
(1967) 08 DEL CK 0013

In the Delhi High Court

Case No : Civil Writ Appeal No. 237D of 1962

Visanji Velji Somays

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 08-08-1967

Acts Referred:

Citation : (1968) ILR Delhi 120 Supp : (1968) ILR Delhi 120

Hon'ble Judges : S.K. Kapur, J

Bench : Single Bench

Advocate : P.A. Mehta, K.K. Laoria, S.N. Shankar and N.S. Rao, for the Appellant;

Judgement

S.K. Kapur J.

(1) This judgment will dispose of Civil Writ Petitions Nos. 237-D to 241-D of 1962 and 249-D to 251-D of 1961 as the learned counsel agree that the questions of law and fact arising in all these writ petitions are the same. These cases were heard on 27/4/1967, but the judgment was reserved because the learned counsel for the respondents wanted time to obtain instructions whether or not the Government was willing to issue license to the petitioners. Disinclination of the Government to issue such licenses was communicated to me on the day I was leaving Delhi to work at the Circuit Bench at Simla.

(2) In view of the common questions arising in all the writ petitions, I am reciting the facts of Civil Writ Petition No. 237-D of 1962 only. An Open General license dated 27/1/1952 was issued by the Central Government giving permission to all persons to import by country craft from certain places in middle East and East Africa, set out in the license, all or any of the goods specified therein, including cloves, provided the goods were shipped or dispatched or consigned to India on or before 30/6/1952. The period of validity of the said Open General license was extended from time to time by various notices up to 30/9/1957, so that the articles covered by the said license were imported freely by country crafts

without any special license or permission. On 8/8/1957, the Assistant Controller of Imports wrote to the African Trading Company (Private) Limited that the concession for import of certain goods by sailing vessels from East African countries without import trade control restrictions was valid up to 30/9/1967, and "the date "30/9/1957" refers to the date of arrival of goods at an Indian Port and not the date of shipment from countries abroad." On 13/8/1957, the Bombay Clove Merchants Association Limited, of which the petitioner claims to be a member, made a written representation to the Chief Controller of Imports that on account of certain practical difficulties the import of goods by country craft should be allowed in all cases in which the goods had been put in the country craft before 30/9/1957, irrespective of the date or dates on which the goods arrived at the Indian ports. On 23/8/1957, a letter was issued to Messrs Jamna Dass Haridas on behalf of the Joint Chief Controller of Imports that in partial modification of the letter dated 25/7/1957, it had been decided that clearance would be allowed for such goods without a license even if the goods arrive after 30/9/1957, provided the shipment was made on or before that date. A letter to the same effect was also addressed on behalf of the Joint Chief Controller of Imports and Exports to the Honrory Secretary of the Bombay Clove Merchants Association Limited on 23/9/1957. In October 1957 the period of validity of Open General license was extended till 31/12/1957, and information to this effect was sent to the Bombay Clove Merchants Association Limited by letter dated 14/10/1957. On 15/11/1957, however, the Joint Chief Controller of Imports and Exports issued Trade Notice No. 112/57 in which it was inter alia stated that import made by country crafts from certain countries was allowed under Open General license which was cancelled on 30/6/1952; that subsequently the position was reviewed and the concession of importing certain goods by country crafts from certain countries was extended from time to time and it expired on 31/12/1957; and that "enquiries have been received as to whether this date i.e. 31/12/1957 should be taken as the date of shipment or the date of arrival of goods at Indian ports. It is, Therefore, clarified that the date of arrival of the goods in India should be the crucial date and that consignments of the goods referred to above arriving at Indian Ports on or before the 31/12/1957, would alone be eligible for the concession." It has been alleged by the petitioner, and this allegation is not denied on behalf of the respondents in their counter-affidavit, that aforementioned Trade Notice was issued without affording any opportunity to the petitioner of being heard in the matter. The petitioner further alleges that relying on previous precedents and the communications dated 23/9/1957, and 14/10/1957, he entered into firm contractual obligations about the middle of October 1957 with his foreign suppliers in Zanzibar for the import of 1000 bundles of cloves to be shipped by country craft on or before 31/12/1957. Copies of the said contracts have been annexed to the petition and this fact also has not been denied in the counter-affidavit. One of the conditions in both the contracts is that the buyer will open confirmed irrevocable letters of credit for the full value of the invoice. The said contracts show that the suppliers agreed to ship the goods by a reliable country craft on or before 31/12/1957.

Having entered into the said contracts, the petitioner by letter dated 18/10/1957, instructed his bankers, the Mercantile Bank of India Limited, Bombay, to open an irrevocable letter of credit in favor of the suppliers whereupon the said bank applied to the Reserve Bank of India for necessary approval and the said approval was granted by the Reserve Bank of India on 28/10/1957, in the following words-

Approved provided the goods are shipped on or before 31/12/1967". (3) The petitioner alleges that the said letter of credit opened in favor of his suppliers was communicated to the latter. On 20/11/1957, the petitioner addressed a letter to the Joint Chief Controller of Imports and Exports informing him about the aforesaid commitments entered into by him in the bonafide belief that the extension of period of concession announced on 14/10/1957 related to the period of shipment of goods up to the end of December 1957 irrespective of the date of arrival of the goods and requested the Joint Chief Controller of Imports to take note of the said commitment and issue necessary instructions to the Department to allow clearance of the said goods even though the vessels carrying the goods might arrive after December 1957. By letter dated 16/12/1957, the Joint Chief Controller of Imports declined to issue any such instructions and said that the concession would be available only if the goods arrived at the Indian ports before December 1957. Thereafter, the petitioner by letter dated 30/12/1957, informed the Joint Chief Controller of Imports that 300 bundles out of 1000 bundles, agreed to be purchased by the petitioner, had already arrived at Indian port before 31/12/1957, and that his request to the bankers for cancelling the letter of credit with respect to the remaining 700 bundles had been declined by the bank according to whom the foreign suppliers having shipped the goods had already utilised the irrevocable letter of credit and received the amount thereof. The remaining 700 bundles were shipped on 23/12/1957, but arrived in Bombay on 15/4/1958. The petitioner has annexed to his petition certificates from various authorities at the dispatch station in support of his plea that country crafts left for India before 31/12/1957. By three separate orders dated 27/5/1958, the Additional Collector of Customs, Bombay, ordered confiscation of the said goods but gave to the petitioner an option under, section 183 of the Sea Customs Act to pay fines of Rs. 29,000.00, Rs. 19,500.00 and Rs. 19,500.00 in lieu of confiscation and clear the goods for home consumption. Three separate orders were made because there were three separate bills of entry though the consignments were the same. The Additional collector found :

It was evident from the correspondence that the goods were contracted for and the irrevocable letters of credit opened before the issue of the I.T.C. Public Notice 112/57 dated 14/11/57 laying down that the date of arrival and not the date of dispatch will be the criterion for determining the eligibility of the goods for C.G.L. XIX. Further they had tried to cancel the order when they found that the goods will not reach India before 31/12/1957 but were unable to do so because of the irrevocable commitments entered into with the shippers.

Since the goods have arrived after the expiry of the C.G.L. and as no license has been produced to cover the same, the goods are deemed to have been imported in contravention of the Import Control Order 1955 read with sub-section 2 of section 3 of the Imports & Exports (Control) Act of 1947."

(4) Aggrieved by the orders of the Additional Collector the petitioner appealed to the Central Board of Revenue but the appeals were dismissed by three orders dated 29/2/1960. The Central Board of Revenue observed that the Open General license was valid for shipment of goods only up to 30/6/1952, and was not extended further. On the other hand, only the import of certain goods from specified countries was continued to be allowed under executive instructions issued from time to time. It was not Therefore, correct to say that the license was continued and, Therefore, the validity of the Trade Notice No. 112/57, could not be questioned. They, however, found in favor of the petitioner that the commitment under the letter of credit for the import of goods in question was made prior to 15/11/1957, but that, according to the Board of Revenue, provided only a mitigating circumstance which had already been taken notice of by the Additional Collector in imposing, a penalty of only 30 per cent of the value of the goods. The petitioner filed revision petitions before the Central Government which were dismissed again by three separate orders dated 29/5/1961; 29/5/1961 and 30/5/1961. The order made by the Government of India was acurt one and me said that there was no reason to interfere with the order in appeal. A It is in these circumstances that the petitioner has filed the present writ petition for quashing of the orders of the Additional Collector, the Central Board of Revenue and the Central Government.

(5) In the counter-affidavit filed on behalf of the respondents it has not been denied by the respondents that the petitioner entered into a firm commitment with foreign suppliers on the basis of the representation contained in the letters dated 23/9/1957, and 14/10/1957, and he opened irrevocable letters of credit with the permission of the Reserve Bank of India. In their counter-affidavit the respondents also admit that the concession to import goods from certain African and East Asian countries was allowed after the expiry of the Open General license on 30/6/1962. They, however, say that the final extension was clearly restricted to the goods reaching Indian ports by 31/12/1957, that the concession had to be discontinued in public interest inasmuch as that they were experiencing great difficulty in obtaining authentic evidence of the date of shipment in the case of goods imported by sailing vessels under the aforesaid concession without Import Trade Control restrictions and that "on the basis of "certain communications issued by Joint Chief Controller of Imports and Exports, Bombay, a confusion was sought to be raised on this point and, therefore. Trade Notice dated 15/11/1957 was issued to remove all confusion in the matter. The decision that the date of arrival of the goods in India should be the crucial date and that consignments arriving at the Indian ports on or before 31/12/1957 would be eligible for the concession, was taken much earlier and this fact was also communicated by Chief Controller of Imports and Exports, New Delhi, to

parties who sought certification as far back as August, 1957". It thus clearly appears from the counter-affidavit that the respondents have made no firm allegation denying the issue of the letter dated 23/9/1957, extending the concession to goods shipped before 30/9/1957. It is in the light of the above facts that the learned counsel for the petitioner raised the following contentions:-

(1)The Government was estopped from cancelling the license when the petitioner had, acting on its representation, contained in the various letters already mentioned, entered into a final commitment with the exporters and had thus acted to his detriment.

(2)In any case the authorities had no power to cancel the license which cancellation had the effect of operating retrospectively on the contracts already entered into.

(3)The permission given to the petitioner in the form of an open general license could not be cancelled without hearing the petitioner.

(6) On behalf of the respondents, on the other hand, it was stated that the Government could not be estopped in the exercise of Governmental functions; that the open general license had, in any case, expired in June, 1952 and the period was thereafter extended only by executive instructions leaving an absolute discretion with the authorities to cancel and/or revoke the permission and that nothing contained in the Imports (Control) Order, 1955 applied to import of any goods covered either by open general license issued by the Central Government or by executive instructions issued by the Chief Controller of Imports and Exports to the Customs authorities by reason of clause 11 of the import-control order. It was not however, disputed that because of clause 2(a) of the said order the Chief Controller of Imports and Exports includes a Joint-Chief Controller of Imports and Exports and a Deputy Chief Controller of Imports and Exports.

(7) I will first take up the question of estoppel. Mere acquiescence or non-action on the part of the public agents or officers does not ordinarily work an estoppel unless such non-action or acquiescence supply the elements of representation necessary to constitute an estoppel. In 31 Corpus Jurisdiction Secundum-page 411-article 139, one finds the following statement of law in regard to estoppel against State:-

It has been broadly stated that there can be no estoppel against the United States or a State. Nevertheless, subject to limitations and exceptions considered supra article 138, it is well established that in a "proper case" the doctrine of equitable estoppel may apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a stage agency, commission, or officer."

When acting in its sovereign or governmental capacity, the United States or a

state ordinarily is not estopped. The doctrine of estoppel will not be applied to deprive the government of the due exercise of its police power, or to affect public revenues or property rights, or to frustrate the purpose of its laws or thwart its public policy."

""On the other hand, when functioning in a proprietary, as distinguished from a governmental capacity, the doctrine of estoppel may be applied to the United States or a state".

(8) The question has been subject-matter of discussion also in a number of English decisions and I would like to refer to *Robertson v. Minister of Pensions*(1) In that case *Robertson* wrote to the Director of Personal Services at the War Office stating that he had been rendered permanently unfit for general service and on 8/4/1941, the Director replied:

""You wrote me on March 11 regarding the injury you sustained in December 1939; and I now write to let you know that your case has been duly considered and your disability has been accepted as attributable to military service." It was held that the assurance was binding on the Crown because no term could be implied that the Crown was at liberty to revoke it. The B dispute arose because the Minister of Pensions later decided that *Robertson's* disability was not attributable to War service.

Denning, J.

observed:-

What then is the result in law? If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like. No such defense is made here..... (9) The next question is whether the assurance in the War Office letter is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by *Rowlatt, J.* in *Rederiaktiebolaget Amphitrite v. The King*,(2) but it was unnecessary for the decision because the statement there was not a promise which was intended to be binding but only an expression of intention. *Rowlatt J.* seems to have been influenced by the cases on the right of the Crown to dismiss its servants at pleasure, but those cases must now all be read in the light of the judgment of *Lord Atkin* in *Reilly v. The King*(3), That judgment shown that, in regard to contracts of service, the Crown is bound by its express promises as much as any subject. The cases where it has been held entitled to dismiss at pleasure are based on an implied term which cannot of course, exist where there is an express term dealing with the matter. In my opinion the defense of executive necessity is of limited scope. It only avails the Crown where there is an implied

term to that effect or that is the true meaning of the contract. It certainly has no application in this case. The War Office letter is clear and explicit and I see no room for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause."

(10) Similarly, in *Municipal Corporation of Bombay vs. Secretary of State for India*(4), Jenkins, C.J. said:-

Though it has been argued before us that section 115 of the Evidence Act, or the principle it embodies, cures the informality, the substantial plea appears to me to be that the after events have created in favor of the Municipality equities, which afford an answer to the Secretary of States' claim to eject the Municipality. Unfortunately we are without the assistance of Mr. Justice Russell's opinion on this point, as his Judgment does not deal with it. The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply.

(11) It differs essentially from the doctrine embodied in section 115 of the Evidence Act, which is not a rule of equity, but is a rule of evidence that was formulated and applied in Courts of law: while the doctrine, with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent, fraud. The doctrine in relation to the circumstances of this case is thus formulated by Lord Kingdown in *Ramsden v. Dyson* (5) "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.

(12) That the Crown comes within the range of this equity is apparent from *Plimmer v. Mayor, & c.*, of "Wellington (6) and *Ahmad Yar Khan v. Secretary of State for India in Council*", (7).

The equitable doctrine of estoppel was also applied against the Government in *Kumari Akhtar v. Admission Committee* (8).

(13) It, Therefore, emerges from the above discussion that normally the Government may not be estopped in the matter of its governmental functions nor would the rule of estoppel operate adversely upon the discretion of the Government to formulate matters of policy from time to time, but, yet in the circumstances as these where the Government has put a party in a position that it acts to its detriment by entering into firm contracts and parting with money, the Government cannot without any good reason, that is reason where public interest requires the interest of an individual to be adversely affected, retract from that position and subject its subjects to such harassment. I say without any good reason because the only reason given by the State is that proper proof of

shipment was not available in case of such imports. That may be good reason for changing its policy in future, but cannot be so for making the cancellation operate retrospectively on the contracts. The Constitution has recognised rights of the subjects to carry on trade or business. That recognition is based on the belief that such rights come to the subjects not as a matter of generosity by the State but by reason of their being members of a free civilized society possessed of a particular mode of thought. It is always such like lurking invasions which destroy the sanctity of such rights and have, Therefore, to be zealously safeguarded. The State is at liberty to formulate its future course of conduct and in given circumstances may be held not bound by the policy decisions in the past. In that view, it may legitimately be suggested that it cannot fetter its future executive action. But, surely such future actions should generally be so moulded as not to operate harshly, in the absence of good reasons on the obligations incurred by the subjects on the basis of representations by the State. There is no fundamental matter of policy involved in the change of the crucial date in as much as the irrevocable letter of credit opened in favor of the foreign suppliers had already been utilised and the money drawn by the exporters. The money, Therefore, in any case, found its way across the borders and the goods arrived in India. In these circumstances, I find it hard to justify the act of the Government in confiscating the goods and imposing such heavy penalties.

(14) I would also like to refer to Import Trade Control Hand Book of Rules and Procedure 1956 page 29, paragraph's, which reads:--

"68.The validity of an import license is related to the date of actual shipment or dispatch from the supplying country and not to the date of arrival at an Indian Port. It follows that if the goods are shipped on any date within the period of effective validity of the license, they will be allowed to be cleared even if they arrive at a port in India after the expiry of the license. Conversely, if the goods are shipped before the date on which the license was issued, the import will, on arrival in India, be treated as unauthorised, even though on the date of arrival the importer holds a license issued after the shipment of the goods. Importers are accordingly advised to satisfy themselves that they hold a valid license on the date on which the goods imported are shipped by the suppliers." (15) In *African Trading Company v. Union of India* (civil Writ No. 241-D of 1961) decided on 4/4/1967, the question about the change of date in the same open General license arose, but I dismissed the petition because in that case the question of estoppel was not raised and no such facts were shown from which it could be concluded that the petitioner entered into a firm commitment on the basis of any representation by the State. Before such a plea can be sustained a party has to show that it entered into commitment after the date of shipment had been announced as the crucial date and before it was changed.

(16) For the reasons aforesaid, these petitions must be allowed and the impugned orders quashed. The parties are, however, left to bear their own costs.