

(1999) 12 CAL CK 0030
In the Calcutta High Court

Case No : Appeal from Original Order No. 345 of 1992 and Matter No. 2897 of 1989

Union of India (UOI)

APPELLANT

Vs

Indian Rayon and Industries Ltd.

RESPONDENT

Date of Decision : 21-12-1999

Acts Referred:

Customs Act, 1962 — Section 15, 25

Citation : (2003) 161 ELT 109

Hon'ble Judges : V.K. Gupta, J; Malay Kumar Basu, J

Bench : Division Bench

Advocate : S. Gooptu, for the Appellant; Dube and Co., for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta, J.—This appeal under Clause 15 of the Letters Patent is directed against Judgment dated 27-3-92 passed by the learned Single Judge of this Court in Matter No. 2897 of 1989, whereby he has by allowing the writ application filed by the respondents directed the appellants to clear and deliver the goods imported by the respondents without payment of any duty of customs caused by reason of the withdrawal of the exemption notification issued in terms of Section 25 of the Customs Act and by issuing certain other consequential and ancillary directions.

2. Brief facts leading to the filing of the present appeal are that the respondents being engaged in the business of textiles took steps for importing from abroad an automatic winding machine used in the textile industry and called by the name of "AUTOCONER". "AUTOCONER" as a machine item was liable to attract the payment of customs duty u/s 25 of the Customs Act at all material times except during the relevant period, which we shall notice hereafter, when exemption was granted to it from payment of customs duty by issuance of a notification by the Government of India. Withdrawal of the exemption, and in the meanwhile as per the respondents, writ-petitioners their having taken steps for importing

"AUTOCONER" on the basis of exemption notification, resulted in the respondents filing writ application under Article 226 of the Constitution which, as noticed above, was allowed on the terms indicated hereinabove.

3. The customs Notification No. 71/87 was issued on 1st March, 87 whereby machines specified in the Table annexed with that notification were exempted from payment of customs duty on the terms indicated in that notification. "AUTOCONERS" were not included in the Table annexed with the aforesaid notification. This notification was to remain in force upto 31st March, 1988. Notification No. 71/87, dated 1st March, 87 however was amended by customs Notification No. 246 of 1988, dated 13th September, 1988 whereby "AUTOCONERS" were included in the Table annexed to Notification No. 71/87. The amending Notification No. 246/88 further provided that Notification No. 71 of 1987 was to remain in force upto 31st March, 1990.

4. The appellants issued Notification No. 63 of 1989 on 1st March, 1989 whereby, in amendment of Notification No. 71/87 the rate of customs duty was revised from 25% ad valorem to 35% ad valorem.

5. We now come to the impugned notification, whereby "AUTOCONERS" were altogether taken out from the list of machines which were exempted from payment of customs duty. This was done vide Notification No. 143/89-Customs issued on 21st April, 1989. The Notification may be reproduced hereunder for ready reference. It reads thus :

"In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962). The Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 71 /87-Customs, dated 1st March, 1987, namely :- In the Table annexed to the said Notification, Sl. No. 8 and the entry relating thereto shall be omitted."

6. The respondents felt aggrieved by the issuance of this notification on 21st April, 1989 because their grievance was that acting on the basis of Notification No. 246/88, dated 13th September, 1988, they took steps for importing "AUTOCONERS" from abroad and entered into a contract on 23rd February, 1989 with Messrs. Karl Mayer of West Germany. The respondents also say that they opened necessary Letter of Credit on 18th March, 1989 in favour of the aforesaid supplier in United Bank of India.

7. The respondents, further case is that the machinery was shifted on 30th April, 1989 and arrived into Indian Ports on 4th July, 1989. Since in the meanwhile Notification No. 143 of 1989, dated 21-4-89 had come into operation and therefore, the respondents-petitioners were required to pay customs duty on "AUTOCONERS", which was in derogation to the promise made by the appellants as per Notification No. 71/87 (as amended by Notification No. 246/88), they, feeling aggrieved filed writ application as indicated hereinabove.

8. Doctrine of promissory estoppel or equitable estoppel has been the subject matter of discussion for a long time in this country. Various judgments of the Supreme Court starting with the Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., have dealt with the ambit, scope and evaluation of the doctrine of promissory estoppel. It is not the case of the appellants that, in abstract terms this doctrine cannot be attracted or made applicable against the Government but in the facts and circumstances of this case we have to see and consider whether the doctrine can at all be held applicable to the present case, based on the facts about the issuance of the aforesaid notifications and as to whether the respondents/writ-petitioners can be held entitled to invoke this doctrine against the appellants. In the case of Kasinka Trading and another, etc. etc. Vs. Union of India and another, their Lordship of the Supreme Court, while dealing with the evolutionary development of the doctrine of promissory estoppel held as under:

"The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or affect a legal relationship to arise in the future, knowing as well intending that the representation, assurance of the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.

It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make." There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the Courts are bound to consider all aspects including the results sought to be achieved and the public goods at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the

court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."

9. In so far as the scope of the power to grant exemption from payment of customs duty under the Customs Act, their Lordships held as under in the same Judgment:

"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 included 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 of customs duty etc as item 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 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 States. 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 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 "

"The argument on behalf of the appellants, vehemently pressed by Mr. Ashoke Desai and Mr. Hansh Salve, their learned Senior Advocates, is to the effect that since the Notification No 66/79 had itself indicated that it shall be operative till 31st March, 1981, the Government could not withdraw the same before the expiry of that date. It was argued that the appellants had placed orders for the import of PVC resin relying upon the exemption notification on the understanding that it was to remain operative till 31st March, 1981 and had made arrangements for importing the goods accordingly and they could not be prejudiced by the withdrawal of that notification before 31-3-1981. We cannot persuade ourselves to accept this submission of the learned Counsel. Merely by mentioning the date as 31st March, 1981, as the date up to which the exemption Notification No 66/79 was to be operative, no unequivocal representation could be said to have been made that it could not be rescinded or modified before that date even if the Government was satisfied that it was necessary in the public interest to rescind it. Since, the notification had been issued u/s 25(1) of the Act, the very same power was available to the authority for rescinding or modifying that notification and the appellant ought to have known that the said notification was capable of or liable to be revoked, modified or rescinded at any time even before the expiry of 31st March, 1981, if the "public interest" so demanded. To hold that after the Government had issued the Notification 66/79 indicating that it was to remain operative till 31st March, 1981, it could not be rescinded or modified before the expiry of that date would amount to prohibiting the Government from discharging its statutory obligation u/s 25(1) of the Act, if it was satisfied that it was in the "public interest" to withdraw, modify or rescind the earlier notification. The plain language of Section 25 of the Act is indicative of the position that it is in the public interest and public interest alone which is the dominant factor. It is not the case of the appellants that the withdrawal of Notification 66/79 by the impugned notification was not in "public interest". Their case, however, is that relying upon the earlier notifications they had acted and the Government should not be permitted to go back on its assurance as otherwise they would be put to huge loss. The Courts have to balance the equities between the parties and indeed the Courts would bind the Government by its promise "to prevent manifest injustice or fraud". The following observations from *Malhotra and Sons v. Union of India* [AIR (1976) & K 41] have been noticed with approval by this Court in *Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, and in *M.P. Sugar Mills case* (supra):

"The Courts will only bind the Government by its promise to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government acts in its governmental, public or sovereign capacity."

The burden of customs duty etc. is passed on to the consumer and therefore, the question of the appellants being put to a huge loss is not understandable. No injustice has been done much less fraud practised by the Government in withdrawing the exemption.

10. It would thus clearly emerge by the above-quoted observations in *Kasinka Trading* that the grant of exemption u/s 25 of the Customs Act by itself would not amount to holding out any promise or assurance to any intending importer that the exemption once granted would remain operative indefinitely and that it cannot be withdrawn at any intervening or supervening stage of point of time. The grant of exemption u/s 25 of the Customs Act from the very nature of power of exemption granted to the Government is with a view to enabling the Government to regulate, control and promote the industries and industrial production in the country. The supersession or revocation of an exemption notification, in the public interest is therefore also an exercise of the same statutory power of the Government under the law itself. The power to grant exemption being based on Section 25 of the Act also thus includes the power to modify or withdraw exemption and the liability to pay customs duty thus would start or arise the moment the exemption is modified or withdrawn. Goods thus imported would become subject to the payment of customs duty as prevalent, in terms of Section 15 of the Customs Act.

11. The grant of exemption, in public interest and its withdrawal, again in public interest is the dominant factor although. Their Lordships in *Kasinka Trading* clearly observed that the plain language of Section 25 of the Customs Act is clearly indicative of the position that it is the public interest and public interest alone which is the over-riding factor while determining the validity of a notification withdrawing exemption from customs duty and that the Courts have to balance the equities between the parties based on such public interest. Public interest thus therefore is the determinative and over-riding consideration in finding out whether the impugned notification should be allowed to operate or not. In the present case the language of the notification itself clearly suggests that it was issued in public interest. It is also not the case of the respondents-writ petitioners that it was not issued in public interest.

12. The case of the respondents before the learned Single Judge, and as spelt out clearly in the writ application itself was revolving around the doctrine of promissory estoppel. In *Kasinka Trading* their Lordships clearly held that the notification granting exemption originally cannot be said to have extended any representation, much less a promise or assurance to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the Government. It is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise intended to create a legal relationship. It has clearly been observed that notification issued u/s 25 of the Customs Act cannot be said to be holding out 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 any such notification. Actually in Para 26 of *Kasinka Trading their Lordships* went so far as to holding as under :

exemption notification u/s 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the "public interest" so demanded."

13. *Kasinka Trading* came to be noticed by a Larger Bench of the Supreme Court in *Shrijee Sales Corporation and Another Vs. Union of India (UOI)*, dealing with the question whether there was any difference between two sets of notifications; one, when the date of its remaining in force is mentioned and the other notification does not mention any period up to which it was to remain operative. On this question and on the question of public interest being paramount, it was held as under :

"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 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. Briscos* (1964) 3 All. E R 556 quoted in *M P Sugar Mills* (supra) even 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 promise to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable."

14. Viewed from any angle, therefore, we have no hesitation in holding that the learned Single Judge went wrong in his assumption that either the doctrine of promissory estoppel was attracted and thus, applicable in the present case or that the appellants could be prevented from charging customs duty from the respondents-writ petitioners because the withdrawal of exemption was hit by the invocation of this doctrine of promissory estoppel. The Judgment under appeal therefore suffered from aforesaid patent error of law and misappreciation of the

scope of the exemption granted and its subsequent withdrawal. We have thus no hesitation in allowing this appeal and setting aside the Judgment of the learned Single Judge.

15. The appeal is accordingly allowed. The judgment of the learned Single Judge is set aside. All interim orders issued from time to time shall stand vacated immediately and forthwith.

16. No order as to costs.

17. Let a xerox copy of this judgment, duly counter-signed by the Assistant Registrar of this Court be given to the parties upon their undertaking to apply for and obtain certified copy of the same upon usual undertakings.