

(2019) 12 JH CK 0168

In the Jharkhand High Court

Case No : Writ Petition (T) No. 4320, 4274, 4275 Of 2019

Brahmaputra Metalics Ltd

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Bihar Electricity Duty Act, 1948 — Section 9
Kerala Building Tax Act, 1975 — Section 3A

Citation : (2019) 12 JH CK 0168

Hon'ble Judges : H. C. Mishra, J;Deepak Roshan, J

Bench : Divison Bench

Advocate : Sumeet Gadodia, Karan Saha Deo, Atanu Banarjee, Dhananjay Pathak, Ranjana Mukherjee, Pooja Kumari, Saket Upadhya

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner Company and learned counsel for the State, in all these matters.

2. Since the issue involved in all these matters are same, they have been heard together, and are being disposed of by this common Judgment.

3. The petitioner Company is engaged in business of manufacture of Sponge Iron and M.S. Billet, and it is having its integrated manufacturing unit in the District of Ramgrah. They are also having their own captive thermal power plant of 20 MW, for generation of electricity for captive consumption.

The petitioner Company came into commercial production w.e.f. 17.08.2011, and the certificate to that effect has been issued by the Government of

Jharkhand, Directorate of Industries, to the petitioner Company on 31.5.2013, brought on record as Annexure-2 to the writ application.

4. The State of Jharkhand framed its industrial policy, commonly known as Jharkhand Industrial Policy, 2012, which was given retrospective effect

from 1.4.2011. The policy has been brought on record as Annexure-1 to the writ application, in which, Para 32.10 relates to 'Incentive for captive power plant', in the following terms:-

â??32.10 Incentive for captive power plant

New or existing industrial units setting up captive power plant shall be exempted from the payment of 50% of electricity duty for a period of five years for self-consumption or captive use (i.e. in respect of power being used by the plant) from the date of its commissioning.â??

Again Para 38 of the Industrial Policy provides for 'Monitoring and Review', sub-clause (b) thereof reads as follows:-

â??38. Monitoring and Review

(b) All concerned departments and organizations would issue necessary follow up notifications within a month to give effect to the

provisions of this policy. The implementation of this policy will be duly monitored by Government at the level of Chief Secretary atleast once

in a quarter so that the State Government may carry out a mid-term review of this policy.â??

5. Admittedly no follow up notification was issued by the State Government for giving effect to the provisions of the policy for a long time. The State

Government, in its Department of Commercial Taxes, came out with such gazette notification only on 8th January 2015, as contained in Annexure-5 to

the writ application, for giving effect to the benefits of the industrial policy, which reads as follows:-

S.O. 67 dated 8th January, 2015 -- In the light of Para 32.10 of Jharkhand Industrial Policy, 2012 and in exercise of the powers

conferred by the Section 9 of the adopted Bihar Electricity Duty Act, 1948, the Governor of Jharkhand is pleased to exempt new or existing

industrial units setting up captive power plant for self consumption or captive use (in respect of power being used by the plant) from the

payment of 50% of Electricity Duty from the date of the commissioning of the power plant.

The notification shall be effective from the date of issue and shall remain effective till the period mentioned in the relevant provisions of the

Jharkhand Industrial Policy, 2012.

6. The petitioner Company, which admittedly came into commercial production

w.e.f. 17.08.2011, made its claim for 50% exemption in electricity duty for the financial years 2011-12, 2012-13 and 2013-14, but the said benefit was denied to the petitioner for the simple reason that the State Government had not come out with the follow up notification giving effect to the industrial policy, till 8.1.2015. Aggrieved thereby, the present writ applications have been filed by the petitioner.

7. Learned counsel for the petitioner has submitted that the impugned action of the State Government denying the benefit of the industrial policy to the petitioner, for the financial years 2011-12, 2012-13 and 2013-14, is absolutely illegal and arbitrary, as there is no reason for denying the benefit to the petitioner Company, except the fact that due to the laches on part of the State Government, the required follow up notification was issued belatedly on 8.01.2015, that too, giving the notification a prospective effect. The petitioner Company, was entitled to get the benefit of exemption in the electricity duty for a period of five years only, from the date of its commissioning, which shall be coming to an end in the financial year 2015-16. Thus, in effect the petitioner Company shall get the benefit for one or two financial years only, and be deprived of the benefit for the remaining years, only due to the laches on part of the State Government. It is the case of the petitioner that there is no other reason for denying the benefit to the petitioner.

8. Learned counsel for the petitioner has placed reliance upon a decision of the Honâ??ble Apex Court in State of Bihar and Ors. Vs. Kalyanpur

Cement Ltd., reported in (2010) 3 SCC 274, wherein where a similar issue had arisen. In State of Bihar, the industrial policy was notified in the year

1995. In the said industrial policy of the State of Bihar also, there was a provision for monitoring and reviewing, which stated that all the departments

and organisations concerned shall issue follow up notification to give effect to the provisions of the policy within a period of one month, which is similar

to Para 38-(b) in the present Industrial Policy. No notification giving effect to the industrial policy of the State of Bihar was issued by State

Government, and the policy itself lapsed on 31.8.2000. Kalyanpur Cement Ltd.'s, claim for sales tax exemption was rejected by the State Government

on the ground that the Government had decided not to grant such incentive to the sick industrial units. The follow up notification was issued by the

State Government during the pendency of the matter before the Apex Court, on

18.10.2004. In the backdrop of these facts, the Honâ??ble Apex

Court held as follows:-

â??85. Even if we are to accept the submission of Dr. Dhavan and Mr. Dwivedi that the provisions contained in Clause 24 were mandatory, the time of one month for issuing the notification could only have been extended for a reasonable period. It is inconceivable that it could have taken the Government three years to issue the follow up notification. We are of the considered opinion that failure of the appellants to issue the necessary notification within a reasonable period of the enforcement of the Industrial Policy, 1995 has rendered the decisions dated 6.1.2001 and 5.3.2001 wholly arbitrary. The appellant cannot be permitted to rely on its own lapses in implementing its Policy to defeat the just and valid claim of the Company. For the same reason we are unable to accept the submission of the learned Senior Counsel for the appellant that no relief can be granted to the Company as the Policy has lapsed on 31.08.2000. Accepting such a submission would be to put a premium and accord a justification to the wholly arbitrary action of the appellant, in not issuing the notification in accordance with the provisions contained in Clause 24 of the Industrial Policy, 1995.â?? (Emphasis supplied).

9. Learned counsel for the petitioner has also placed reliance upon a decision of Apex Court in *Manuelsons Hotels Private Limited Vs. State of Kerala & Others*, reported in (2016) 6 SCC 766. In the said case, the Government of Kerala issued notification on 11.7.1986, enabling those engaged in tourism promotional activities to become automatically eligible for concessions / incentives as applicable to the industrial sector from time to time. The amendment in Kerela Building Tax Act, 1975, was also made w.e.f. 6.11.1990, but without giving any exemption as promised in the notification issued in the year 1986, the amendment was deleted w.e.f. 1.3.1993. The matter went up to the Apex court, wherein the Honâ??ble Apex Court took note of the similar situations in its earlier decisions in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P.*, reported in (1979) 2 SCC 409, and *State of Punjab Vs. Nestle India Ltd.*, reported in (2004) 6 SCC 46,5 wherein sales tax benefits were granted to the company, even though, necessary exemption notifications had not been issued and the Apex Court granted the

benefits considering the principle of permissible promissory estoppel to be equitable doctrine. Relying on those decisions, the Honâ??ble Apex Court laid down the law in *Manuelsons Hotels'* case (supra), as follows:-

36. -----. The non-exercise of such discretionary power is clearly vitiated on account of the application of the doctrine of promissory estoppel in terms of this Courtâ??s judgments in *Motilal Padampat* and *Nestle*. This is for the reason that non-exercise of such power is itself an arbitrary act which is vitiated by non-application of mind to relevant facts, namely, the fact that a G.O. dated 11-7-1986 specifically provided for exemption from building tax if hotels were to be set up in the State of Kerala pursuant to the representation made in the said G.O. True, no mandamus could issue to the legislature to amend the Kerala Building Tax Act, 1975, for that would necessarily involve the judiciary in transgressing into a forbidden field under the constitutional scheme of separation of powers. However, on facts, we find that Section 3-A was, in fact, enacted by the Kerala Legislature by suitably amending the Kerala Building Tax Act, 1975 on 6-11-1990 in order to give effect to the representation made by the G.O. dated 11-7-1986. We find that the said provision continued on the statute book and was deleted only with effect from 1-3-1993. This would make it clear that from 6-11-1990 to 1-3-1993, the power to grant exemption from building tax was statutorily conferred by Section 3-A on the Government. And we have seen that the Statement of Objects and Reasons for introducing Section 3-A expressly states that the said section was introduced in order to fulfil one of the promises contained in the G.O. dated 11-7-1986. We find that the appellants, having relied on the said G.O. dated 11-7-1986, had, in fact, constructed a hotel building by 1991. It is clear, therefore, that the non-issuance of a notification under Section 3-A was an arbitrary act of the Government which must be remedied by application of the doctrine of promissory estoppel, as has been held by us hereinabove. The ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise. -----." (Emphasis supplied).

10. Placing reliance on these decisions, learned counsel for the petitioner submitted that the petitioner could not be denied the benefit of the Industrial Policy for the financial years 2011-12, 2012-13 and 2013-14 only due to the fact that the follow up notification was issued by the State Government on 8.1.2015, and it was given a prospective effect. It is submitted by learned counsel that the follow up notification, even though issued on 8.1.2015, has to be given effect from the date of issuance to the Industrial Policy, so that the benefits thereof cannot be denied to the entitled industrial units in the State of Jharkhand. Alternatively, it is submitted by learned counsel for the petitioner that the petitioner is also ready for adjustment of the amount of exemption in electricity duty in its future bills, or the benefit may be given to the petitioner Company for five years from the date of issuance of notification.

11. Learned counsel for the State on the other hand has opposed the prayer, submitting that though the industrial policy was made by the State Government in the year 2012, but the follow up notification could not be issued due to certain reasons till 8.1.2015. It is submitted by learned counsel that there being no period prescribed giving the outer limit for issuance of notification, there was no vested right to the petitioner, either to get the notification implemented from an earlier date, or for getting the benefits of the policy until the policy was implemented by issuance of the follow up notification. Learned counsel submitted that there was no wrong committed in issuing the notification with the prospective effect, as it related to the financial matters. It is further submitted by learned counsel for the State that the law laid down in Kalyanpur Cement's case (supra), is not applicable to the facts of this case, inasmuch as in the said case, no follow up notification was issued by the State Government, till the policy lapsed on 31.8.2000. The follow up notification was issued in the said case after policy came to an end, in view of an order passed by the Apex Court in the said case, making it clear that the same would be subject to final decision in that matter. Learned counsel for the State accordingly, submitted that in the State of Bihar, though the industrial policy was framed, but the State did not intend to give the benefits thereof to the sick industries, whereas this is not the case in the State of Jharkhand. In this State, the benefits have been given, but from a later date, and accordingly, the petitioner Company cannot claim

the benefit of exemption in electricity duty, as a matter of right, till the follow up notification was issued by the State Government. Learned counsel for

the State also adopted the submissions of the learned senior counsel appearing for the State of Bihar, as discussed in Paras 35 and 36 of the decision

in Kalyanpur Cement's case (supra), in support of his contention that the doctrine of promissory estoppel shall not apply to this case. The fact

however, remains that those submissions were not accepted by the Honâ??ble Apex Court, as is apparent from Para 66 of the aforesaid decision.

12. Having heard learned counsels for both the sides, in the present case also, we find that by issuance of the Jharkhand Industrial Policy 2012, a

promise was given by the State Government to give the benefit of exemption of 50% in electricity duty for the period of five years, for self-

consumption or captive use, to all the new and the existing industrial units setting up captive power plant, in the State of Jharkhand. It is not the case

that the State Government in fact did not intend to give the benefits to such industrial units, as admittedly, it has come out with the follow up

notification, though belatedly, issued on 8.1.2015, which shows that the State Government in fact intended to give effect to the promise that it had

made to the industrial units in the State. However, the last paragraph of the notification issued on 8.1.2015 states that the notification shall be effective

from the date of issue and shall remain effective till the period mentioned in the relevant provisions of the Jharkhand Industrial Policy. No specific

reason has been assigned for issuance of the follow up order belatedly, in absence whereof, it has to be deemed that delay in issuance of the follow up

notification was not due to any particular or specific reason, but for the lethargic approach of the State authorities. In fact, it is stated in the writ

application, that the notification has been issued by the State Government, only when one M/s Usha Martin Ltd., filed a writ application, being W.P.(T)

No. 6008 of 2014, in this Court, praying for issuance of direction upon the respondent State to issue the follow up notification. It was during the

pendency of the said writ application, that the notification was issued by the State Government.

13. In case of the petitioner Company, and other such new or existing industrial units, entitled to get the benefits of the Jharkhand Industrial Policy

2012, with effect from the year 2011, the effect of this notification would be denying the promise made by the State Government, in as much as, the

benefit was to be given w.e.f. the financial year 2011-12, for a period of five years only, which came to an end in the financial year 2015-16. The

notification itself having been issued on 8.1.2015, practically the petitioner's unit and the other such units would get the benefit only for one or two

years only, at the place of five years, which they were otherwise entitled to, under the Industrial Policy.

14. As such, we are of the considered view that non-issuance of the follow up notification for more than two years, for no cogent reason, in the

present case also, should not stand in the way of the industrial units in getting the benefit, which was promised by the State Government, and denial

thereof by the State Government for the years 2011-12, 2012-13 and 2013-14, shall be hit by the doctrine of promissory estoppel, and the ministerial

act of non-issuance of the notification cannot possibly stand in the way of the industrial units getting the relief under the said doctrine, for, it would be

unconscionable on the part of the Government to get away without fulfilling its promise, as has been held by the Hon'ble Apex Court in

Manuelsons Hotels' case (supra).

15. For the foregoing reasons, we are of the considered view that the last paragraph of the gazette notification dated 8.1.2015, issued by the State

Government in its Department of Commercial Taxes, giving only prospective effect to the said notification has to be struck down. We accordingly,

quash that part of the aforesaid notification, which states that "The notification shall be effective from the date of issue and shall remain effective till

the period mentioned in the relevant provisions of the Jharkhand Industrial Policy 2012."

16. We further direct that the notification shall be deemed to be in effect from the date, Jharkhand Industrial Policy, 2012, was given effect to, i.e.,

from 01.04.2011 itself.

17. The alternate submission of learned counsel for the petitioner that the benefit may be given to the petitioner Company for five years from the date

of issuance of notification dated 08.01.2015, cannot be acceded to, for the simple reason that Para 32.10 of the Industrial Policy clearly speaks for the

exemption for a period of five years only, from the date of commissioning of the industrial unit. As the petitioner Company has started its commercial

production in the year 2011, the benefit was to be given w.e.f. the financial year

2011-12, for a period of five years only, which came to an end in the financial year 2015-16. The same cannot be extended any further. That is precisely the reason, that we have given the retrospective effect to the notification from the date, Jharkhand Industrial Policy, 2012, was given effect to, i.e., from 01.04.2011.

18. As the petitioner Company has already deposited the electricity duty for the financial years 2011-12, 2012-13 and 2013-14, we hereby, direct that

the amount of entitled exemption deposited by the petitioner Company shall be adjusted in the Company's future liability of the electricity duty. Thus,

the amount already deposited shall not be required to be refunded to the petitioner Company.

19. All these writ applications are accordingly, allowed with the direction as above.