result in reduction of DEPB rate of 23% to almost 1%. It was submitted that the contract which the Respondent had entered into was keeping in mind the earlier DEPB rate and such a drastic reduction had made the entire transaction uneconomic and had put the Respondent to unbearable losses. Reliance was placed on paragraph 1.5 of the Export-Import Policy and it was submitted that the transitional clause should be applied and the Respondent should be given benefit.

10. The request made by the Respondent was considered by the Appellants but was rejected by the letters dated 23rd July, 1999 and 13th August, 1999.

11. The Respondent thereafter approached the appellate authority but was informed by letter dated 23rd February, 2000 that the appeal regarding DEPB did not lay before the appellate authority. Accordingly, the Respondent filed the aforesaid Writ Petition (Civil) No. 4098/2000 which has been allowed by the impugned judgment dated 21st May, 2010.

12. The learned Single Judge while allowing the writ petition has applied the principle of promissory estoppel making reference to the judgment in the case of Union of India Vs. Cosmique International, Delhi The said judgment deals with cash compensatory support and withdrawal of benefit. Reference has also been made to a Division Bench judgment in Southern Petrochemical Industries Corporation Ltd. v. Union of India decided on 23rd November, 2009 in LPA No. 231/2008.

13. Doctrine of promissory estoppel has been explained and expounded in several decisions of the Supreme Court, (see Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, State of Arunachal Pradesh Vs. Nezone Law House, Assam, Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, Jasbir Singh Chhabra and Others Vs. State of Punjab and Others, State of Bihar and Others Vs. Kalyanpur Cements Ltd., It is principally evolved on equity and to avoid injustice. It is applied to the Executive action of the State and is applied when it can be shown that it would be equitable to hold the Government or the public authority to the promise or representation made by it. Promissory estoppel does not apply against a Statute but it applies against the policy decision and executive action. Promissory estoppel being a doctrine of equity does not also apply if the State or the executive authority is able to show that larger public interest required a change in the policy and it would be inequitable to enforce "estoppel" against the Government. Thus, promissory estoppel being an equitable doctrine must yield to the equity, if larger public interest so requires and it can be shown by the Government or the 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 them.

14. In the present case, the Appellants have not placed any factual matrix on

record to justify or show that the modification was made in public interest. However, what was pointed out is that DEPB rates were always susceptible to change at anytime. It was submitted that no promise was made by the Appellant that the rate fixed shall continue when exports were made. Thus, the Respondent was fully aware that the DEPB rates may undergo reduction/modification. The Appellants have relied upon the handbook of procedures 1997-2002, Volume I, in which it has been stated that DEPB rates and value cap shall be applicable as on the date of export as per Clause 15.15 of the handbook of procedures.

15. For the sake of convenience, Clause 15.15 of the Hand Book is reproduced below:

15.15 Date of shipment/despatch for the purposes of exports will be reckoned as under:

MODE OF TRANSPORTATION DATE OF SHIPMENT/ DESPATCH

(i) By sea (a) For bulk cargo, the date of Bill of Lading or the date of mate receipt, whichever is later. (b) For containerised cargo, the date of "Onboard Bill of Lading", or "Received for Shipment Bill of Lading", where the L/C provides for such Bill of Lading. For exports by containers from Inland Container Depot (ICD), the date of Bill of Lading issued by shipping agents at the time of loading of export goods in the ICD after customs clearance. (c) For Lash barges, the date of Bill of Lading evidencing loading of the export goods on board.

(ii) By Air The date mentioned by the appropriate Officer of Customs on the Shipping Bill, evidencing loading or handing over of goods to the air cargo complex, which are not international airports, or by way of rotation of flight number and date.

(iii) By Post Parcel . The date stamped on the postal receipt

(iv) By Rail The date of RR (Railway Receipt).

(v) By Registered Courier Service The date affixed on Courier Receipt/Waybill

(vi) By Road The date on which the goods crossed the Indian border as certified by the Land Customs Authorities.

However, wherever the Policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to the consignments already handed over to the Customs for examination and subsequent exports upto the date of Public Notice. Similarly, in such cases where the goods are handed over to the customs authorities before the expiry of the export obligation period but actual Exports take place after expiry of the Export Obligation period, such exports shall be considered within the export obligation period and taken towards fulfillment of export obligation.

16. Clause 1 and 4 of the General Instruction for DEPB Rate reads as under:

GENERAL INSTRUCTION FOR DEPB RATES

1. The DEPB rate and the value cap shall be applicable as existing on the date of export as defined in paragraph 15.15 of Handbook (Vol.1).

xxxx

4. The DEPB rate aims to neutralise the incidence of duty on the inputs used in the export product. Therefore, the DEPB rates as given in appendix 28A refer to normally tradable/exportable product....

17. The Respondent has, however, relied upon Clause 1.5 of the Exim Policy which reads as under:

In case an export or import that is permitted freely under this policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulations, unless otherwise stipulated provided that the shipment of the export or import is made within original validity or irrevocable letter of credit establish before the date of imposition of such restriction.

18. It is the stand of the Appellants that paragraph 1.5 of the Exim Policy 1997-2002 is not applicable to DEPB credit as the same is determined on the prevailing rates of custom duty on the import content of the export product. The result is "neutralisation", (Refer Liberty India (supra)).

19. Clause 15.15 is a general clause and fixes/prescribes the date of shipment/export. This is the general principle/rule. However, the aforesaid clause does not stipulate the effect or consequence when there is an amendment or reduction but subsequent to or after an exporter had entered into a firm contract. The question raised is whether in such cases, principle of promissory estoppel can be applied.

20. Clause 1.5 of the Exim Policy may not be strictly applicable as the same deals with export/import and imposition of restriction or regulation within original validity or issue of irrevocable letter of credit before such imposition of restriction but the said clause gives an indication and supports the principle of promissory estoppels; that the Appellants do not want that the importers/ exporters should suffer economic loss or hardship because of change or amendment in the policy. Equity and fairness are the foundation of Clause 1.5 of the Exim Policy. The purpose and object behind Clause 1.5, which is transitory in nature, is to protect citizens and prevent hardships on the importer/exporter when a regulation or restriction is imposed.

21. This brings us to the main issue that the principle or doctrine of promissory estoppel cannot be invoked because the Appellants could change the DEPB rates at anytime and thus there was no promise. Therefore the Respondent cannot claim that the DEPB rate on the date of the contract should be applied. The aforesaid contention is not new and has been examined and dealt with by the Supreme Court in several cases.

22. In *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, importers of PVC resin had prayed for quashing of a notification by which an earlier notification granting exemption from payment of customs duty was withdrawn before the cut off date in the first notification granting exemption. The Supreme Court rejected the plea of promissory estoppel, inter alia, holding as under:

21. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued u/s 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. From the very nature of power of exemption granted to the Government u/s 25 of the Act, it follows that the same is with a view to enabling the Government to regulate, control and promote the industries and industrial production in the country. Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the Appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued on the Central Government "being satisfied that it is necessary in the public interest so to do". Strictly speaking, therefore, the notification cannot be said to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification issued u/s 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption." 23. No doubt the

above said paragraph refers to Section 25 of the Customs Act, 1962 and the power of the Government to withdraw or impose taxes/concessions, but the aforesaid paragraph also refers to public interest and the right of the Government to prematurely withdraw tax concession/benefit and not abide by the cut off date in the public interest. This is clear when we examine paragraph

23 of the said judgment, which reads as under:

23. The Appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification u/s 25(1) of the Act.

24. The aforesaid decision and ratio was clarified in Shrijee Sales Corporation and Another Vs. Union of India (UOI), in which again the same notification withdrawing tax concessions in the case of PVC resin was in issue. It was held as under:

7. The next question is whether the fact that the Notification No. 66 mentioned the period during which it was to remain in force, would make any difference to the situation. In other words, could it be said that an exemption notified without specifying the period within which the exemption would remain in force, would be withdrawn in public interest but not the one in which a period has been so specified? Once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where a period has been indicated. The Government is competent to resile from a promise even if there is no manifest public interest involved, provided, of course, no one is put in any adverse situation which cannot be rectified. To adopt the line of reasoning in Emmanuel Ayodeji Ajayi v. Briscoe quoted in M.P. Sugar Millseven where there is no such overriding public interest, it may still be within the competence of the Government to resile from the promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, provided, of course, it is possible for the promisee to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable.

25. Similar view is expressed by the Supreme Court in State of Punjab Vs. Nestle India Ltd. and Another, [also see A.P. Steel Re-Rolling Mill Ltd. Vs. State of Kerala

and Others,

26. Several judgments on the subject of the promissory estoppel were extensively examined in depth in Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, and the decision, ratio and explanation of the reasoning in Kasinka Trading (supra) was reiterated. Reference was made to MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, wherein it was held that doctrine of promissory estoppel applies to notifications. It has been accordingly held that when a Government makes a promise intending or intended that it would be acted upon by the promisee and the promisee acts by relying upon the promise and alters his position, the Government should be held to be bound by the promise and the promise would be enforceable notwithstanding that there was no consideration and no formal contract was executed. However, the said doctrine is based on equity and when over-riding equity in form of "public interest" requires that the plea of promissory estoppel should not be applied, the Courts would not issue a writ. In MRF Limited (supra), it was also highlighted that in the case of Kasinka Trading (supra) the burden of customs duty etc. had been passed on the consumers and there was no question of the Assessee being put to a huge loss.

27. Again in the case of U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others, principle of promissory estoppel was applied in case of a notification issued under a legislative enactment, i.e., delegated legislation. It was held that no doubt the Government has power to revoke the notification but when the other party has suffered on account of the revocation, then if a promise is made and acted upon, principle of promissory estoppel can be applied. Delegated legislation cannot be treated at par with the primary legislation and, therefore, are not entitled to same degree of protection in respect of retrospectivity. Further, the onus is on the Government to show that the concession or benefit has been withdrawn in a public interest and evidence and material must be brought on record to establish the plea of larger public interest by the Government/authority.

28. In the present case, the Appellant has not pleaded that why the difference in the DEPB rate was made and what prompted the huge and substantial reduction from 23% to bare 1%, in case the cap value of Rs. 200/- is taken into consideration. The Appellants have not endeavoured to justify or explain why this was necessary and required. In the counter affidavit, it is pleaded as under:

The Petitioners reportedly were given DEPB credit on one shipping bill of 26.3.1998@23% vide DEPB licence No. 0127753 dated 18.2.1999. They were also given DEPB credit @ 20% with a value cap of Rs. 200/- i.e. Rs. 40/- per piece for their shipment dated 15.4.1998 which included six shipping bills. They were also given DEPB credit @ 20% with a value cap of Rs. 200/- i.e. Rs. 40/- per piece for their shipment from 14.5.1998 to 26.5.1998 which included 5 shipping bills. Against other 9 shipping bills Petitioner was given DEPB credit @ 20% with a Value cap of Rs. 200/- @ Rs. 40/- per piece. Petitioners application

for DEPB@ 23% which was pending before the DGFT was rejected vide order dt.23.7.1998 on the ground that DEPB credit is allowed only at the rate applicable on the date of export.

5. The Petitioners aggrieved by a change in the EXIM Policy which prior to 15.4.1998 provided a credit entitlement of 23% on all knitted and woven jackets seek to challenge the same and impugn the order dated 23.7.1998 for non-grant of DEPB@23%.

29. Even otherwise, as noticed above, the policy introduced and implemented with effect from 15th April, 1998, had placed maximum cap of Rs. 200 per piece on knitted Gents Jacket with or without lining and the DEPB rate was specified 16%. However, in case of woven jackets the rate specified was 20% without any value cap. The value cap for woven jackets was not specified and stated in the rates introduced on 15th April, 1998. The value cap for woven jackets was introduced only vide circular dated 28th July, 1998 which has been quoted above. The aforesaid circular though described as clarificatory in nature, in fact imposes value cap for the first time on the woven jackets. Such a circular cannot be given a retrospective effect. The Respondent should be given benefit of paragraph 15.15 of the handbook i.e. entitled to DEPB rate as prescribed on the "date of export". This will mean that the Respondent is entitled to DEPB rate as in the policy with effect from 15th April, 1998 @ 20% applicable to the woven jackets without any value cap. In *Suchitra Components Ltd. v. Commissioner Central Excise* 2007 208 ELT 321 SC It has been held as under:

2... The point raised by the learned Counsel for the Appellant is covered by the recent judgment of this Court in *CCE v. Mysore Electricals Industries Ltd.* In the said judgment, this Court held that a beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. Thus, when the circular is against the Assessee, they have right to claim enforcement of the same prospectively.

30. In view of the aforesaid reasoning the appeal fails and is dismissed. Decision and directions given by the learned single judge are correct. They should be complied with within two months. No costs. (SANJIV KHANNA) JUDGE (DIPAK MISRA) CHIEF JUSTICE July 25th, 2011 NA/kkb