

M/S.Ruby Overseas vs Union Of India on 21 March, 2018

Author: M.Duraiswamy

Bench: M.Duraiswamy

RESERVED ON : 15.03.2018

DELIVERED ON : 21.03.2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21 .03.2018

CORAM

THE HON'BLE MR.JUSTICE M.DURAI SWAMY

W.P.No.2274 of 2018 &

W.M.P.Nos.2770 to 2772 of 2018

M/s.Ruby Overseas

No.141 (Old No.68)

Govindappa Naicken Street

Chennai-600 001

Represented by its Partner

Shri. Ameen Khudus

... Petitioner

v.

1 The Joint Director General of Foreign Trade
Ministry of Commerce and Industry
Department of Commerce
Udyog Bhavan, H-Wing, Gate No.2
Maulana Azad Road
New Delhi-110 011

2 The Commissioner of Customs
Custom House No.60
Rajaji Salai
Chennai-600 001

... Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of C

For Petitioner : Mr.Vijaya Narayanan, Senior Counsel
for Mr.S.Krishnanandh

For Respondents : Mr.N.Rajan,
Central Govt. Standing Counsel- for R1

Mrs. Hema Muralikrishnan,
Senior Standing Counsel - for R2

ORDER

The petitioner has filed the above writ petition to issue a Writ of Certiorarified Mandamus to quash the communication dated 18.12.2017 attributable to the 1st respondent and further direct the 2nd respondent to permit clearance of the goods "Pigeon Peas" imported by them in terms of Sale Contract dated 10.10.2017 and cause release of the same in terms of the "No Objection Certificate" dated 28.11.2017.

2. The brief case of the petitioner is as follows:-

(i) According to the petitioner, they are importers, exporters of pulses, spices and betel nuts and are engaged in the said business since the year 2007. The petitioner, for the conduct of the said business, procured the said goods locally and from abroad. The petitioner overseas are favoured with an Import Code issued by the Director General of Foreign Trade. During the course of their business, the petitioner entered into a sale contract dated 10.10.2017 with their overseas supplier M/s.Afrisian Mozambique LDA, Mozambique, for supply of 2000 MTs in 80'x20'ft containers of "Pigeon Peas (white) - Mozambique Origin" @ USD 275 per Mt C & F, Nhava Sheva/Chennai.

(ii) The 1st respondent issued a Trade Notice dated 17.11.2017 in connection with the implementation of a Memorandum of Understanding between India and Mozambique for import pigeon peas grown in Mozambique. The Government of Republic of India entered into a Memorandum of Understanding with the Government of Republic of Mozambique dated 07.07.2016 with the primary objectives , viz., (1) Promoting of the production pigeon peas and other pulses in Mozambique through active cooperation between the Ministry of Consumer Affairs Food and Public Distribution of the Republic of India and the Ministry of Agriculture and Food Security of the Republic of Mozambique; and (2) Encouraging progressive increase in the quantity of pigeon peas and other pulses traded between Mozambique and India subjective to the quantities produced and the consumption requirement of both countries.

(iii) In the light of the Memorandum of Understanding dated 07.07.2016, they had entered into a sale contract dated 10.10.2017 with their Overseas Supplier from Mozambique M/s.Afrisian Mozambique LDA for supply of a quantity of 2000 MTs in 80 FCL x 20' containers @ USD 275 PMT of "Pigeon Peas (White)" - Mozambique Origin, New Crop 2017 and 20% advance with 80% balance amount to be paid against the documents through their bankers.

(iv) On the publication of the trade notice dated 17.11.2017 by the 1st respondent, they caused a communication dated 20.11.2017 to the office of the 1st respondent, enclosing a copy of the above referred contract dated 10.10.2017 and a certificate of origin issued by Mozambique Chamber of Commerce dated 02.11.2017, requesting for issuance of a No Objection Certificate in terms of their trade notice.

(v) Based on the petitioner's communication dated 20.11.2017, the office of the 1st respondent caused a communication dated 28.11.2017 marking copy of the No Objection Certificate issued by the 1st respondent. Based on the No Objection Certificate dated 28.11.2017, attributable to the 1st respondent the petitioner had instructed their overseas suppliers to start aggregating, collecting, sorting, cleaning, packing of the said quantity of Pigeon Peas contracted by them and make arrangements for necessary marking on the Polypropylene bags with necessary markings and details as were required under the Food Safety and Standards Act, 2006.

(vi) The petitioner received a communication dated 18.12.2017 attributable to the 1st respondent with a copy marked to the 2nd respondent stating that the Government of Mozambique has mandated only the ICM (Institute de Cereasi de Mozambique) to be the sole designated agency responsible for regulating export of pulses to India under Memorandum of Understanding. Further, the 1st respondent has stated that the Government of Mozambique has noted that India's import figures differs from the figures available with them and claims that the Government of India import only those pulses from Mozambique that are supported by the Certificate of Origin (COO) issued by ICM, and not to accept any other imports.

(vii) Considering the request of Government of Mozambique and since imports permitted vide trade notice dated 17.11.2017 for implementing the Memorandum of Understanding between India and Mozambique, it was decided to withdraw the No Objection Certificate granted to the petitioner for import of 2000 MTs of Pigeon Peas from Mozambique under India- Mozambique Memorandum of Understanding vide letter dated 28.11.2016. The petitioner was asked to accept the Certificate of Origin from ICM and thereafter seek the No Objection Certificate from contractor.

(viii) According to the petitioner, the 1st respondent issued the No Objection Certificate in terms of trade notice dated 17.11.2017 attributable to the 1st respondent and therefore, the withdrawal of No Objection Certificate granted to the petitioner by the 1st respondent is wholly arbitrary and clear violation of principles of natural justice. In these circumstances, the petitioner has filed the above writ petition.

3. The brief case of the respondents is as follows:-

(i) According to the respondents, on 21.11.2017, the petitioner, via e-mail, forwarded a scanned copy of Certificate of Origin dated 02.11.2017 issued by the Mozambique

Chamber of Commerce to the petitioner for import of 2000 MT of Pigeon Peas from Mozambique under the Memorandum of Understanding. On the same day, another e-mail was received from Afrisian Mozambique LDA forwarding the scanned copy of Certificate of Origin dated 02.11.2017 issued by the Mozambique Chamber of Commerce for import of 2000 MT of Pigeon Peas from Mozambique under the Memorandum of Understanding.

(ii) After due examination and confirmation of the Country of Origin Certificates submitted by the petitioner vis-a-vis Mozambique Chamber of Commerce, the 1st respondent issued 'No Objection Certificate' to the Customs Office, Chennai on 28.11.2017 for allowing import of 2000 MTs of pulses by the petitioner from Mozambique under the Memorandum of Understanding.

(iii) The Ministry of External Affairs, by dated 30.11.2017, informed the 1st respondent that the Government of Mozambique has mandated the Instituto de Cereasi de Mozambique (ICM) to be the sole designated agency responsible for regulating the export of pulses to India under the Memorandum of Understanding. Further, the Government of Republic of Mozambique has urged the Government of India to import only those pulses from Mozambique that are supported by the Certificate of Origin issued by ICM and not to accept any other imports.

(iv) Based on the letter dated 30.11.2017, the 1st respondent decided to withdraw the 'No Objection Certificate' dated 28.11.2017 issued to the petitioner on the ground that the Country of Origin Certificate dated 02.11.2017 submitted by the petitioner had not been issued by the ICM. The petitioner was also advised to obtain the requisite Country of Origin Certificate from ICM and thereafter seek 'No Objection Certificate' from the 1st respondent.

(v) The trade notice dated 17.11.2017, vide which the Government of India has laid down the procedure /guidelines for proper implementation of the Memorandum of Understanding with the Government of Republic of Mozambique, is not a part of the Memorandum of Understanding. It has been issued in order to implement the Memorandum of Understanding in its true spirit. Even after the 'No Objection Certificate' was withdrawn, the petitioner had every opportunity to obtain the Country of Origin Certificate from ICM as others have done. As on 09.02.2018, quantity of 1479 MTs was available for export to India.

(vi) Since the Government of Mozambique had requested that import of only those pulses from Mozambique that is supported by the Certificate of Origin issued by ICM, should be allowed, the respondent had withdrawn the 'No Objection Certificate' issued to the petitioner. The 1st respondent neither withdrawn the 'No Objection Certificate' on the ground of it not being genuine nor on the ground of not complying with the procedure/guideline issued vide trade notice dated 17.11.2017, but, on the ground that the petitioner has not followed the procedure/guideline laid down by the

Government of Republic of Mozambique and had submitted that the Country of Origin Certificate issued by a party other than ICM. It is the responsibility of the petitioner to follow the procedure/guidelines of the Government of the Country of import. Only the petitioner is responsible for consequences arising out of any violation of the procedure laid down by the country of import. In these circumstances, the respondents prayed for dismissal of the writ petition.

4. Heard Mr.Vijaya Narayanan, learned Senior Counsel appearing for the petitioner and Mr.N.Rajan, learned Central Government Standing Counsel appearing for the 1st respondent and Mrs. Hema Muralikrishnan, learned Senior Standing Counsel appearing for the 2nd respondent.

5. Mr.Vijaya Narayanan, learned Senior Counsel appearing for the petitioner submitted that the impugned order passed by the 1st respondent is liable to be set aside for the reason that the 1st respondent is estopped from withdrawing the 'No Objection Certificate' issued in favour of the petitioner. Further, the learned Senior Counsel submitted that when the proper authority has granted valid 'No Objection Certificate' merely because the Government of Mozambique had stated that henceforth the 'No Objection Certificate' should be obtained from ICM would not make the 'No Objection Certificate' issued in favour of the petitioner as invalid. That apart, the learned Senior Counsel also submitted that the letter written by the Government of Mozambique to the Government of India shall not have retrospective effect and if at all it can only be prospective. In support of his contentions, the learned Senior Counsel relied upon the following judgments: -

(i) 2006(204) ELT 8 (S.C.) [Union of India v. Asian Food Industries], wherein in paragraph No.36, the Hon'ble Supreme court held as follows:-

36. Different stages for the purpose of the said Act would, therefore, be different. For interpretation of the provisions of the 1992, Act and the policy laid down as also the procedures framed thereunder, vis-a-vis the provisions of the 1962 Act, the rate of customs duty has no relevance. What would be relevant for the said purpose would be actual permission of the proper officer granting clearance and loading of the goods for exportation. As soon as such permission is granted, the procedure laid for export must be held to have been complied with."

(ii) 2006 (206) ELT 6 (SC) MRF Ltd., Kottayam v. Assistant Commissioner wherein the Hon'ble Supreme court held as follows:-

"17. As against this Shri T.L.V. Iyer, learned senior counsel appearing for the State of Kerala has contended that having regards to the facts of the case, no question of promissory estoppel, legitimate expectation or violation of Article 14 of the Constitution of India can arise. SRO 1729/93 itself has specifically provided that the state will have the power to add to the negative list. The appellant was therefore well aware that the benefit of SRO 1729/93 was a precarious one liable to be cancelled or varied at any time. In addition, Section 10(3) of the Act also enables the State to withdraw or cancel any exemption though prospectively. Therefore, according to him,

there has been no arbitrary action on the part of the State in issuing SRO 38/98 with prospective effect. It was well within their powers under Section 10(3) as well as under clause (g) of the negative list in SRO 1729/93. Referring to the decisions of this Court in *Kasinka Trading Vs. Union of India*, 1995 (1) SCC 274 and *Sales Tax Officer Vs. Shree Durga Oil Mills*, 1998 (1) SCC 572 it is contended that where public interest is involved, no rule of promissory estoppel can bind the Government. That the promissory estoppel does not operate against a statute. That in view of the defeasible nature of the right granted by SRO 1729/93, no right came to be vested in the appellant by reason thereof to justify the invocation of the principle of promissory estoppel; nor could they have any legitimate expectation that the exemption would be continued. That SRO 38/98 was issued in public interest. Elaborating the submission, it is contended by him that SRO 38/98 was issued to clarify the doubt which had arisen with reference to compound rubber in SRO 1729/93. A comparison of SRO 1729/93 and SRO 38/98 will show that the making of compound rubber was not "manufacture" even under SRO 1729/93; nevertheless, the state has granted the exemption till after the doubt was clarified on 15.1.1998 by SRO 38/98. Since no right could have vested in the appellant because of the precarious nature of the exemption granted by SRO 1729/93, it cannot be said that SRO 38/98 has taken away any vested right, more particularly because it is made expressly prospective. Regarding the Board of Revenue order dated 30.6.1998 it is submitted that the same has to be read in conjunction with SRO 1729/93 as amended by SRO 38/98. That the Board of revenue could not have granted a benefit which was not otherwise available to the appellant under the prevailing notifications.

27. The provisions of the Act or notification are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect. This Court in *S.L. Srinivasa Jute Twine Mills (P) Ltd. Vs. Union of India & Anr.*, 2006 (2) SCC 740, has held that it is a settled principle of interpretation that:

"retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication; there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary."

30. High Court in its judgment has recorded a finding that the notifications being statutory "no plea of estoppel will lie against a statutory notification". This finding of the High Court is erroneous. The doctrine of promissory estoppel has been repeatedly applied by this Court to statutory notifications. Reference may be made to *Pournami Oil Mills Vs. State of Kerala*, 1986 (Supp.) SCC 728. In the said case the Government of Kerala by an order dated 11.4.1979 invited small scale units to set up their industries in the State of Kerala and with a view to boost industrialization, exemption from sales tax and purchase tax was extended as a concession for a period of five years, which was to run from the date of commencement of production. By a subsequent notification dated 29.9.1980, published on Gazette on 21.10.1980, the State of Kerala withdrew the exemption relating to the purchase tax and

confined the exemption from sales tax to the limit specified in the proviso of the said notification. While quashing the subsequent notification, it was observed:

"If in response to such an order and in consideration of the concession made available, promoters of any small-scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of *M.P. Sugar Mills v. State of U.P.*. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in *Bakul Cashew Co. v. Sales Tax Officer, Quilon*, 1986 (2) SCC 365. In *Bakul Company's* (supra) case this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in *M.P. Sugar Mills' case*, 1979 (2) SCC 409. In our view, to the facts of the present case, the ratio of *M.P. Sugar Mills' case* directly applies and the plea of estoppel is unanswerable.

Xxx xxxx Such exemption would continue for the full period of five years from the date they started production. New industries set up after 21.10.1980 obviously would not be entitled to that benefit as they had noticed of the curtailment in the exemption before they came to set up their industries."

[Emphasis supplied]

31. This decision was followed by a three-Judge Bench in the case of *State of Bihar Vs. Usha Martin Industries Ltd.*, 1987 (Supp.) SCC 710 where it was stated that the matter stands concluded by the decision in *Pournami Oils Mill's case* (supra). In *Shri Bakul Oil Industries Vs. State of Gujarat*, AIR 1987 SC 142, it was observed in para 11:

"..The exemption granted by the Government, as already stated, was only by way of concession for encouraging entrepreneurs to start industries in rural and undeveloped areas and as such it was always open to the State Government to withdraw or revoke the concession. We must, however, observe that the power of revocation or withdrawal would be subject to one limitation viz. the power cannot be exercised in violation of the rule of Promissory Estoppel. In other words, the

Government can withdraw an exemption granted by it earlier if such withdrawal could be done without offending the rule of Promissory Estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation having regard to the fact that Promissory Estoppel cannot be claimed against a statute".

32. Answering the question as to whether the Board is restrained from withdrawing the rebate prematurely before the completion of three/five years period by virtue of doctrine of promissory estoppel, this Court in Pawan Alloys & Casting Pvt. Ltd. Vs. U.P. State Electricity Board, 1997 (7) SCC 251, held:

"10. It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as 'State' within the meaning of the said Article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.

Xxx xxxx

24. ..We, therefore, agree with the that by these notifications the Board had clearly held out a promise to these new industries and as these new industries had admittedly got established in the region where the Board was operating, acting on such promise, the same in equity would bind the Board. Such a promise was not contrary to any statutory provision but on the contrary was in compliance with the directions issued under Section 78A of the Act. These new industries which got attracted to this region relying upon the promise had altered their position irretrievably. They had spent "large amounts of money for establishing the infrastructure, had entered into agreements with the Board for supply of electricity and, therefore, had necessarily altered their position relying on these representations thinking that they would be assured of at least three years' period guaranteeing rebate of 10% on the total bill of electricity to be consumed by them as infancy benefit so that they could effectively compete with the old industries operating in the field and their products could effectively compete with their products. On these well-established facts the Board can certainly be pinned down to its promise on the doctrine of promissory estoppel."

[Emphasis supplied]

41. Under Section 10(1) of the Act the State Government has the power to make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under this Act. However, the power of Government under Section 10(3) by notification in the Gazette to cancel or vary any notification issued under Section 10(3) cannot be exercised retrospectively. This is the view taken by the Kerala High Court in *M.M. Nagalingam Nadar Sons Vs. State of Kerala*, 1993 (91) STC 61, where the learned Single Judge of the High Court has stated as under:

" Power is thus given under sub-section (1) to make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under the Act. Sub-section (3) enables the Government to cancel or vary any such notification issued under sub-section (1). Significantly, sub-section (3) is silent about retrospectively for any notification issued under it. Thus while sub-section (1) authorizes the grant of an exemption or reduction in rate with retrospective effect in respect of any tax payable under the Act, sub-section (3) does not provide for any cancellation or variation retrospectively. In issuing notifications under Section 10, the Government is exercising only delegated powers. While the legislature has plenary powers to Legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only those powers which are specifically conferred. Therefore, if it is intended to confer on the Government a power to cancel/withdraw/vary an exemption or reduction in rate of tax, with retrospective effect, such a power has to be specifically conferred, and in the absence of any such specific conferment of power in sub-section (3) of Section 10, the Government cannot issue notifications there under affecting a vested right or imposing an obligation to act retrospectively. I have already mentioned that this provision is significantly silent on such a power. Equally, the Government has also no power to levy a tax with retrospective effect. The retrospective cancellation/ withdrawal of an exemption or a reduction in rate tantamounts to levy of a tax, or tax at a higher rate from a date in the past, for which the Government has no power under sub-section (3)."

[Emphasis supplied]

43. Before this Court the State of Kerala did not dispute the above finding (See 2000(9) SCC 286) where the State's appeal was dismissed. That Section 10(3) of the Keral General Sales Tax Act did not confer the power to withdraw an exemption with retrospective effect was not challenged by the State Government and accordingly the finding regarding the meaning and effect of Section 10(3) of the Act has become final. In any event, the appeal preferred by the State of Kerala was dismissed and the judgment of the High Court has therefore become final. Accordingly, it was held that Section 10(3) does not confer the power to withdraw an exemption with retrospective effect. Effect of this is that the amendment notification SRO 38/98 has to be read so as not to take away or disturb any manufacturer's pre-existing accrued right of exemption for a period of 7 years. If SRO 38/98 is construed as now contended by the respondent, then the inevitable consequence would be that SRO

38/98 would itself be rendered ultra vires Section 10(3) of the Act, and therefore, illegal, bad in law and null and void.

44. We do not agree with the submission made by the learned counsel for the respondent/State that subsequent notification was classificatory in nature. That it only removed the doubt which had arisen with reference to "compound rubber" in the SRO 1729/93. Making of "compound rubber" had been accepted to be "manufacture" in the Memorandum of Undertaking entered between MRF and the Government on 6.10.1993 and the addendum dated 10.4.1996 to the Memorandum of Undertaking dated 6.10.1993. It is further recognized in the eligibility certificate issued by the Director of Industries and Commerce after investigation and due verification and the exemption certificate issued by the Board of Revenue.

45. For the reasons stated above, the appeal is accepted, order of the High Court is set aside. Writ of mandamus is issued restraining the respondents from taking any proceedings against MRF Ltd. contrary to or inconsistent with the eligibility certificate dated 10.1.1997 and the exemption order dated 10.6.1998. Parties shall bear their own costs."

(iii) 2009(246) E.L.T.495 (Del.) [Union of India v. Himsheel International], wherein High Court of Delhi held as follows:-

"13. Doctrine of promissory estoppel has been explained and expounded in several decisions of the Supreme Court, (see Motilal Padampat Sugar Mills Co. Ltd. versus State of U.P. (1979) 2 SCC 409; State of Arunachal Pradesh versus Nezone Law House, (2008) 5 SCC 609; Sharma Transport versus Govt. Of A.P., (2002) 2 SCC 188; Jasbir Singh Chhabra v. State of Punjab, (2010) 4 SCC 192; State of Bihar & Ors. versus Kalyanpur Cements Ltd., (2010) 3 SCC 274). 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."

(iv) 1996 (86) ELT 189 Mad [Rex Trading Company vs Union Of India] wherein in this court held as follows:-

"32. With regard to the second contention of Mr. Habibullah Basha the learned Senior Counsel for the petitioner, it is submitted that in any event, the Public Notice

will have no retrospective effect. In this connection, the learned senior counsel for the petitioner, Mr. Habibullah Basha cited the following rulings of the Supreme Court in the case of the Cannanore Spinning and Weaving Mills Limited v. The Collector of Customs and Central Excise, Cochin and Others and in M/s. Bharat Baprel and Drum Manufacturing Company Private Limited v. The Collector of Customs, Bombay and Another and in Union of India and Others v. Kanunga Industries . It is clear from the above rulings that notifications will have only prospective operation unless the enactment provides for a retrospective operation. In view of the above, there is force in the contention of the learned senior counsel for the petitioner that the Public Notice will have only prospective effect and not retrospective effect.

34. I have carefully considered the contentions of the learned Senior counsel for the petitioner and respondents with regard to the third contention and I am of the view that upon the facts and circumstances of the case, the doctrine of promissory estoppel will apply. It is well settled by the above rulings of the Supreme Court that the doctrine of promissory estoppel is applicable against the Government in exercise of its Governmental or public or executive functions and executive action cannot be invoked to defeat the applicability of doctrine of promissory estoppel. I am, therefore, of the considered view that upon the facts and circumstances of the case, the doctrine of promissory estoppel will apply, as the petitioner in pursuance of Open General Licence Order No. 1 of 1983 has carried out certain acts detrimental to himself by entering into contract with the foreign supplier to supply Isoborneol and by opening an irrevocable letter of credit and other incidental and connected acts. It was further pointed out by the learned senior counsel for the petitioner that by virtue of an earlier order passed by this court in W.M.P. Nos. 12555 and 12556 of 1984, the petitioner was allowed to clear the goods on payment of the customs duty, and the petitioner has paid the customs duty and cleared the goods. The only point that is open to the respondents is with regard to the levy of penalty under Section 124 of the Customs Act. In the instant case, the import has been in accordance with O.G.L. Order No. 1/83 and as the Public Notice dated 17-10-1983 has no legal effect of amending the O.G.L. Order No. 1/83, the import of Isoborneol is in accordance with law and levy of penalty does not arise upon the facts and circumstances of the case."

6. Countering the submissions made by the learned Senior Counsel appearing for the petitioner, Mr.N.Rajan, learned Central Government Standing Counsel appearing for the 1st respondent submitted that the 1st respondent had withdrawn the 'No Objection Certificate' issued to the petitioner only for the reason that the Government of Mozambique requested the Government of India to import the pulses only if the importer obtain 'No Objection Certificate' from ICM and not from any other agencies. Further, the learned Central Government Standing Counsel submitted that the petitioner can very well obtain 'No Objection Certificate' from ICM and seek for 'No Objection Certificate' afresh and the withdrawal of 'No Objection Certificate' would not prejudice the petitioner. Further, the learned Central Government Standing Counsel submitted that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory

prohibition. In support of his contentions, the learned counsel relied upon a judgment reported in AIR 1986 Supreme Court 806 [Union of India and others v. Godfrey Philips India Ltd], wherein the Hon'ble Supreme court held as follows:-

"14. Of course we must make it clear and that is also laid down in Motilal Sugar Mills case (AIR 1978 SC 621) (supra), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that 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 which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine it must yield when the equity so requires, if it can be shown by the Government or 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 it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in Motilal Sugar Mills case (supra) and we find ourselves wholly in agreement with what has been said in that decision on this point."

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side it could be seen that the petitioner is aggrieved by the proceedings of the 1st respondent dated 18.12.2017, by which, the 1st respondent has withdrawn the 'No Objection Certificate' granted to the petitioner for import of 2000 MTs of "Pigeon Peas from Mozambique on the ground that subsequently the Government of Mozambique informed the Government of India mandating only ICM (Institute de Cereasi de Mozambique) to be the sole designated agency responsible for regulating export of pulses to India under Memorandum of Understanding. Import effected by the petitioner is pursuant to the notice dated 17.11.2017, which provides for the manner in which the No Objection Certificate has to be obtained.

8. On a perusal of the trade notice, it could be seen that nowhere it has been mentioned that service would be only by ICM. In the impugned communication, it has been stated that the decision taken by the Government of Mozambique much after the sale contract dated 10.10.2017 was entered into for supply of pigeon peas and after issuance of the No Objection Certificate by the 1st respondent vide proceedings dated 28.11.2017.

9. The learned Central Government Standing Counsel also submitted that the impugned communication is an outcome of a directive issued by the Government of Mozambique and not the officials in the Indian Government.

10. Admittedly, the decision of Government of Mozambique stating that the certification would be only by ICM is a subsequent decision.

11. It is not the case of the respondents that the decision taken by the the Government of Mozambique would operate retrospectively and that there was a request made by the Government of Mozambique to withdraw all the No Objection Certificates issued by other agencies prior to their decision. Even the communication sent by the Government of Mozambique is silent to the operation of the decision. That being the case, it can only be prospective and it cannot be stated that it would operate retrospectively. If the said decision is applied retrospectively, then, there should be a specific mention in the communication issued by the Government of Mozambique to the Government of India. When the communication is silent with regard to the application of the subsequent decision, it meant only be prospective.

12. That apart, when there is no mention in the impugned order as to the withdrawal of the No Objection Certificates already issued in favour of the importers, there is no necessity for withdrawing the existing No Objection Certificates issued in favour of the importers. The respondents could have very well advised the petitioner to approach the Government of Mozambique for getting suitable clearance based on the No Objection Certificates already issued in their favour. When the 1st respondent had issued the No Objection Certificate in favour of the petitioner, they cannot withdraw the No Objection Certificate merely because the Government of Mozambique had taken a subsequent decision asking the importers to get No Objection Certificates from ICM.

13. It is not in dispute that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred from enforcing a statutory prohibition. In the case on hand there is no statutory prohibition for the issuance of No Objection Certificate.

14. As already stated, the Government of Mozambique has not requested the Government of India to withdraw the No Objection Certificates issued by the other agencies other than ICM. They have only stated that export would be permitted only if the exporter obtains No Objection Certificate from ICM. When their communication is silent about the withdrawal of existing No Objection Certificates, the judgment relied upon by the learned Central Government Standing Counsel appearing for the 1st respondent is not applicable to the present case. On the other hand, the judgments relied upon by the learned Senior Counsel appearing for the petitioner squarely applies to the facts and circumstances of the present case.

15. Applying the ratios laid down in the judgments relied upon by the learned Senior Counsel, I am of the considered view that the impugned order dated 18.12.2017 is liable to be set aside. Accordingly, the same is set aside. Though the impugned order passed by the 1st respondent withdrawing the No Objection Certificate is set aside by this Court in this writ petition, the petitioner should approach the Government of Mozambique for getting clearance for the import of Pigeon Peas based on the No Objection Certificate issued by the Chamber of Commerce of Mozambique - Beira.

16. With these observations, writ petition is allowed. No costs. Consequently, connected Miscellaneous petitions are also closed.

21.03.2018 Index: Yes/No Speaking Order/Non Speaking Order Note : Issue order copy today itself
Rj To 1 The Joint Director General of Foreign Trade Ministry of Commerce and Industry
Department of Commerce Udyog Bhavan, H-Wing, Gate No.2 Maulana Azad Road New Delhi-110
011 2 The Commissioner of Customs Custom House No.60 Rajaji Salai Chennai-600 001
M.DURAISWAMY, J., Rj Order in W.P.No.2274 of 2018 & W.M.P.Nos.2770 to 2772 of 2018
21.03.2018