

Vikrant Tyres Ltd. Vs. Union of India

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Court : Karnataka

Decided On : Apr-19-1991

Reported in : 1991(33)ECC147; 1991LC25(Karnataka); 1992(61)ELT381(Kar); 1991(2)KarLJ346

Judge : S.R. Rajasekhara Murthy, J.

Acts : [Customs Act 1962](#) - Sections 25 and 25(1); Central Excise Rules, 1944 - Rule 8 and 8(1); [Central Excise Act, 1944](#) - Sections 37, 37(2), 38 and 38(2)

Appeal No. : Writ Petition No. 10423/1987

Appellant : Vikrant Tyres Ltd.

Respondent : Union of India

Advocate for Def. : Shri Ashok Haranahally, C.G.S.C.

Advocate for Pet/Ap. : Shri A. Hidayatullah, ;K. Srinivasan and ;K.P. Kumar, Advs.

Judgement :

ORDER

Rajasekhara Murthy, J.

1. The first petitioner is a Company registered under the Companies Act, and the second-petitioner is a shareholder. This writ petition is filed for a declaration that Notification No. 159/85 dated 16-7-1985 issued by the Central Government in exercise of its power conferred by Rule 8(1) of the Central Excise Rules, 1944 ('Rules'), rescinding the Notification No. 88/84 dated 6-4-1984 (Annexure - 'B'), as void and unenforceable against the petitioners.

2. A writ of mandamus directing the refund of the excess of duty of Rs. 34,36,487 - 10 ps. paid during the period 16-7-1985 to 22-10-1986 is also prayed for as a consequence flowing from the first prayer.

3. The petitioner-company manufactures tyres, tubes and flaps at its factory in Mysore, which where exigible to excise duty under Tariff Item 16 of the I schedule to the Central Excises and Salt Act, 1944 ('the Act') during the relevant period.

4. Under a scheme of incentives introduced by the Government of India in the year 1976 in order to encourage entrepreneurs to set up new units for the manufacture of tyres for which there was great demand in the country and was in short supply. This Scheme was given statutory effect and the first Notification No. 186 was issued on 6-6-1976 which was in force upto the end in the year 1980. By Notification No. 107/81 dated 24-4-1981, the exemption was continued for a further period of 5 years from the date of production.

5. Pursuant to representation made by the tyre manufacturers, the Central Government continued the incentive scheme for a further period of 7 years and issued Notification No. 268/82 dated 13-11-1982 exempting the duty of excise leviable on tyres, as was in excess of 75% of the duty of excise payable on tyres. This exemption was available for a period of seven years from the date of first clearance and the amount of exemption was enhanced to an amount equivalent to 50% of the investment made on plant and machinery prior to the date of first clearance and subject to other conditions. Under the said notification the exemption period of five years provided in Notification No. 107/81 was extended to seven years from the date of first clearance. The maximum of 30% of the investment allowable under Notification No. 107/81 was also enhanced to 50% by the Notification 268/82.

6. But these concessions extended under the said notification were made applicable only to new units started under the licence granted under Section 11 of the Industries (Development and Regulation) Act, 1951, between 1-4-1976 and 31-3-1984 only. This notification deprived the old manufacturers, who had made further investments and had expanded their units between 1-4-1976 and 31-3-1984, since the exemption was extended only to the new units stated under Section 11 of the Act. Therefore, the old units again made representations to the Central Government to extend the benefits to the old units also. It is after considering the said representations that Notification No. 88/84 dated 6-4-1984 (Annexure - 'B') was issued by the Central Government.

7. By this notification, the additional benefit granted under Notification 268/82 was also extended to the industrial undertakings licensed under Section 13 of the Industrial (Development and Regulation) Act, 1951, namely - units which had been granted licence for expansion. The benefit under Notification 88/84 was also available to the petitioner-company, who had made substantial investment for expansion of the unit and was, therefore, eligible for the additional incentive granted under the said notification.

8. It is not in dispute that the petitioner became eligible for the additional benefits under Notification No. 88/84. Applying the conditions to the petitioner-company, a Certificate dated 10-7-1984 was issued by the Directors General of Technical Development of the Government of India ('DGTD' for short), certifying that the petitioner had made further investment on plant and machinery during the period 23-10-1979 and 31-3-1984 in a sum of Rs. 1,922 lakhs. On the basis of this investment, the petitioner-company became eligible for the rebate in excise duty payable on its manufacture and computing the exemption in the manner contemplated under the notification, became entitled to a cash benefit of Rs. 5,76,61,800.

9. While the petitioner-company continued to clear the specified goods by availing of the tax exemption under the scheme of Notification 88/84, the Central Government issued Notification No. 159/85 dated 16-7-1985 rescinding Notification No. 88/84. Pursuant to the rescinding of Notification 88/84 the

Assistant Collector of C. Ex., Mysore stopped the clearances of the specified goods by the petitioner-company with effect from 16-7-1985. As a result, the petitioner company cleared the goods by paying the full excise duty and later made a claim for refund of the excess duty of Rs. 34,36,487.10. The petitioner-company demanded refund of the excess duty paid relying on the decisions of Rajasthan and Madras High Courts allowing similar claims for refund. The Assistant Collector of Central Excise declined to grant the refund by his endorsement dated 17-6-1987 (Annexure - D) and this order is impugned in this writ petition.

10. Sri Arshad Hidayatullah, the learned Counsel instructed by M/s. King and Partridge, Bangalore urged as the principal contention that the Notification No. 159/85 rescinding the Notification No. 88/84 which resulted in deprivation of the benefits that had accrued to the petitioner-Co., should be declared as ultra vires, applying the doctrine of promissory estoppel. As a consequence of the said declaration, the further prayer of the petitioners is that the benefit of Notification 88/84 should be extended to it for the full period of 7 year up to 24-10-1976. (sic)

11. In elaboration of these contentions on this question the learned Counsel submitted that the petitioner's unit was in existence as on 31-3-1984 and had made substantial investment for the expansion of the unit and had obtained licence for such expansion under Section 13 of the Industries (Development and Regulation) Act, 1951. It was also pointed out that the 'DGTD' had certified that the petitioner-company had made additional investment of Rs. 1922.06 lakhs and on the basis of the said investment and in accordance with the Notification 88/84 had earned Rs. 5,76,61,800 by way of concession in excise duty payable.

12. On these facts it was urged by Sri Arshad Hidayatullah that the respondents' action in depriving and denying this cash entitlement applying Notification 159/85 is unjust, unreasonable and arbitrary.

13. The case of the petitioners was opposed by Sri Ashok Haranahally, the learned Additional Standing Counsel for the Central Government, who argued and put forward three contentions in support of his case. The proposition advanced by the learned Standing Counsel were these :

'1. The petitioner company has not acted in reliance upon the notification and has not altered its position on the said basis. Even otherwise there is no altering of position vis-a-vis the time bound nature of the Notification.

2. The principle of promissory estoppel, which is doctrine in equity cannot be invoked against the exercise of legislative functions.

(i) The subordinate legislation is also an exercise of legislative function. The power to exempt from tax is an exercise of legislative function just as the power to impose tax is a legislative function.

(ii) The subordinate legislation under Rule 8 of the Central Excise Rules involves exercise of legislative function. It is immaterial for this purpose that in a particular case the Notification are placed before Parliament (as in Customs Act) and in certain other cases (like in Central Excise Act as it existed between 1973 to 1988) the notifications are not placed before Parliament.

3. It is not open to the Courts to issue a direction to the Court to continue exemption. The principles of estoppel cannot be invoked to continue the Notification even after the same is rescinded. This amounts to judicial law making which is not permissible.'

14. The main plank of the argument of the learned Standing Counsel, as stated above, was that a notification issued in exercise of the delegated power under Rule 8 of the Central Excise Rules, is also a legislative function, and that, therefore, the principle of promissory estoppel does not apply to such legislative function. In support of this proposition, the statement of law contained in M.P. Sugar Mills' and Godfrey Phillips' cases, namely, 'that the principle or promissory estoppel does not apply to legislative functions', was sought to be relied upon.

15. One other supporting argument for this proposition was that the Rules framed under Section 38 of the Central Excises Act are placed before the Parliament and the rules so framed are subject to any modification to be made or suggested by the Parliament. The argument was that the rules, therefore, become part of the statute and the notifications, therefore, are legislative in character and the

notifications partake the nature of legislative functions.

16. Dealing with the factual position first, it is necessary to refer in brief, to the incentives given, from time to time, under various notifications (referred to earlier). The manner in which the entire scheme of incentives had to be worked out was a continuing scheme under which the concessions contemplated were extended on a carry over basis from one stage to the other. Notification 88/84 was made applicable to the existing units which had undertaken expansion by way of investment up to 31-3-1984. Since the petitioner-Company's first clearance was on 24-10-1979, the contention is that they should have got the benefit of exemption for the full-period of seven years, i.e., upto 24-10-1986. That the petitioner-company had earned a sum of Rs. 5,76,61,800/- by way of cash entitlement under the Notification 88/84 is not in dispute. But the same was discontinued with effect from 16-7-1985 when Notification 159/85 was issued rescinding Notification 88/84 and the contention of the Department is that the Central Government was well within its power to withdraw any concession and there is no vested right in any manufacturer to claim the benefit notwithstanding the rescission of the notification.

17. The two questions that, therefore, arise for decision in this case are :

(i) whether the petitioner-company was entitled to the full benefit of incentives under Notification 88/84 applying the principle of promissory estoppel against the Central Government

(ii) whether the statutory notification issued in exercise of the power under Rule 8(1) of the Rules, is legislative in character

18. According to the learned Counsel for the petitioner-company the point that arises for decision on these facts is no longer *res integra* and applying the principles of promissory estoppel the petitioner is entitled to succeed.

19. In order to appreciate the contentions of the learned Counsel, it would be convenient to advert to the various decisions relied upon by him in their order on the principal contention regarding promissory estoppel.

20. The earliest of decisions and the leading case on the subject is the decision of the Supreme Court in : Motilal Padampath Sugar Mill Co. Ltd. v. The State of Uttar Pradesh and Ors. : [1979]118ITR326(SC) . That was a case wherein the Supreme Court upheld the plea of promissory estoppel against the State. This principle, which was enunciated and explained by the Supreme Court in all its aspects was subsequently applied and reiterated by the Supreme Court in a number of decisions.

21. The decisions, which according to the petitioner-company, have a direct bearing on the present case are :

Pournami Oil Mill v. State of Kerala - 1987 (27) E.L.T. 594;

A.C.C.T. v. Dharanendra Trading Company - (1988) 3 SCC 570 and the decision of this Court in :

Dharanendra Trading Company v. A.C.C.T. - ILR 1979 (2) Kar. 1909 and the decision of the Bombay High Court in :

Bharat Commerce Industries v. Union of India - 1987 (32) E.L.T. 40.

In Pournami Oil Mills case and Dharanendra Trading Company case, the Supreme Court had occasion to apply the doctrine of promissory estoppel to the statutory notifications issued under the Kerala Sales Tax Act and the Karnataka Sales Tax Act.

22. Though the appeals filed by the State of Karnataka against the judgment on this Court which was rendered in the 1979 in Dharanendra Trading Company case were preferred in the year 1980, they were disposed of on 5th May, 1988, whereas, Civil Appeal in Pournami Oil Mill case, though filed in the year 1986, was disposed of earlier, i.e., on 19-12-1986. Therefore, I propose to take up Pournami Oil Mill case first, and then, refer Dharanendra Trading Co., case.

23. In Pournami Oil Mill case, two notifications issued by the Kerala Government under Section 10 of the Kerala Sales Tax Act came up for interpretation. The industries, namely, the new units, who failed before the Kerala High Court came

up in appeal before the Supreme Court. Under the two notifications issued by the Kerala Government, the new industries had been given certain incentives. By the first notification dated 11-4-1979, higher tax exemption was given to new industries, whereas, it was reduced by a later notification dated 21-10-1980. The question that came up for consideration before S.C. was : whether the industries started prior to 21-10-1980 were entitled to the exemption for the full period of five years from the date of production, and whether by virtue of the second notification they could be deprived of the benefit of the tax exemption. The Supreme Court held, that the higher tax exemption that was extended to the new industries started prior to 21-10-1980 should be continued for the full period of five years from the date of production and the second notification should apply only to industries set-up after 21-10-1980. The Supreme Court upheld the contentions of the appellants that the plea of promissory estoppel was applicable against the State in that case. It was observed in the course of the Judgment that the ratio in M.P. Sugar Mills case : [1979]118ITR326(SC) directly applied to the facts of the said case and the plea of estoppel pleaded by the appellants was unanswerable.

24. In Dharanendra Trading Company case, which was decided in the year 1988, the same was the position, and the notification extending certain tax exemption to new industries issued under Section 8(A) of the Karnataka Sales Tax Act, came up for consideration. The Supreme Court dismissed the appeals of the State and upheld the view of the learned Single Judge of the High Court. The Supreme Court, while dismissing the appeals of the State, repelled the contentions of the appellant that the doctrine of promissory estoppel cannot be made applicable to statutory notifications. The Supreme Court also reiterated the ratio of the decisions in : Indo-Afghan, Century Spinning and M.P. Sugar Mills' cases, which had been relied upon the learned Single Judge of the High Court. The Supreme Court also made reference to : State of Bihar v. Usha Martin - 65 STC 430, in support of their view that the doctrine of promissory estoppel must be regarded as good law.

25. Sri Arshad Hidayatullah placed strong reliance on the these two decisions in view of the fact that the statutory notifications issued under the Sales Tax Acts of Kerala and Karnataka, were involved in those two decisions, and the Supreme Court upheld the plea of promissory estoppel against the State.

26. One other decision which needs to be next referred to is the Division Bench decision of the Bombay High Court in : Bharat Commerce Industries v. Union of India - 1987 (32) E.L.T. 40. The question that came up for decision in that case was : whether the plea of promissory estoppel was available to a party aggrieved, against the Central Government, in relation to a notification issued under Section 25 of the Customs Act. The notification that came up for interpretation in that case before the Bombay High Court was a notification issued under Section 25(1) of the Customs Act.

27. The brief facts of that case were : The appellants imported viscose staple fibre and viscose tow on the basis of a notification dated 5-1-1979 issued by the Central Government under Section 25(1) of the Customs Act. By the time the fibre reached Bombay a second notification had been issued on 30-10-1979 raising the rate of duty on viscose fibre per k.g. The appellants challenged the levy of higher rate of duty pleading estoppel against the Central Government from levying higher rate of duty and their claim was opposed by the Union of India on the ground that the doctrine of promissory estoppel had no application to the Legislative exercise of power by the Central Government under Section 25(1) of the Customs Act. Elaborate arguments were advanced by Sri Arshad Hidayatullah before the Bombay High Court and the question that was posed for consideration by the High Court was : 'Is the plea of promissory estoppel available when the Government, in exercise of power to frame subordinate legislation, makes a representation, but, thereafter acts contrary to the representation ?'

Large number of cases, and in fact, every case on the subject was cited by the learned Counsel appearing for the assessee before the Bombay High Court. Analysing all the cases of the Supreme Court, cited on the point, their Lordships summed up their views in Paragraph 16 of the Judgment and reiterated one important principle that the doctrine of promissory estoppel is not available against the Legislature in exercise of its legislative function. In Paragraph 21, their Lordships categorically held that the doctrine of promissory estoppel is available against the Government when it is exercising powers conferred upon it by statute or powers of subordinate legislation. This is what the High Court observed while rejecting the arguments of the Revenue :

'21. We were, therefore, inclined to take the view that the doctrine of promissory estoppel was available against Government when it was exercising powers conferred upon it by statute or powers of subordinate legislation. We saw no reason why Government should be permitted to act contrary to the terms of its representation, upon which citizens had based themselves, only because it was so acting in exercise of powers given under a statute or in exercise of powers of subordinate legislation. As the Supreme Court has pointed out, Government is under no obligation to make a representation. If, then, it does, it must be held to it. If the legislature disapproves, it can enact legislation nullifying the representation. If the equities have changed and the public good demands that Government should act contrary to the terms of its representation, the Courts will not require the Government to honour its representation; but subject to that, it must'.

Dealing with the ratio of the decision of the Supreme Court in Pournami Oil Mill's case, the Bombay High Court observed that the Supreme Court was very well aware that the Kerala Government in that case was exercising power under Section 10 of the Kerala Sales Tax Act when it made the representation and when it sought to act contrary to the terms of the representation made in the notification.

The Bombay High Court reproduced the observations made by the Supreme Court in M.P. Sugar Mill's case at page 51 of its Judgment wherein the observations made by Sri Shah, J. in Indo-Afghan case were adverted to by Supreme Court. Sri Shah, J. pointed out that the Government may claim to be exempt from the liability to carry out the promise 'on some indefinite and undisclosed ground of necessity or expediency' but the grounds for such repudiation must be disclosed to the Court and the Court must decide whether the subsequent events are such as to render it inequitable to enforce the liability against the Government.

Sri Shah, J. further observed, that the burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of his burden.

This is the essence of the rule of law as expounded by Shah, J. in Indo Afghan case while explaining the principle of promissory estoppel and its scope and ambit and limitations.

28. Referring to the principle of promissory estoppel as enunciated by the Supreme Court in M.P. Sugar Mills' case and Godfrey Phillips' case, the Bombay High Court observed thus : [1987 (32) E.L.T. 40 at Page 49 Para 16].

'16. In the Godfrey Phillips' case, as in the M.P. Sugar Mills' case, it was held that '(i) there can be no promissory estoppel against the Legislature in the exercise of its legislative functions nor (ii) can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that (iii) promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or (iv) which was outside the authority or power of the officer of the Government or of the public authority to make.' (Numerals supplied.). The doctrine of promissory estoppel is not available in the four cases so carefully set out. It is not available against the 'legislature exercising legislative functions'. It is not enough that legislative functions are being carried out; it is only if the legislative functions are being carried out by the legislature that the doctrine is not available.'

29. Applying the ratio of the Supreme Court decisions, the Bombay High Court held, on the facts of that case, that the second notification dated 30th October, 1979, which was issued by the Central Government increasing additional duty payable on viscose fibre should be made applicable to the appellants before them till 31-12-1979, when the time provided under the first notification ceased to be in force. The plea of promissory estoppel raised against the Central Government was, therefore, upheld and the excess duty collected was directed to be refunded. This decision, according to the learned Counsel for the petitioners squarely supports the present case and should be made applicable for upholding the claim of the petitioners-company in this writ petition.

30. The learned Counsel for the petitioners-company also relied upon some decisions of other High Courts which have taken similar view, which would be referred to later.

31. Before parting with the Bombay case, I must observe that Sri Arshad Hidayatullah, who argued the case of the appellants before the Bombay High Court, has put in all the labour and effort before the Bombay High Court in order to drive home his point and succeeded in doing so. The judgment of the Bombay High Court is, therefore, a reflection of his arguments presented before the Bombay High Court which has made his task before this Court easier since all the decisions on the subject have been considered by the Bombay High Court.

32. The other decisions relied upon by the learned Counsel for the petitioner company are :

1. Union of India v. J.K. Industries - 1990 (49) E.L.T. 511 (Rajasthan)

2. Union of India v. Chakra Tyres - 1990 (45) E.L.T. 3 (Madras).

33. Both these decisions dealt with the Notification 88/84 and upheld the similar plea of promissory estoppel urged by the assesseees in both the cases and dismissed the appeals filed by the Union of India. Both the High Courts applied the doctrine of promissory estoppel and incidentally it may be mentioned that the Division Bench decision of the Bombay High Court in Bharat Commerce case - 1987 (32) E.L.T. 40, was also relied upon.

34. The Division Bench of the Rajasthan High Court, while dismissing the appeal filed by the Union of India held that Notification 159/85 is bad and it cannot be allowed to stand in view of the doctrine of promissory estoppel.

35. The Madras High Court consisting of Sri S. Mohan and Sri Bhaktavatsalam, JJ. also took the same view and upheld the contentions of the Union of India that the notification issued under Rule 8 was a piece of subordinate legislation and, therefore, the doctrine of plea of promissory estoppel was not applicable to that act of legislation. Their Lordships followed the principles laid down in (i) M.P. Sugar Mills (ii) Godfrey Phillips (iii) Usha Martin (iv) Indian Aluminium Co., and (v) Dharanendra Trading Co., cases. The ratio of the decision of the Madras High Court was that the theory of promissory estoppel is not applicable only when the power is exercised under any plenary power of the legislature and not when the

power is exercised under the delegated legislation.

36. It was, therefore, urged by Sri Arshad Hidayatullah, that the preponderance of view expressed by various High Courts, viz., the Division Benches of the three High Courts, namely, Bombay, Rajasthan and Madras is in favour of the petitioner and an appeal was made that this Court may also adopt the same view and allow the petitioners-company's writ petition.

37. Per contra, Sri Ashok Haranahally opposed the arguments of the petitioners and relied upon the following decisions in support of his contentions. Before dealing with the other decisions, it must be pointed out that a stray sentence culled out from the decision of the Supreme Court in M.P. Sugar Mills case and Godfrey Phillips case, which is reproduced earlier, does not answer the contentions of the petitioners. Placing reliance on the said observation, taken out of context, would be laying down a dangerous proposition. On the other hand, the Bombay High Court in Bharat Commerce case after dealing with both the decisions, expressed their view to the contrary, in Paragraphs 13 and 14 of their Judgment. In earlier Paragraph 12 of their judgment their Lordships also distinguished the applicability of the Judgment of the Supreme Court in the case of Jayantilal Amrutlal Shodan v. F.N. Rana : [1964]5SCR294 , and also distinguished the view expressed by the Full Bench of the Delhi High Court in Bombay Conductors and Electricals Ltd. & Anr. v. Government of India and Anr. - 1986 (23) E.L.T. 87 (Delhi) which I propose to deal with later in the course of this order.

38. The following are the decisions relied upon by Sri Ashok Haranahally in support of the proposition that the Notification issued under Rule 8 of the Rules is legislative in nature :

(1) Orient Weaving Mills v. Union of India : 1978(2)ELT311(SC) .

The Supreme Court held that Rule 8 of the Central Excise Rules does not suffer from excessive delegation. The Supreme Court was dealing with the contention of the assesses, which had challenged the constitutional validity of Rule 8 of the Central Excise Rules, that it suffers from the vice of excessive delegation of powers to the Central Government, inasmuch as, it confers power on the Central

Government to exempt wholly or partly any duty. This observation should be read along with what their Lordships observed in para - 8, viz., that Rule 8 is as much a part of the statute as Section 37(2) Clause (xvii) which is the rule making power.

(2) Jayantilal Amrutlal Shodan v. F.N. Rana : [1964]5SCR294 .

Sri Shah, J. (as he then was), enumerated the functions of Government under three heads Executive, Legislative and Judiciary. That case arose under the Land Acquisition Act, vis-a-vis Art. 258(1) of the Constitution under which the President can entrust to States functions which are vested in the Union and not those which are vested in him as President.

(3) Excise Commissioner v. Ramkumar : AIR 1976 SC2237 .

The observations of the Supreme Court made in Paragraphs 19 and 21 were sought to be relied upon. The Supreme Court held that there can be no question of estoppel against the Government in the exercise of its Legislative, Sovereign or Executive powers. This statement of the law was made in the context of exercise of power by the Government of Uttar Pradesh in imposing tax on the retail sales of liquor which was earlier exempt from levy of sales tax at the time of auction. The Supreme Court cited with approval the decision in State of Kerala v. Gwalior Rayon Silk Manufacturing Co. : [1974]1SCR671 , which reiterated that there can be no estoppel against exercise of sovereign powers of Government if it becomes necessary to be used in for public good whether it is legislative or executive. The relevant extract from the said decision is reproduced below :

'We do not see how an agreement of the Government can preclude legislation on the subject. The High Court has rightly pointed out that the surrender by the Government of its legislative powers to be used for public good cannot avail the company or operate against the Government as equitable estoppel'. (4) M/s. Jitram Shivkumar v. State of Haryana : [1980]3SCR689 . The estoppel is applicable against the Government in the exercise of its governmental, public or executive functions. The Supreme Court, of course, reiterated that there can be no promissory estoppel against the legislature in the exercise of its legislative functions. The Supreme Court expressed its disagreement with the general

observations made in Jit Ram's case and reiterated the enunciation of the principle in M.P. Sugar Mills' case.

(5) Indian Express v. Union of India : [1986]159ITR856(SC) .

The Supreme Court was dealing with the power of the Central Government to grant exemption under Section 25(1) of the Customs Act. The Supreme Court observed that the Notification under the Customs Act is a piece of legislation. (See : Paras 69 and 70 of the Judgment). No question relating to the applicability of promissory estoppel of subordinate legislation came up for consideration in that case. But the Court upheld the power of the Court to question such notification on the ground of unreasonableness.

(6) M/s. Sree Sitaram Sugar Co. v. Union of India : [1990]1SCR909 .

That was a case of fixation of sugar price under the Essential Commodities Act. Such orders fixing the sugar price were held to be legislative in nature. The Supreme Court did not interfere with the challenge made to the Sugar Price Control Orders on the ground that it is not a matter for judicial review. The observations made by the Supreme Court in Paragraph 36 of its judgment were made in relation to the special nature of the enactment, namely - Essential Commodities Act.

(7) Shri Bakul Oil Industries & Anr. v. State of Gujarat and Anr. : [1987]165ITR6(SC) .

It was a case arising under the Gujarat Sales Tax Act granting exemption from tax to new industries. The exemption granted under the notification dated 29-4-1970 was modified by a subsequent notification dated 11-11-1970. It was held by the Supreme Court that the first notification did not stipulate any period and was not a time-bound notification, hence, it was open to the State Government to amend the notification or withdraw the same by a later notification.

(8) Bombay Conductors & Electricals v. Govt. of India - 1986 (23) E.L.T. 87 (Delhi) (Full Bench).

Strong reliance was placed by the learned Standing Counsel for the Department on this decision. The notification issued under Section 25(1) of the Customs Act was under consideration. It was held by the Delhi High Court that such notification was legislative in character and, hence, the doctrine of promissory estoppel has no application. Their Lordships summed-up their view in Paragraph - 56 of the Judgment.

(9) Govind Ram Aggarwal v. Collector of Customs - 1988 (35) E.L.T. 280.

It was held by the Calcutta High Court that the principle of promissory estoppel was not applicable to fixation of rate of duty under the Customs Act. In the context of the facts of the case that the relevant date for determination of the duty is the date of entry of goods or the date of presentation of the bill of entry. The Calcutta High Court followed the Full Bench decision of the Delhi High Court in Bombay Conductors' case.

(10) Black Diamond v. Union of India - 1988 (36) E.L.T. 225.

The High Court held that the withdrawal of modvat in respect of aerated waters was purely a matter of policy of the Government.

(11) Jain Sudh Vanaspathi v. Union of India - 1983 (14) E.L.T. 1688.

It was also a case of notification issued under Section 25 of the Customs Act bench came up for consideration. Following the Full Bench decision of the Delhi High Court in Bombay Conductors case, the Calcutta High Court held, that estoppel cannot be pleaded against a statutory notification.

(12) Indian Rayon Corporation v. Collector of Customs - 1986 (27) E.L.T. 626 (Calcutta).

It was held that the principle of promissory estoppel cannot be sustained against the notification issued by the Central Government under the Customs Act. The Calcutta High Court placed reliance on the Full Bench decision of the Delhi High Court in Bombay Conductors' case.

39. Deriving sustenance from these decisions, Sri Ashok Haranahally made a forceful attempt to persuade this Court to hold that the statutory notifications issued by the Central Government as applicable to the tyre manufacturers are in the nature of subordinate legislation and that, therefore, the plea of promissory estoppel pleaded by the petitioners-company in this case should be rejected as not applicable to notifications issued in exercise of legislative function. The learned Standing Counsel also submitted that the petitioner-company has failed to make out that the additional investment was made pursuant to and acting upon the Notification No. 88/84, which was issued only on 6-4-1984. He also drew my attention to the observations made by the Supreme Court in *M.P. Sugar Mills* case, that the principle of promissory estoppel cannot be invoked against the legislative function. The learned Counsel also strongly relied upon the decision of the Supreme Court in *Sri Sitharam Sugar Mills*' case wherein, it was held that the price fixation of sugar under Section 3 of the Essential Commodities Act is legislative in nature. He also pointed out that the power contained in Section 37 of the Central Excises Act under which the power to frame rules for the purpose of administration of the Act is delegated to the Central Government. It was further argued that the rules so framed are placed before the Parliament and the Parliament may, as required under Section 38(2), may suggest modification or even disagree with the rule. It was, therefore, forcefully argued, that the rules are framed by virtue of the exercise of power conferred under Section 37 become part of the statute and that, therefore, the principle of promissory estoppel does not apply to such legislative function.

40. Much stress was laid on the Full Bench decision of the Delhi High Court in *Bombay Conductors*' case and *Jain Sudh Vanaspathi* case of the same High Court. The learned Standing Counsel also urged for acceptance of the view expressed by the Calcutta High Court in the series of decisions, referred to earlier.

41. Sri Arshad Hidayatullah, learned Counsel distinguished each one of the decisions relied upon by Sri Ashok Haranahally. On facts, it was submitted by the learned Counsel in reply to the Standing Counsel's argument that the Notification No. 88/84 did apply to such of the existing units which had made further investment upto 31-3-1984. That this was the undisputed fact was also pointed out

from the first proviso to the notification, which read thus :

'Provided that such tyres are manufactured in a factory which is an industrial undertaking licensed under Section 11 or Section 13 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and from which the clearance of tyres was effected for the first time during the period commencing on the 1st day of April, 1976 and ending with the 31st day of March, 1984 (hereinafter referred to as the said first clearance of tyres).'

It was, therefore, argued that the petitioner-company having become eligible for the concession extended to the existing units licensed under Section 13 of the Industrial (Development and Regulation) Act, 1951 and they were entitled to the benefit under the Notification No. 88/84 for the full period of seven years from the date of commencement of production. The learned Counsel, therefore, submitted, that applying Notification No. 88/84 to the petitioners case, on the undisputed facts, they are entitled to the refund of the excess duty paid upto 22-10-1986 consequent on the rescission of the Notification 88/84 with effect from 16-7-1985.

42. So far as the law on the question that arises for decision in this case is concerned, it was reiterated that the principle of promissory estoppel was applied by the Supreme Court even in cases of delegated legislation in the form of Notification issued under the statutes. In this context, the learned Counsel relied upon the two decisions of the Supreme Court in :

(i) Jayantilal Amrutlal Shodan v. F.N. Rana : [1964]5SCR294 , and

(ii) Indian Express v. Union of India : [1986]159ITR856(SC) .

wherein the Supreme Court was dealing with the Notifications issued under Section 25(1) of the Customs Act and observed that the Government does perform a delegated or subordinate legislative function in exercising power under Section 25 of the Customs Act and the notification issued under that Section is a piece of subordinate legislation.

43. Referring to the other cases cited on behalf of the Department, viz.,

(i) Orient Weaving Mills (P) Ltd. v. Union of India and Ors. : 1978(2)ELT311(SC)

(ii) Narinder Chand v. U.T., Him. Pra. : [1972]1SCR940 , and

(iii) Lachmi Narain v. Union of India : [1976]2SCR785 .

It was submitted that the observations made in these cases should be understood and confined to the context in which they were made and have no bearing on the facts of the present case.

44. Dealing with the series of cases of the Calcutta High Court, relied upon by Sri Ashok Haranahally, it was submitted by Sri Arshad Hidayatullah that the enunciation of the law that the statutory notifications issued under Section 25 of the Customs Act are legislative in character, is contrary to law laid down by the Supreme Court.

45. Sri Ashok Haranahally did make a valiant effort to bring the statutory notifications under the legislative functions of the Parliament and on this premise, his further attempt was to take it out of the applicability of promissory estoppel. I must say that the argument of Sri Ashok Haranahally, which was backed by an elaborate study on the subject, has not made any dent on the forceful plea and the arguments advanced by Sri Arshad Hidayatullah. In the first place, the argument of Sri Ashok Haranahally has to be rejected on the principal question whether a statutory notification is a legislative function. In this context, it is necessary to go to the earliest of the decisions, namely, Indo-Afghan Industries case - A.I.R. 1968 S.C. 718 Justice Shah (as he then was) laid down in categorical terms that the import and export control order, though legislative in character would be subject to judicial review by the Court, if it became necessary to enforce any contractual right flowing from such order. The Supreme Court was dealing with the claim of an exporter who was entitled to an incentive for an import licence for importing raw material equal to cent-percent of the F.O.B., the value of the exports. The Supreme Court declared that in appropriate cases the Courts have the power to direct the concerned authority to make the facility available to the citizen who has acted to his prejudice acting upon the representation in the policy, and has been denied that facility laid down. The Supreme Court further observed that the claim

of the respondents in that case was appropriately founded upon the equity which arose in their favour as a result of the representation made on behalf of the Union of India under the export promotion scheme. This dictum was reiterated by the Supreme Court in Godfrey Phillips' case. The Supreme Court pointed out and applied the principles of the decision in M.P. Sugar Mills' case in so far as the doctrine of promissory estoppel was made applicable against the Government. Quoting Indo-Afghan case for the enunciation of the law as expounded in Indo-Afghan case against the executive action and against public bodies as applied in Century Spinning Mills case : [1970]3SCR854 , the only exception as expounded by the Supreme Court on a review of these cases was that the doctrine must yield when equity so requires, i.e., if it can be shown by the Government or public authority that it would be inequitable to hold the Government or the public authority to the promise or representation made by it and the enforcement of the obligation against the Government or the public authority would be contrary to the statute or affects prejudicially the interests of revenue or is against public policy.

46. After considering the elaborate arguments advanced in support of the rival contentions, I am of the opinion that the petitioner-company must succeed on an application of the plea of promissory estoppel to the facts of the case. That the petitioner-company had earned benefit in the form of case credit on the additional investment of Rs. 1,922.06 lakhs between 23-10-1979 and 31-3-1984 in accordance with the terms and conditions of Notification No. 88/84, is not in dispute. It cannot also be disputed that a Certificate to this effect was issued by the DGTD, Government of India, by his Certificate dated 10-7-1984.

On these undisputed facts, the Department was bound to extend all the benefits flowing from the Notification No. 88/84 for the full 7 years period, i.e. upto 23-10-1986.

47. In the light of the view I have taken and the conclusions arrived on the application of the principle of promissory estoppel to the facts of the case, I declare and hold that the Notification No. 159/85 dated 16-7-1985 as unenforceable and void so far as the petitioner is concerned.

48. In the result, the writ petition is allowed, and the Notification No. 159/85 dated 16-7-1985 (Annexure 'B'), is quashed so far as the petitioner is concerned.

49. As a consequence, I order issue of a mandamus to the First-Respondent, Union of India to refund excess duty of Rs. 34,36,487.10 ps. on the petitioner-company within eight weeks from the date of receipt of this order.

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