

(2009) 05 CAL CK 0001

Calcutta High Court

Case No: Writ Petition 5572 (W) of 2009

Jessop and Company Limited
and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: May 15, 2009

Acts Referred:

- Foreign Trade (Development and Regulation) Act, 1992 - Section 11, 11(4), 14, 15, 15(3)

Citation: (2010) 1 CALLT 437 : (2009) 3 CALLT 119

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: Bhaskar Sen, Mr. Jishnu Chaudhury, Mr. Amit Agarwala and Mr. Samit Rudra, for the Appellant; Somenath Bose, Bhaskar Prasad Banerjee and Mr. Shakeel, Md. Akhtar, for the Respondent

Final Decision: Dismissed

Judgement

Soumitra Pal, J.

Jessop & Co. limited is the petitioner No.1 and the petitioner No.2 is its principal officer. The petitioner No.1 (for short "the petitioner") was previously a Government of India Undertaking and after the process of disinvestment it is now controlled by its management. The petitioner is engaged in the business of manufacture and sale of E.M.U coaches, wagons, heavy cranes, etc. and in course of its business undertakes both import and export activities. For the purpose of such activity on 20th June, 1990 the petitioner was allotted an Import -Export Code bearing No.0290000211 (for short "I.E.C."). In the usual course of business the petitioner is required to import components and parts for E.M.U. coaches, cranes, wagons etc. At present a consignment of hydraulic cylinder is lying at the Netaji Subhas Chandra Bose International Airport which is required for the manufacture of a crane at the Bokaro Steel Plant of the Steel Authority of India Limited. On 22nd February, 2009

the said consignment arrived at the airport. The agent of the petitioner filed necessary documents with the customs authorities for its release. On 23rd/24th February, 2009 the agent of the petitioner informed the petitioner that I.E.C. of the petitioner had been suspended by the respondent authorities. Since due to non-release of the goods the petitioner was severely prejudiced and as the particulars could not be provided by the agent. In the first week of March, 2009 the petitioner made enquiries with the authorities, but without any effect. On 18th March, 2009 a letter demanding justice was issued, but it went unheeded. Aggrieved, the writ petition was filed.

2. The matter was moved on 23rd March, 2009 when directions were issued for filing of affidavits. Affidavits have since been exchanged and are on record.

3. Learned senior advocate appearing on behalf of the petitioner reiterating the statements made in the writ petition submitted that no order of suspension was furnished. The petitioner came to know about the suspension from the certificate proceedings and were not aware of the contents in paragraph 3 of the order in original since it was sent to a wrong address. Allegation is as no opportunity to make representation in any form was given to the petitioner prior to the suspension of I.E.C., there was an utter violation of the provisions of Foreign Trade (Development and Regulation) Act, 1992 (for short "the Act") and violation of natural justice. Since suspension of I.E.C. is discretionary as evident from the word "may" appearing in section 11(4) and has civil consequences, before passing the order of suspension, the respondents should have adhered to the principles of natural justice and fair play which are inherent by giving an opportunity to the petitioner to represent in any manner which is not a useless formality. Where order of suspension u/s 11(4) of the Act is passed, the conditions stipulated in section 8 of the Act are required to be followed. Since order of suspension has civil consequences, the provisions contained in section 8 has to be read into section 11(4). Reliance was placed on the following judgments in support of his contentions which are as under:

1. [Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another,](#)
2. [C.B. Gautam Vs. Union of India and Others,](#)
3. [M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another,](#)
4. [Canara Bank and Others Vs. Shri Debasis Das and Others,](#)
5. [Ruia Cotex Ltd. Vs. Corporation Bank and Others,](#)
- 6 [Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,](#)
7. [Management of M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and Others,](#)

8. [U.P Awas Evam Vikas Parishad Vs. Gyan Devi \(Dead\) by L.Rs. and another, etc. etc.,](#)

4. Learned advocate appearing on behalf of the respondents refuting the submission advanced on behalf of the petitioner submitted that there was no denial of the fact that before the order imposing penalty was passed notice to show-cause was issued and the petitioner replied in writing. Thus ample opportunity was given to the petitioner No.1 to put forward their case. However, the petitioners failed to avail themselves of the opportunity of personal hearing. Thereafter, order was passed. Being aggrieved by the order, the petitioner preferred appeal which was dismissed. u/s 15(3) the order passed in appeal has become final. By the order passed by the adjudicating authority the petitioner was informed that non-payment of penalty would lead to suspension of I.E.C. without any further notice till payment of the full fiscal penalty. Moreover, as the petitioners undertook by declaration dated 5th December, 1996 that they would be liable to penal action in the event of failure to fulfil the export obligation under the Act or the Rules and the orders framed thereunder, the Customs Act, 1962 and EXIM Policy, the petitioner is estopped from contending that he is entitled for an opportunity of being heard before an order of suspension is passed. Moreover, there is no allegation of unreasonableness or unfairness. It has not been stated in the absence of opportunity of hearing that the petitioner would suffer prejudice. Since penalty has not been paid and is not going to alter the outcome, further opportunity to represent would be an useless formality. It was submitted that since u/s 14 opportunity was granted to the petitioner before the imposition of penalty and as the language of section 11(4) is plain and unambiguous which is the determinative factor of the legislative intent, the conditions as stipulated in section 8 are not required to be followed. Submission was as the petitioner was sounded in advance regarding suspension which was sufficient to meet the requirement of natural justice, the action impugned is just and proper. Learned advocate for the respondents relied on the following judgments in support of his contentions:

1. [Kaushalya Rani Vs. Gopal Singh,](#)

2. [Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur,](#)

3. [A.H. Magermans Vs. S.K. Ghose and Others,](#)

4. [Union of India and another Vs. Ex Constable Amrik Singh,](#)

5. Controller of Examinations & Ors. v. G.S. Sunder & Anr., 1993 supp(3) SCC 82

6. [Union of India and another Vs. W.N. Chadha,](#)

7. The [The Maharashtra State Financial Corporation Vs. M/s. Suvarna Board Mills and another,](#)

8. [Union Bank of India Vs. Vishwa Mohan,](#)

9. [M.C. Mehta Vs. Union of India \(UOI\) and Others,](#)

10. [Canara Bank and Others Vs. Shri Debasis Das and Others,](#)
11. [Union of India \(UOI\) and Others Vs. Dharamendra Textile Processors and Others,](#)
12. [Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja,](#)
13. [Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others,](#)
14. Central Bank of India v. State of Kerala & Ors., 2009(2) E.L.T. 3 SC 529

5. The question which falls for consideration is whether the petitioner is to be given an opportunity to furnish representation or is entitled to be heard before the Importer-Exporter Code is suspended u/s 11(4) for non-payment of penalty.

6. In order to decide the issue it is necessary to refer to section 8, the relevant provisions in section 11 and 14 of the Act. Section 8 is as under:-

S.8. Suspension and cancellation of Importer-Exporter Code Number:

(1) Where -

(a) any person has contravened any law relating to Central Excise or customs or Foreign Exchange or has committed any other economic offence under any other law for the time being in force as may be specified by the Central Government by notification in the Official Gazette; or

(b) the Director-General has reason to believe that any person has made an export or import in a manner gravely prejudicial to the trade relations of India with any foreign country or to the interests of other persons engaged in imports or exports or has brought disrepute to the credit or the goods of the country,-

the Director-General may call for the record or any other information from that person and may, after giving to that person a notice in writing informing him of the grounds on which it is proposed to suspend or cancel the Importer-Exporter Code Number and giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice and, if that person so desires, of being heard, suspend for a period, as may be specified in the order, or cancel the Importer-Exporter Code Number granted to that person.

(2) Where any Importer-Exporter Code Number granted to a person has been suspended or cancelled under sub-section (1), that person shall not be entitled to import or export any goods except under a special licence granted, in such manner and subject to such conditions as may be prescribed, by the Director-General to that person.

(Emphasis supplied)

Relevant provisions contained in section 11 is set out hereinbelow

S. 11. Contravention of provisions of this Act, rules orders and export and import policy. - (1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and the orders made thereunder and the export and import policy for the time being in force.

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be ade, whichever is more.

(3) Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes of cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.

(4) A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer-Exporter Code Number of the person concerned may, on failure to pay the penalty by him, be suspended by the Adjudicating authority till the penalty is paid.

(5).....

(6).....

(Emphasis supplied)

Section 14 is extracted hereunder :

S. 14. Giving of opportunity to the owner of the goods, etc.- No order imposing a penalty or of adjudication of confiscation shall be made unless the owner of the goods or conveyance, or other person concerned, has been given a notice in writing-

(a) informing him of the grounds on which it is proposed to impose a penalty or to confiscate such goods or conveyance; and

(b) to make a representation in writing within such reasonable time as may be specified in the notice against the imposition of penalty or confiscation mentioned therein, and, if he so desires, of being heard in the matter.

7. A reading of section 11(4) shows if penalty is not paid it may be recovered as an arrear of land revenue. In case of such failure to pay the penalty, the importer exporter Code may be suspended till the penalty is paid. Section 14 prescribes the procedure for adjudication before the imposition of penalty or order directing confiscation.

8. In the instant case I find that a show cause notice was issued on 24th March, 2003 with regard to the payment of customs duty for non-production of progress report.

Consequently two demand notices were issued on 29th May, 2000 and 27th June, 2000. The petitioner belatedly filed the progress report as evident from its letter dated 19th July, 2000 and prayed for condoning the delay in filing the same. As evident from the letter dated 8th September, 2000 the progress report was rejected by the respondent No.5. However, the petitioner was given an opportunity for personal hearing. Thereafter a show cause notice dated 22nd July, 2003 for violation of import export policy was issued. Since show cause notice was not replied to, a defaulter order dated 3rd March, 2004 was issued. Consequently, a show cause notice dated 22nd March, 2004 u/s 11 of the Act was issued whereby the petitioner was granted liberty to file written reply and to intimate whether it chose to be heard in person. On 16th April, 2004 the reply was filed on behalf of the erstwhile directors of the petitioner. On 7th June, 2004 extension of time was sought for to submit a detailed reply/clarification. A further reply dated 17th June, 2004 was sent by the petitioner. Thereafter, on 1st August, 2005 the Joint Director General of Foreign Trade, respondent No.2 passed an order imposing a penalty of Rs.17,19,404/- and issued directions to pay to the Customs Authority the full amount of customs duty on which exemption of benefit was obtained along with penal interest as provided in the Exim policy read with the Customs Act. The petitioner was informed, as evident from paragraph 3 of the order, to deposit the penalty within fifteen days failing which the I.E.C. might be suspended without any further notice till payment of full penalty. Incidentally, I find from the order in original that the petitioner had failed to avail itself of the opportunity of personal hearing. Thereafter, being aggrieved by the order on 24th May, 2007 the petitioner preferred an appeal u/s 15 of the Act before the Appellate Authority. The Appellate Authority by an order dated 13th/14th August, 2008 dismissed the appeal on the ground of delay in filing the appeal and for non-fulfilment of the conditions of licence. Incidentally the authorities by an intimation dated 29th December, 2005 requested the Collector, South 24 Parganas to recover the penalty from the petitioner and on its Directors as arrears of land revenue. Therefore, there is no denial of the fact that the petitioner was given the opportunity to file representation and for hearing before order was passed imposing penalty and there was compliance of natural justice. However, the question is whether a further opportunity to represent should have been afforded to the petitioner before order of suspension of the I.E.C. was passed. A plain reading of section 11(4) shows that in case of non-payment of penalty, which in the instant case has not been paid, suspension is consequential. The word "and" appearing in 11(4) makes non-payment of penalty and consequent suspension conjunctive. The language of section 11(4) is clear and unambiguous. Since suspension flows from the order of penalty, imposition of penalty and the act of suspension cannot be read in isolation. Suspension is corollary to penalty. That non-payment of penalty would lead to the suspension of I.E.C. without any further notice till full penalty is paid is evident from paragraph 3 of the order in original which the petitioner was aware of. Assuming that the petitioners were not aware of the actual text of the order and was thus not aware that non-payment of penalty would lead to suspension,

however, the petitioner is estopped from raising the plea of denial of natural justice before issuance of the order of suspension in view of the "Declaration/undertaking" furnished on 5th December, 2006 whereby the petitioner undertook "That I/ We shall be liable to penal action in accordance with the EXIM policy/procedure/Foreign trade (Development & Regulation) Act, 1992, or the Rules and Orders framed thereunder and the Customs Act, 1962 in addition to forfeiture of Bank Guarantee or any other Bond/ Guarantee given to the Customs, in the event of failure to fulfil the export obligation as stipulated, within the export obligation period as prescribed or subsequently extended by the competent authority." (page 91 of the writ petition). Therefore, it is evident from the declaration/undertaking that the petitioners were conscious of the consequences that might befall for non-payment of penalty.

9. In course of hearing an argument was advanced that rule of law stipulates that it is obligatory on the part of the respondents to allow the petitioner to represent or allow an opportunity of hearing before passing an order which has civil consequences. A portion of paragraph 6 of the affidavit in reply which is in support of such submission runs thus "Even if such suspension is required to be made u/s 11(4) of the Act, the conditions stipulated in section 8 of the Act are required to be followed. Moreover and without prejudice to the above, it is stated that the suspension of I.E.C. has civil consequences and, therefore, natural justice is required to be followed." There is no doubt that the Foreign Trade (Development and Regulation) Act, 1992 is an Act relating to revenue. It is "An Act to provide for the Development and Regulation of Foreign Trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto". It is a special enactment. In order to maintain fiscal discipline it has its own mechanism for settlement of disputes and recovery of revenue. Therefore, in such circumstances an adjudication would depend on the framework of the statute. The Supreme Court in a recent judgment in *Union of India v. Dharmendra Textile Processors* (supra) while dealing with a fiscal law-Central Excise Act, 1944 and the Rules framed under the Excise Act held as under:

13. It is a well settled principle in law that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.

14. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See *Institute of Chartered Accountants of India v. Price Waterhouse* - 1977 6 SCC 312). The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for

its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford v. Spooner* (1846) 6 MOO PC 1, the Courts cannot aid the legislature's defective phrasing of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. (See [State of Gujarat and Others Vs. Dilipbhai Nathjibhai Patel and Another](#), . It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See *Stock v. Frank Jones (Tipton) Ltd.* 1978 (1) ALL ER 948.) Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. The Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in *Vickers Sons*")

15. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage* - 218 FR 547) The view was reiterated in [Union of India and Others Vs. Filip Tiago De Gama of Vedem Vasco De Gama](#), .

16. In [D.R. Venkatachalam and Others Vs. Dy. Transport Commissioner and Others](#), , it was observed that the Courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

17. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

(Emphasis supplied)

10. Therefore, it is well-settled so far as interpretation of revenue law is concerned Court has to examine what has been stipulated. There is no scope for any intentment. Nothing can be read into a provision. Application by implication does not arise. Language used has to be looked into. Regard should be to the strict letter of law. Equitable considerations have no place and interpretations cannot be on the basis of presumption or assumption. What is important is the intention of the legislature as reflected in the statute. In order to gather the intention interpretation has to be on the basis of the words used in the section. Therefore, while ascertaining the exact meaning of the legislation only the language used should be of prime consideration.

11. In such backdrop it is to be noted section 8 is under Chapter III of the Act, sections 11 and 14 are under Chapter IV. While section 8 speaks of suspension or cancellation of Importer-Exporter Code of any person for contravention of any law

relating to Central Excise or Customs or Foreign Exchange or for commission of any economic offence under any other law after giving an opportunity to represent in writing and if the person so desires after giving an opportunity of hearing, section 11 speaks of imposition of penalty and in case of its non-payment, suspension of the code for contravention of the provisions under "this Act" that is, under the Foreign Trade (Development and Regulation) Act, 1992. Though in section 8 legislature has consciously enumerated a *modus prior* to suspension or cancellation of the I.E.C., a separate procedure has been prescribed in section 14 of the Act for contravention of provisions of "this Act" which has been admittedly adhered to by the respondents. Therefore, as the statutory provisions operate in different background and context and the language is plain and unambiguous, the answer, whether the petitioner should have been given a further opportunity, has to be in the negative as it is an established proposition of law that Court cannot read into words which the legislature has consciously omitted. Moreover, as held in *Union of India v. Dharmendra Textile Processors* (supra) "The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said." Hence, as the Act is a fiscal law, section 11(4) has to be considered textually. Under the Act in case of non-payment of penalty, the authority has a discretion to suspend the Code. It is a restriction till the penalty is paid. The word "may" is to be read in that context. Further opportunity to represent before suspension, has been consciously omitted in 11(4) by the legislature and cannot be imported as a subtext. Moreover, the petitioner has not pleaded about the difference that might have been caused in the absence of hearing. In this context it is appropriate to refer to the law laid down in *C.B. Gautam* (supra) wherein it has been held "We agree that in order to save a statute or a part thereof from being struck down it can be suitably read down. But such reading down is not permissible where it is negated by the express language of the statute. Reading down is not permissible in such a manner as would fly in the face of the express terms of the statutory provisions" (paragraph 36). (Emphasis supplied)

12. Besides it is to be noted that there is no challenge to the provision of the Act. In view of the provisions contained in section 11 of the Act, the principles of law laid down by the Apex Court in *Eurasian Equipment and Chemicals* (supra), where blacklisting was not under a statute, are not applicable to the facts of case since in the instant case the writ petition was granted every opportunity to present its case before the order in original was passed. The law laid down in the judgment in *Southern Painters* (supra) is not applicable where the appellant was not notified of the reason for the deletion of its name from the list of qualified contractors. The law laid down in *Canara Bank* (supra), in *Ruia Cotex* (supra), *Mohinder Singh Gill* (supra), *Management of M/s. Nally Bharat Engineering Co. Ltd.* (supra), *U.P. Awas Evam Vikas Parishad* (supra) are not applicable as in the instant case suspension was carried out for violation of fiscal law. In the absence of challenge to the provisions of the Act

and in view of the stand taken by the learned Attorney General as evident from paragraph 7 of the judgment in C.B.Gautam (supra), the law laid down therein is inapplicable.

13. Hence, as the petitioner gave an undertaking, was given opportunity to represent, knew about the statutory consequences of non-payment of penalty and as suspension is consequential and in view of the provisions contained in section 11(4), no further opportunity to represent or hearing is required before an order of suspension under the Act is passed. Therefore, the writ petition is dismissed.

No order as to costs.

Urgent photostat certified copy of this judgment and order, if applied for, be given to the appearing parties on priority basis.